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A SELECTION

OF

LEGAL MAXIMS,

Classified and Illustrated.

BY

HERBERT BROOM LL D

THE NINTH EDITION

BY

W J BYRNE,

OF CLAY'S INN AND OF KING'S INNS BUTLIN
BARRISTER AT LAW

Maxims are the concerted good sense of nations SIR J MACKINTOSH

Juris praecepta sunt haec honeste vivere alterum non laedere suum cuique tribuere J J 1 3

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PREFACE.

The late Dr Broom published the first edition of this book in 1845 and four subsequent editions in 1848, 1858, 1864 and 1870 From the first it was recognised as a masterly exposition of the principles upon which our common law is based, and, more especially in the Colonies and in the United States, it had become something in the nature of a legal classic long before the death of Dr Broom in 1882

Further editions were brought out in 1884 by Mr Herbert F Manisty and Mr Charles Cagney, in 1900 by Mr Herbert F Manisty and Mr Herbert Chitty, and in 1911 by Mr Joseph Gerald Pease and Mr Herbert Chitty These editors all took the view that no alteration except such as was inevitable should be made in the text as it had last left the hands of Dr Broom

The present editor has acted on the same view Only such alterations as legislation and judicial decisions since 1911 have made necessary will be found All the characteristic peculiarities of the original work remain The reader will still find the italics with which Dr Broom sought to fix the attention of the possibly inattentive student, the curious valedictory paragraph with which he concluded the text, and even the Finis Coronat Opus which he wrote at the end of his index

Between four and five hundred new cases have been noted The Table of Cases is, however, increased to a much greater extent than would have been caused by the mere insertion of these additional cases Dr Broom, following the old fashion, very frequently gave merely a reference to a report without giving the name of the case in question and the cases to which he referred in this manner were necessarily absent from his Table of Cases In this edition the rule has been to give in every instance the name of the

case as well as the reference to the report and this has much increased the length of the Table of Cases

A number of errors which, during the course of successive editions, had crept into the notes, have been eliminated, and it is hoped that very few fresh errors have taken their place

The manuscript of this edition left the editor's hands last November only a few cases decided since then have been noted

The editor feels it only right to express his sense of the care and intelligence with which the proofs have been read by the proof-readers of the Eastern Press, Limited

The preface to the first edition is reprinted below

W J B.

April, 1924

PREFACE TO THE FIRST EDITION.

In the Legal Science, perhaps more frequently than in any other, reference must be made to first principles Indeed, a very limited acquaintance with the earlier Reports will show the importance which was attached to the acknowledged Maxims of the Law, in periods when civilization and refinement had made comparatively little progress In the ruder ages, without doubt, the great majority of questions respecting the rights, remedies, and liabilities of private individuals were determined by an immediate reference to such Maxims, many of which obtained in the Roman Law, and are so manifestly founded in reason, public convenience, and necessity, as to find a place in the code of every civilized nation In more modern times, the increase of commerce, and of national and social intercourse, has occasioned a corresponding increase in the sources of litigation, and has introduced many subtleties and nice distinctions, both in legal reasoning and in the application of legal principles, which were formerly unknown This change, however, so far from diminishing the value of simple fundamental rules, has rendered an accurate acquaintance with them the more necessary, in order that they may be either directly applied, or qualified, or limited, according to the exigencies of the particular case, and the novelty of the circumstances which present themselves If, then, it be true, that a knowledge of first principles is at least as essential in Law as in other sciences, certainly in none is a knowledge of those principles, unaccompanied by a sufficient investigation of their bearing and practical application, more likely to lead into grievous error In the present Work I have endeavoured, not only to point out the most important Legal Maxims, but also to explain and illustrate their meaning, to show the various exceptions to the rules which they enunciate, and the qualifications which must be borne in mind when they are applied I have devoted considerable time, and much labour, to consulting the Reports, both ancient and modern, and also the standard Treatises on leading branches of the Law, in

order to ascertain what Maxims are of most practical importance, and most frequently cited, commented on, and applied I have likewise repeatedly referred to the various Collections of Maxims which have heretofore been published, and have freely availed myself of such portions of them as seemed to possess any value or interest at the present day I venture, therefore, to hope, that very few Maxims have been omitted which ought to have found place in a work like that now submitted to the Profession In illustrating each Rule, those Cases have in general been preferred as examples in which the particular Maxim has either been cited, or directly stated to apply It has, however, been necessary to refer to many other instances in which no such specific reference has been made, but which seem clearly to fall within the principle of the Rule, and whenever this has been done, sufficient authorities have, it is hoped, been appended, to enable the reader, without very laborious research, to decide for himself whether the application suggested has been correctly made, or not In arranging the Maxims which have been selected as above mentioned, the system of Classification has, after due reflection, been adopted first, because this arrangement appeared better calculated to render the Work, to some extent, interesting as a treatise exhibiting briefly the most important Rules of Law, and not merely useful as a book of casual reference, and, secondly, because by this method alone can the intimate connection which exists between Maxims appertaining to the same class be directly brought under notice and appreciated It was thought better, therefore, to incur the risk of occasional false or defective classification, than to pursue the easier course of alphabetical arrangement An Alphabetical List has, however, been appended, so that immediate reference may be made to any required Maxim The plan actually adopted may be thus stated —I have, in the first Two Chapters, very briefly treated of Maxims which relate to Constitutional Principles, and the mode in which the Laws are administered These, on account of their comprehensive character, have been placed first in order, and have been briefly considered, because they are so very generally known, and so easily comprehended After these are placed certain Maxims which are rather deductions of reason than Rules of Law, and consequently admit of illustration only Chapter IV comprises a few principles which may be considered as fundamental, and not referable exclusively to any of the subjects subsequently noticed, and which follow thus Maxims relating to Property, Marriage, and Descent, the Interpretation of Written Instruments in

general, Contracts, and Evidence Of these latter subjects, the Construction of Written Instruments, and the Admissibility of evidence to explain them, and also those Maxims which embody the Law of Contracts, have been thought the most practically important, and have therefore been noticed at the greatest length The vast extent of these subjects has undoubtedly rendered the work of selection and compression one of considerable labour, and it is feared that many useful applications of the Maxims selected have been omitted, and that some errors have escaped detection It must be remarked, however, that, even had the bulk of this Volume been materially increased, many important branches of Law to which the Maxims apply must necessarily have been dismissed with very slight notice, and it is believed that the reader will not expect to find, in a Work on Legal Maxims, subjects considered in detail, of which each presents sufficient materials for a separate Treatise One question which may naturally suggest itself remains to be answered For what class of readers is a Work like the present intended? I would reply, that it is intended not only for the use of students purposing to practice at the Bar, or as attorneys, but also for the occasional reference of the practising barrister, who may be desirous of applying a Legal Maxim to the case before him, and who will therefore search for similar, or, at all events, analogous cases, in which the same principle has been held applicable and decisive The frequency with which Maxims are not only referred to by the Bench, but cited and relied upon by Counsel in their arguments, the importance which has, in many decided cases, been attached to them, the caution which is always exercised in applying, and the subtlety and ingenuity which have been displayed in distinguishing between them, seem to afford reasonable grounds for hoping that the mere Selection of Maxims here given may prove useful to the Profession, and that the examples adduced, and the authorities referred to by way of illustration, qualification, or exception, may, in some limited degree, add to their utility

* * * * * *

HERBERT BROOM

TEMPLE,
January 30th, 1845

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ALPHABETICAL

LIST OF LEGAL MAXIMS.

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(*a*) In *Stockdale* v *Hansard* 9 A & E 1, at p 116, Ld Denman observed, that this maxim cannot apply where an abuse is directly charged and offered to be proved

(*b*) The law, observed Lord Bacon, makes this difference, that, if the parties have put it in the power of a third person, or of a contingency, to give a perfection to their act, then they have put it out of their own reach and liberty to revoke it but where the completion of their act or contract depends upon the mutual consent of the original parties only, it may be rescinded by express agreement So, in judicial acts, the rule of the civil law holds, *sententia interlocutoria revocari potest*, that is, an order may be revoked, but a judgment cannot (Bac M reg 20)

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(c) See *Kippen* v *Darley* 3 Macq 208
(d) See the notes to *Mostyn* v *Fabrigas*, 1 Smith L C Story Confl Laws, tit '*Contracts*'
(e) Arg *A G* v *Chomley*, 2 Eden 304, at p 313.

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Furiosus solo furore punitur 222 n (*x*)
Furtum non est ubi initium habet detentionis per dominium rei (3 Inst 197)

Generale nihil certi implicat (W 164)
Generalia specialibus non derogant (Jenk Cent 120) (*g*) 17—18
Generalia verba sunt generaliter intelligenda 416
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(*f*) Every exception that can be accounted for is so much a confirmation of the rule that it has become a maxim, *exceptio probat regulam* ' (*per* Ld Kenyon C J in *R* v *Eriswell, Inhbs of*, 3 T R 707 at p 722) See also *per* Ld Kenyon C J, in *Dand* v *Sexton*, 3 T R 37, and in *Crespigny* v *Wittenoom*, 4 T R 790, at p 793 *per* Ld Mansfield, C J, in R v *Jarvis*, 1 East, 643, n (*e*), at p 647, *per* Ld Campbell C J, in *Bostock* v *N Staffs Ry Co*, 4 E & B 798, at p 832 arg *Lyndon* v *Standbridge*, 2 H & N 45, at p 48

(*g*) Cited *Derby* v *Bury Impt Coms*, L R 4 Ex 222, at p 226, *Kidston* v *Empire Ins Co*, L R 1 C P 535, at p 546

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Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa (8 Rep 154)
Generalis regula generaliter est intelligenda (6 Rep 65)

Habemus optimum testem confitentem reum (Fost Cr L 243) (*h*)
Hæredi magis parcendum est (D 31, 1, 47)
Hæreditas nihil aliud est quam successio in universum jus quod defunctus habuerit (D 57, 17, 62)
Hæreditas nunquam ascendit 337
Hæres est aut jure proprietatis aut jure representationis (3 Rep 40)
Hæres est nomen juris, filius est nomen naturæ (Bac M reg 11)
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In ambiguis orationibus maxime sententia spectanda est ejus, qui eas protulisset 361
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In disjunctivis sufficit alteram partem esse veram 376
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In favorem vitæ libertatis et innocentiæ omnia præsumuntur (L 125)
In fictione juris semper æquitas existit 91
In generalibus latet error
In judicio non creditur nisi juratis (Cro Car 64)
In jure non remota causa, sed proxima spectatur 143, 152
In jure omnis definitio periculosa est
Injuria non excusat injuriam 26
Injuria non præsumitur (Co Litt 232 b)
In majore summa continetur minor (5 Rep 115)
In maleficiis voluntas, non exitus, spectatur (D 48, 8, 14)
In odium spoliatoris omnia præsumuntur 606
In omnibus pœnalibus judiciis et ætati et imprudentiæ succurritur 222

(*h*) In the various treatises upon the law of evidence will be found remarks as to the weight which should be attached to the confession of a party Respecting the above maxim Ld Stowell has observed that What is taken *pro confesso* is taken as indubitable truth The plea of guilty by the party accused shuts out all further inquiry *Habemus confitentem reum* is demonstration, *unless indirect motives can be assigned to it* (*Mortimer* v *Mortimer*, 2 Hagg 310, at p 315)

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In omnibus quidem, maxime tamen in jure, æquitas spectanda sit (D 50, 17, 90)
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In pari delicto potior est conditio defendentis 465
In pari delicto potior est conditio possidentis 465
In pœnalibus causis benignius interpretandum est (D 50, 17, 155, § 1)
In præsentia majoris cessat potentia minoris 77
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Intentio inservire debet legibus non leges intentioni (Co Litt 314 b)
Interest reipublicæ ne malefici remaneant impunita (Jenk Cent 31) (W 140)
Interest reipublicæ suprema hominum testamenta rata haberi (Co Litt 236 b)
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In toto et pars continetur (D 50, 17, 113)
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Ita semper fiat relatio ut valeat dispositio (6 Rep 76)

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Judicis est jus dicere, non dare (L 42)
Judicium redditur in invitum (Co Litt 248 b)
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Jura eodem modo destituuntur quo constituuntur (Bell Dict of Scots Law, 1st ed , p 636)
Jura naturæ sunt immutabilia 85

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Lex nil frustra facit 178
Lex non cogit ad impossibilia 171
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Lex non favet votis delicatorum 254
Lex non requirit verificari quod apparet curiæ (9 Rep 54)
Lex plus laudatur quando ratione probatur 110
Lex posterior derogat priori 17
Lex rejicit superflua, pugnantia, incongrua (Jenk Cent 133, 140, 176)
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Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ sortiatur effectum, interveniente novo actu 330

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Licita bene miscentur, formula nisi juris obstet (Bac Max reg 24) (s)

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Malitia supplet ætatem 223

Malus usus est abolendus 595

Mandata licita strictam recipiunt interpretationem, sed illicita latam et extensam (Bac Max reg 16) (l)

Mandatarius terminos sibi positos transgredi non potest (Jenk Cent 53)

Matrimonia debent esse libera (H 86)

Meliorem conditionem suam facere potest minor, deteriorem nequa quam (Co Litt 337 b)

Melior est conditio possidentis et rei quam actoris (4 Inst 180) 463, 465

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Naturale est quidlibet dissolvi eo modo quo ligatur 563

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Nemo agit in seipsum 152 n (x)

Nemo aliquam partem recte intel ligere potest antequam totum perlegit 378

Nemo allegans turpitudinem suam est audiendus 469

Nemo commodum capere potest de injuria sua propria 195 n (f)

Nemo contra factum suum venire potest (2 Inst 66)

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Nemo debet bis vexari, si constat curiæ quod sit pro una et eadem causa 225

Nemo debet esse judex in propria causa 81

Nemo debet locupletari aliena jactura (m)

Nemo debet locupletari ex alterius incommodo (Jenk Cent 4)

Nemo de domo sua extrahi debet 283 n (t)

Nemo ejusdem tenementi simul potest esse hæres et dominus (1 Reeves, Hist Eng L 106)

Nemo enim aliquam partem recte intelligere possit antequam totum iterum atque iterum perlegerit, 378

Nemo est hæres viventis 334

Nemo ex alterius facto prægravari debet (see 1 Poth , by Evans, 133)

Nemo ex proprio dolo consequitur actionem 207

Nemo ex suo delicto meliorem suam conditionem facere potest (D 50, 17, 134, § 1) 574

(s) 'The law,' says Ld Bacon, 'giveth that favour to lawful acts that, although they be executed by several authorities yet the whole act is good if therefore, tenant for life and remainderman join in granting a rent 'this is one solid rent out of both their estates, and no double rent, or rent by confirmation (Bac Max reg 24) and if tenant for life and reversioner join in a lease for life reserving rent this shall enure to the tenant for life only during his life, and afterwards to the reversioner (see 1 Crabb, Real Prop 179)

(k) Cited arg *Hodgson* v *De Beauchesne*, 12 Moo P C C 285 at p 308 *Lloyd* v *Guibert*, L R 1 Q B 115 at p 119

(l) A principal is civilly liable for those acts only which are within the scope of the agent's employment But if a man incite another to do an unlawful act he shall not, in the language of Ld. Bacon, 'excuse himself by circumstances not pursued,'' as if he command his servant to rob I D on Shooter's Hill, and he does it on Gad s Hill, or to kill him by poison, and he doth it by violence (Bac Mac reg 16, cited *Parkes* v *Prescott*, L R 4 Ex 169, at p 182)

(m) Cited by Bovill, C J , in *Fletcher* v *Alexander*, L R 3 C P 375, at p 381

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Nemo patriam in qua natus est exuere nec legeantiæ debitum ejurare possit 53

Nemo plus juris ad alium transferre potest quam ipse haberet 302, 304, 518

Nemo potest contra recordum verificare per patriam (2 Inst 380)

Nemo potest esse simul actor et judex 81

Nemo potest esse tenens et dominus (Gilb Ten 142)

Nemo potest mutare consilium suum in alterius injuriam 22

Nemo præsumitur alienam posteritatem suæ prætulisse (W 285)

Nemo punitur pro alieno delicto (W 336)

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Nemo tenetur ad impossibilia 173

Nemo tenetur divinare (4 Rep 28)

Nemo tenetur seipsum accusare 628

Neque leges neque senatus consulta ita scribi possunt ut omnes &c 26

Nihil aliud potest rex quam quod de jure potest (11 Rep 74)

Nihil consensui tam contrarium est quam vis et metus (D 50, 17 116)

Nihil in lege intolerabilius est eandem rem diverso jure censeri (4 Rep 93 a)

Nihil perfectum est dum aliquid restat agendum (9 Rep 9 b)

Nihil præscribitur nisi quod possidetur (5 B & Ald 277)

Nihil quod est inconveniens est licitum 128, 244

Nihil simul inventum est et perfectum (*n*) (Co Litt 230)

Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est 563

Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est 568

Nil consensui tam contrarium est quam vis itque metus 197 n (*n*)

Nil facit error nominis cum de corpore vel persona constat 407

Nil tam conveniens est naturali æquitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi (I 2, 1, 40)

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Nimia subtilitas in jure reprobatur (4 Rep 5)

Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram 413

Non aliter a significatione verborum recedi oportet quam cum manifestum est aliud sensisse testatorem 362

Non debeo melioris conditionis esse, quam auctor meus, a quo jus in me transit (D 50, 17, 175, § 1)

Non debet alteri per alterum iniqua conditio inferri (D 50, 17, 74)

Non debet, cui plus licet, quod minus est non licere 121

Non decipitur qui scit se decipi 5 Rep 6)

Non dubitatur, etsi specialiter venditor evictionem non promiserit, re evicta, ex empto competere actionem 501

Non est novum ut priores leges ad posteriores trahantur 17

Non ex opinionibus singulorum sed ex communi usu nomina exaudiri debent (D 3, 10, 7 § 2)

Non impedit clausula derogatoria quo minus ab eadem potestate res dissolvantur a qua constituuntur 17

Non in tabulis est jus (10 East, 69)

Non omnium quæ a majoribus nostris constituta sunt ratio reddi potest 108

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Non potest probari quod probatum non relevat (o)

Non potest rex gratiam facere cum injuria et damno aliorum 44

Non potest videri desisse habere, qui nunquam habuit (D 50, 17, 208)

Non quod dictum est, sed quod factum est, in jure inspicitur (Co Litt 36 a) (*p*)

(*n*) Applied to a patent, arg *Re Newal & Elliot* 4 C B N S 269, at p 290

(*o*) See *A G* v *Hitchcock*, 1 Exch 91 at pp 92, 102

(*p*) Cited *White* v *Trustees of British Museum* 6 Bing 310 at p 319, *Ilott* v *Genge*, 3 Curt 160, at p 175, *Croft* v *Lumley* 6 H L Cas 672, at p 722, *per* Martin, B

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Non quod voluit testator, sed quod dixit, in testamento inspicitur 354 n (*m*)
Non solent quæ abundant vitiare scripturas 401 n (*m*)
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Non videtur quisquam id capere, quod ei necesse est alii restituere (D 50, 17, 51)
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Omnia quæ sunt uxoris sunt ipsius viri (Co Litt 112 a)
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(*q*) Cited 2 Bla Com, 21st ed, 162 Co Litt 3 a Arg *Hilhouse* v *Davis*, 1 M & S 169, at p 172, *per* Buller J in *Smith* v *Bower* 3 T R 662 at p 664 See, *per* Knight Bruce, L J, in *Boyse* v *Rossborough*, 3 De G M & G 817 at p 846

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(r) Cited *per* Parke, B , in *Morgan* v *Thomas*, 8 Exch 302, at p 304 see also 1 Bl Com 430

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(*s*) Cited by Ld Wensleydale in *Baird* v *Fortune*, 4 Macq Sc App Cas 127, at p 151
(*t*) See *Ditcher* v *Denison* 11 Moo P C C 324 at p 343
(*u*) See *R* v *Milks* 10 Cl & Fin 534 (cited, p 325, *post*) where this maxim was applied *A G* v *Deans of Windsor* 8 H L Cas 369 at p 392 *Baker* v *Lee*, *Id* 495 at p 512, *Beamish* v *Beamish*, 9 H L Cas 274 at p 338, *per* Ld Campbell, in *Dansey* v *Richardson*, 3 E & B 722

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(x) See 1 Bla Com 21st ed 484

(y) See *Kidston* v *Empire Ins Co*, L R 1 C P 535, at p 546 *Kintore* v *Inverury*, 4 Macq 520 at p 522

(z) See 4 Bla Com 21st ed 363 *Horwood* v *Smith* 2 T R 750 at p 753

(a) See as to this maxim *Goddard's Case*, 2 Rep 4 b *per* Bayley J in *Styles* v *Wardle*, 4 B & C 908 at p 911 *per* Patteson, J, in *Browne* v *Burton*, 17 L J Q B 49 (citing *Clayton's Case*, 5 Rep 1 a and recognising *Steele* v *Mart*, 4 B & C 272 at p 279), *Tupper* v *Foulkes*, 9 C B N S 797 See also *Shaw* v *Kay* 1 Exch 412 *per* Jarvis C J, in *Davis* v *Jones* 17 C B 625, at p 634, *Cumberlege* v *Lawson*, 1 C B N S 709, at p 720, *Xenos* v *Wickham* 14 C B N S 435 13 Id 381, at p 385, and L R 2 H L 296 *Kidner* v *Keith*, 15 C B N S 35

(b) 3 Bla Com, 21st ed, 399 cited by Tindal, C J, 1 Bing N C 522 This maxim is taken from the Roman law, see C 3, 1, 13, § 6

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CORRIGENDA

P 107 line 12 from foot—*After* ratio *insert* ibi

P 119 n (c)—*For* Rodoconichi *read* Rodoconichi

P 160, line 22—*For* cucuta *read* cucuta

P 341 line 6 from foot—*For* 766 *read* 632

P 341 n (c)—*For* 28 *read* 58

LEGAL MAXIMS.

CHAPTER I

§ I —RULES FOUNDED ON PUBLIC POLICY

THE Maxims contained in this section being of general application and resulting so directly from the simple principles on which our social relations depend, it has been thought better to place them first in this collection,—as, in some measure, introductory to the more precise and technical rules which embody the elementary doctrines of English law

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SALUS POPULI EST SUPREMA LEX (*XII Tables —Bacon, Max., reg* 12)—*Regard for the public welfare is the highest law*

Public safety

This phrase is based on the implied agreement of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community, and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good (*a*) "There are," said Buller, J (*b*), "many cases in which individuals sustain an injury for which the law gives no action,

(*a*) *Alibi diximus res subditorum sub eminenti dominio esse civitatis, ita ut civitas, aut qui civitatis vice fungitur, iis rebus uti, easque etiam perdére et alienare possit, non tantum ex summa necessitate, quæ privatis quoque jus aliquod in aliena concedit, sed ob publicam utilitatem, cui privatas cedere illi ipsi voluisse censendi sunt qui in civilem cœtum coierunt*, Grotius de Jure Belli et Pac Bk 3, c 20, s 7, § 1—*Le Salut du peuple est la supreme loi*, Mont Esp des Lois, L XXVII Ch 23 *In casu extremæ necessitatis omnia sunt communia*, 1 Hale, P C 54

(*b*) *Per* Buller, J, in *Plate Glass Co* v *Meredith*, 4 T R 794, at p 797, see Noy, Max, 9th ed 36, *Skewys* (*Exors of*) v *Chamond*, Dyer, 59 (b), at p 60 (b), *Saltpetre, Case of*, 12 Rep 12

as, where private houses are pulled down, or bulwarks raised on private property, for the preservation and defence of the kingdom against the king's enemies" Commentators on the civil law, indeed, have said (*c*) that, in such cases, those who suffer have a right to resort to the public for satisfaction, but no one ever thought that our own common law gave an action against the individual who pulled down the house or raised the bulwark (*d*) On the same principle, viz that a man may justify committing a private injury for the public good, the pulling down of a house when necessary, in order to arrest the progress of a fire, is permitted by the law (*e*)

Likewise, in less stringent emergencies, the maxim is, that a private mischief shall be endured, rather than a public inconvenience (*f*), and, therefore if a highway be out of repair and impassable, a passenger may lawfully go over the adjoining land, since it is for the public good that there should be, at all times, free passage along thoroughfares for subjects of the realm (*g*)

The principle underlying the maxim, as well as the limitations with which it is applied, is well illustrated by the following expressions of Cockburn, C J "The power to erect a sea-wall or embankment as a protection against the sea, or from the influx of the tide in rivers, is one of those things which emanate from the prerogative of the Crown for the general safety of the public (*h*), and no doubt the ordinary right of property must give way to that which is done under that great prerogative authority for the protection and safety of the public, but only to the extent to which it is necessary that private rights or public rights should be sacrificed for the larger public purposes,

(*c*) See Puff de Jure Nat Bk 8, c 5, s 7, Grotius de Jure Bell et Pac Bk 3 c 20, s 7, § 2

(*d*) *Per* Buller, J , in *R* v *Darlington (Inhabitants)*, 4 T R 797

(*e*) Noy, Max , 9th ed 36, *Saltpetre, Case of*, 12 Rep 12, *Maleverer* v *Spinke*, Dyer, 36 (b), *Mines, Case of*, Plowd 310, at p 322, Finch s Law, 39 see *Carter* v *Thomas*, [1893] 1 Q B 673, and *Cope* v *Sharpe (No* 2) [1912] 1 K B 496

(*f*) *Absor* v *French* 2 Show 28, *Dawes* v *Hawkins*, 8 C B N S 848 at pp 856, 859, *per* Pollock, C B , in *A G* v *Briant*, 15 M & W 169, at p 185

(*g*) *Per* Ld Mansfield in *Taylor* v *Whitehead*, 2 Dougl 745, at p 749, *per* Ld Ellenborough in *Bullard* v *Harrison*, 4 M & S 387, at p 393, see also *Dawes* v *Hawkins*, 8 C B N S 848, *Robertson* v *Gantlett* 16 M & W 289, at p 296 *Secus*, where dedication of road to public is not absolute, *Arnold* v *Holbrook*, L R 8 Q B 96

(*h*) See *A G* v *Tomline*, 14 Ch D 58, *West Norfolk Farmers' Co* v *Archdale*, 16 Q B D 754

the general common weal of the public at large" (*i*) And in time of war the Crown can, without paying compensation, take possession of any man's land for purposes—such as the making of trenches, &c —connected with military operations (*k*), but the Crown is not entitled, even in time of war, to take possession of the property of a subject, and use it for merely administrative purposes connected with the defence of the realm, without paying compensation for its use and occupation (*l*)

Upon the principle we are discussing also depends the right of the State to interfere with and place a limit to rights of property for the purposes of revenue and the support of government (*m*) It is, however, a rule of law, which has been designated as a "legal axiom, ' that "no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate, or toll, except upon clear and distinct legal authority, established by those who seek to impose the burden" (*n*) Taxes, &c

In the familiar instance, likewise, of an Act of Parliament for promoting some specific undertaking of public utility, as a canal, railway, or paving Act, the legislature will not scruple to interfere with private property, and will even compel the owner of lands to alienate them on receiving a reasonable compensation for so doing (*o*), but such an arbitrary exercise of power (*p*) is indulged with caution, the true principle applicable to such cases being, that private interests are never to be sacrificed to a greater extent than is necessary to secure Railway and other Acts

(*i*) *Greenwich Bd of W v Maudslay*, L R 5 Q B 397, at p 401

(*k*) *De Keyser s Royal Hotel* v *R* [1919] 2 Ch 197

(*l*) Ibid

(*m*) *Per* Ld Camden in *Entick* v *Carrington*, 19 St Tr 1030, at p 1066

(*n*) *Per* Wilde, C J , in *Gosling* v *Veley* 12 Q B 328, at p 407, see also the same case 4 H L Cas 679, at pp 727, 781, *per* Martin, B , and *per* Ld Truro ' The law requires clear demonstration that a tax is lawfully imposed, said Ld Denman, C J , in *Burder* v *Veley*, 12 A & E 233, at p 247 "It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language, said Bayley, J in *Denn* v *Diamond*, 4 B & C 245, see *per* Bramwell, B , in *A G* v *Ld Middleton*, 3 H & N 125, at p 138, see also *Oriental Bank* v *Wright*, 5 App Cas 842, *A G* v *Beech*, [1899] A C 53, *Bowles* v *Bank of England*, [1913] 1 Ch 57, *A G* v *Wilts United Dairies, Ltd* , 91 L J K B 897

(*o*) As to the items recoverable in respect of depreciation of property under the Lands Clauses Act, 1845, see *Duke of Buccleuch* v *Metr Bd of W* , L R 5 H L 418, *Cowper Essex* v *Acton L B* , 14 App Cas 153, *Holditch* v *Can Nor Ontario Ry Co* , [1916] 1 A C 563, *Sisters of Charity of Rockingham* v *R* , [1922] 2 A C 315

(*p*) See *per* Ld Eldon in *Blakemore* v *Glamorganshire Canal Navigation*, 1 My & K 154, at p 162, judgm in *Tawney* v *Lynn & Ely Ry Co* , 16 L J Ch 282, *Webb* v *Manchester & Leeds Ry Co* , 4 My & Cr 116

Railway and other Acts

a public object of adequate importance (*q*) The Courts, therefore, will not so construe an Act as to deprive persons of their estates and transfer them to others without compensation, in the absence of a manifest reason of policy for thus doing, unless they are so fettered by express statutory words as to be unable to extricate themselves, for they will not suppose that the legislature had such an intention (*r*) And "where an Act is susceptible of two constructions, one of which will have the effect of destroying the property of large numbers of the community and the other will not," the Courts will "assume that the legislature intended the latter" (*s*) Also, as it has been judicially observed, where large powers are entrusted to companies to carry their works through a great extent of country without the consent of the owners of the lands through which they are to pass, it is reasonable and just that any injury to property which can be shown to arise from the prosecution of those works should be fairly compensated to the party sustaining it (*t*), and likewise it is required that the authority given should be strictly pursued and executed (*u*)

Example

In accordance with the maxim under notice, it was held that, where the commissioners appointed by a paving Act occasioned damage to an individual, without exceeding their jurisdiction, neither the commissioners nor the paviors acting under them were liable to an action, the statute under which the commissioners acted not giving them power to award satisfaction to individuals who happened to suffer, and it was observed that some individuals suffer an inconvenience under all such Acts, but the interests of individuals must give way to the accommodation of the public (*x*)—*privatum incommodum*

(*q*) See *Simpson* v *Ld Howden*, 1 Keen 583, at pp 598, 599, *Lister* v *Lobley*, 7 A & E 124

(*r*) See *per* Brett, M R, in *A G* v *Horner*, 14 Q B D 245, at p 257, *per* Ld Abinger in *Stracey* v *Nelson*, 12 M & W 535, at pp 540, 541 (followed in *Nesbitt* v *Mablethorpe U C*, [1917] 2 K B 568), *per* Alderson, B, in *Doe* d *Hutchinson* v *Manchester & Rossendale Ry Co*, 14 M & W 687, at p 694, *Anon*, Lofft, 442, *R* v *Croke* Cowp 26, at p 29, *Clarence Ry Co* v *G North of England Ry Co*, 4 Q B 46

(*s*) *Per* Erle, C J, in *Chelsea Vestry* v *King*, 17 C B N S 625, at p 629, cf *per* Brett, M R, in *Plumstead Bd of W* v *Spackman*, 13 Q B D 878, at p 887, *Raulton* v *Wood*, 15 App Cas 363, at p 366

(*t*) *Caledonian Ry Co* v *Walker's Trustees*, 7 App Cas 259, *Metr Bd of W* v *M'Carthy*, L R 7 H L 243

(*u*) See *Taylor* v *Clemson*, 2 Q B 978, 1031, *per* Ld Mansfield in *R* v *Croke*, Cowp 26, *Ostler* v *Cooke*, 13 Q B 143

(*x*) *Plate Glass Co* v *Meredith*, 4 T R 794, and *Boulton* v *Crowther*, 2 B & C 703, cited by Williams, J, in *Pilgrim* v *Southampton & Dorchester*

publico bono pensatur (*y*) And "where authority is given by the legislature to do an act, parties damaged by the doing of it have no legal remedy, but should appeal to the legislature" (*z*), unless the act be done negligently, in which case an action will lie (*a*) Where, however, the terms of the statute are not imperative but permissive, and where it is left to the discretion of the persons empowered, to determine whether their general powers shall be put into execution or not, the inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisances in any place which might be selected for the purpose (*b*)

We shall hereafter have occasion to consider further the general principles applicable for interpreting statutes passed with a view to the carrying out of undertakings calculated to interfere with private property We may, however, observe, in connection with our present subject, that the extraordinary powers with which railway and other like companies are invested by the legislature are given to them "in consideration of a benefit which , it is to be presumed and hoped, will be obtained by the public ' and that, since the public interest is to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by such Acts necessarily occasion, those powers must always be carefully looked to, and must not be extended further than the legislature has provided, or than is necessarily and properly required for the purposes which it has sanctioned (*c*) It is, moreover, important to notice the distinction which exists between public and private Acts, with reference to the obligations which they impose For general and public Acts bind all the King's

Distinction between public and private Acts

Ry Co, 7 C B 205 at p 228, see *Sutton* v *Clarke*, 6 Taunt 29, *Alston* v *Scales*, 9 Bing 3

(*y*) Jenk Cent 85

(*z*) See *dictum* of Wilde, C J in *Pilgrim* v *Southampton & Dorchester Ry Co*, 7 C B 205 at p 226, *Mayor of Liverpool* v *Chorley Waterworks Co*, 2 De G M & G 852 860, *Dixon* v *Metr Board of W* 7 Q B D 418, *Price's Candle Co* v *L C C*, [1908] 2 Ch 527, *L B & S C Ry Co* v *Truman*, 11 App Cas 45

(*a*) *Whitehouse* v *Fellowes*, 10 C B N S 765, *Brine* v *G W Ry Co*, 2 B & S 402, at p 411, see *Bathurst (Borough of)* v *Macpherson*, 4 A C 256, at p 266

(*b*) *Per* Ld Watson in *Metr Asylum Bd* v *Hill*, 6 App Cas 193 at p 213

(*c*) *Per* Ld Langdale in *Colman* v *Eastern Counties Ry Co*, 10 Beav 1, at p 14, see also *Loosemore* v *Tiverton & N Devon Ry*, 22 Ch D 25 Cf *per* Bowen, L J, in *Wandsworth Bd of W* v *United Telephone Co*, 13 Q B D 904, at p 920, *Mayor of Tunbridge Wells* v *Baird*, [1896] A C 434

subjects, but of private Acts, meaning thereby not merely private estate Acts, but local and personal (*d*), as opposed to general public Acts, "it is said that they do not bind strangers, unless by express word or necessary implication the intention of the legislature to affect the rights of strangers is apparent in the Act, and whether an Act is public or private does not depend upon any technical considerations (such as having a clause or declaration that the Act shall be deemed a public Act), but upon the nature and substance of the case" (*e*) And private Acts passed for the benefit of an individual are construed strictly against him (*f*)

Diversion of highway

On the other hand, where a statute authorises the stopping up and diverting of a highway, and thus interferes with the rights of the public with a view to promoting the convenience of an individual, such provisions as the Act contains for ensuring compensation to the public must receive a liberal construction In such a case "the rights of the public and the convenience of the individual constantly come into opposition, there may be sometimes vexatious opposition on the one hand, but there may be also on the other very earnest pursuit of individual advantage, regardless of the rights and convenience of the public Full effect, therefore, ought to be given to provisions by which, while due concession is made to the individual, proper protection is also afforded to the public" (*g*)

Criminal law

From the principle under consideration, and from the very nature of the social compact on which municipal law is theoretically founded, and under which every man, when he enters society, gives up part of his natural freedom, result those laws which, in certain cases, authorise the infliction of penalties, the privation of liberty, and even the destruction of life, with a view to put down crime, and to ensure the welfare of the public Penal laws, however, should evidently be restrained within the narrowest limits which may be deemed compatible with these objects, and should be interpreted by the judges, and administered by the executive, in a mild and liberal spirit Before any man is subjected to a penalty, a clear case

(*d*) See *Cock* v *Gent*, 12 M & W 234, *Shepherd* v *Sharp*, 1 H & N 115

(*e*) *Per* Wigram V C, in *Dawson* v *Paver*, 5 Hare 415, at p 434 (citing *Barrington's case* 8 Rep 136 a, at p 138 a, and *Lucy* v *Levington*, 1 Ventr 175)

(*f*) *Altrincham Union* v *Cheshire Lines*, 15 Q B D 597, *Scottish Drainage Co* v *Campbell*, 14 App Cas 139, at p 142, *per* Ld Macnaghten in *Herron* v *Rathmines, &c, Comrs*, [1892] A C 498, at p 523

(*g*) *Per* Patteson, J, in *R* v *Newmarket Ry Co*, 15 Q B 703, at p 713

for its imposition should be made out (*h*) A maxim is, indeed, laid down by Lord Bacon, which might at first sight appear inconsistent with these remarks, for he observes that the law will permit a departure from the legal technicalities which he describes as the "*placita juris*," "rather than crimes and wrongs should be unpunished, *quia salus populi suprema lex*," and "*salus populi* is contained in the repressing offences by punishment," and, therefore, *recedituv a placitis juris potius quam injuriæ et delicta maneant impunita* (*i*) But he draws a clear distinction between the "*placita juris*" and the "*regulæ juris*," meaning by the latter words rules of law embodying well-ascertained legal principles, and declares that the law will rather suffer a particular offence to escape without punishment than permit a violation of any *regula juris* (*k*) Nowadays Bacon's *dicta* on the point have no application Every defendant and every accused person is in every case entitled to rely upon every technical defence which is to be found within the letter of the law

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NECESSITAS INDUCIT PRIVILEGIUM QUOAD JURA PRIVATA (*Bac Max*, *reg* 5)—*Necessity gives a privilege as to private rights*

"The law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election, and therefore if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself" (*l*)

Involuntary action

Lord Bacon has in this passage fallen into the common error of opposing compulsory to voluntary action The opposite to voluntary action is involuntary, and the very strongest forms of compulsion do not exclude voluntary action A criminal walking to execution is under compulsion if anyone can be

(*h*) *Walsh* v *Bp of Lincoln*, L R 10 C P 518, at p 538, *per* Ld Esher in *Tuck* v *Priester*, 19 Q B D 629, at p 638, see judgm of Cave, J, in *Crane* v *Lawrence*, 25 Q B D 152

(*i*) Bac Max, reg 12

(*k*) Bac Max, reg 12 The doctrine of our law as to avoiding contracts on the ground that they are opposed to public policy will be considered later

(*l*) Bac Max, reg 5, cited in *Forward* v *Pittard*, 1 T R 27, at p 32

said to be so, but his motions are just as much voluntary actions as if he were leaving his place of confinement to regain his liberty That the law will hold no man responsible for an act, which is involuntary in the strict metaphysical sense, it is unnecessary to state (*m*)

Bacon's necessity

"Necessity," said Lord Bacon, "is of three sorts necessity of conservation of life, necessity of obedience, and necessity of the act of God or a stranger" (*n*) This division of the subject is scarcely logical, but it is convenient for the purpose of making some observations which bear upon the maxim under notice As we shall see, some of his illustrations are by no means sound

Self preservation

1 To preserve one's life is, generally speaking, a duty, but it may be the plainest and highest duty to sacrifice it war is full of instances in which it is a man's duty not to live, but to die, it is not correct to say that there is any absolute or unqualified necessity to preserve one's life (*o*) If two persons be shipwrecked together, and one of them, to escape death from hunger, kill the other for the purpose of eating his flesh, he is guilty of murder, and it is no defence that, when he did the act, he believed, upon reasonable grounds, that he had no other means of preserving his life (*p*) Lord Bacon seems to have thought that if two persons are in danger of drowning, and one of them get to a plank to keep himself above water, the other, to save his own life, may thrust him from it and so cause him to be drowned (*q*), but it is certainly not law that a man may save his life by killing an unoffending neighbour (*r*) He also suggests that hunger might be an excuse for theft, but the law is plainly otherwise (*s*)

Self defence

Our law, however, does recognise that even homicide is sometimes excusable, when done to preserve life If a man be wrongfully assailed, so that he be in danger of his life, and if then, having no other means of escape, he slay his assailant in self-defence, the homicide is excused (*t*) But, before proceeding to this extremity, a man ought generally to retreat

(*m*) Hist Cr Law, Stephen, 1, p 152
(*n*) Bac Max, reg 5, Noy, Max, 9th ed 32
(*o*) *Per* Ld Coleridge, C J, in *R* v *Dudley*, 14 Q B D 237, at p 287
(*p*) *R* v *Dudley*, *supra*
(*q*) Bac Max, reg 5
(*r*) *R* v *Dudley*, *supra*, at p 286
(*s*) 1 Hale, P C 54, see *R* v *Dudley*, *supra* at p 385
(*t*) Post 274 *et seq*, see the Offences against the Person Act, 1861 (24 & 25 Vict c 100) s 7

as far as he safely can, and if two persons quarrel and fight, neither is regarded as defending himself, until he has in good faith fled from the fight as far as he can (*u*) Homicide, the result of a blow struck in a mutual fight, however begun, is therefore not usually excusable

This doctrine of defence extends, moreover, to the leading civil and natural relations of life, and what a man is excused for doing in his own defence, a master or servant, a parent or child, a husband or wife, is excused for doing, one in defence of the other (*v*) And it seems that, where the motive was to defend life, the question, according to our criminal law, is not whether the act was in fact necessary, but whether it was done in the reasonable belief that it was necessary, for instance, if a son honestly believe, on reasonable grounds, that his father is about to murder his mother, he is excused for acting upon that belief, though in fact ill-founded (*y*)

Ignorantia facti excusat

2 The duty to obey existing laws often furnishes justification for an act, which of itself would be culpable (*z*), as where the proper officer executes a criminal in strict conformity with his sentence And it is laid down that there is justifiable homicide where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it (*a*), but this proposition is subject to reasonable qualification, for the intentional killing by a constable of one who resists lawful arrest for drunkenness is most certainly neither justifiable nor excusable And where murder, robbery, or rape is attempted upon anyone, not only the party assaulted may repel force by force, but his or her servant, or any other person present, may interpose to prevent the mischief, and, if death ensue, the party so interposing will be justified (*b*) So, in executing process, a sheriff, it has been observed, acts as a ministerial officer in pursuance of the command he receives in the king's name from a court of justice, which command he is bound to obey He is not a volunteer, acting from his own free will or for his own benefit, but is imperatively commanded to execute the

Necessity of obedience to existing laws

Sheriff

(*u*) 1 Hale, P C 481—483, see *R* v *Bull*, 9 C & P 22 *R* v *Knock*, 14 Cox, C C 1, *R* v *Weston*, Id 346
(*v*) 1 Hale, P C 484 4 Blac Comm 186
(*y*) *R* v *Rose*, 15 Cox C C 540
(*z*) *Ejus vero nulla culpa est cui parere necesse sit*, D 50 17, 169
(*a*) Fost 270
(*b*) Ibid 274

king's writ He is the servant of the law, and the agent of an overruling necessity, and if the service of the law be a reasonable service, he is (in accordance with the above maxim) justly entitled to expect indemnity (*c*), so long as he acts with diligence, caution, and pure good faith, and, it should be remembered, he is not at liberty to accept or reject the office at his pleasure, but must serve if commanded by the Crown (*d*)

"The law has always held the sheriff strictly, and with much jealousy, to the performance of his duty in the execution of writs, both from the danger there is of fraud and collusion with defendants, and also because it is a disgrace to the Crown and the administration of justice, if the king's writ remains unexecuted" (*e*) In this case, therefore, the rule of law usually applies—*necessitas quod cogit defendit* (*f*), although instances do occur where the sheriff is placed in a situation of difficulty because he is the mere officer of the Court, and the Court is bound to see that suitors obtain the fruits of decisions in their favour (*g*)

Act of stranger

3 The actions of a third person do not, as a rule, afford a defence for an act in itself criminal, unless they are of such a nature as to make it strictly involuntary in the correct sense noticed at the beginning of this chapter Thus, if A , by force, take the hand of B , in which is a weapon, and therewith kill C , A is guilty of murder, but B is excused though, if merely a moral force be used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C , this is no legal excuse (*h*)

Husband and wife

To the rule that the moral force of another is no excuse for a crime, there is one, and perhaps only one, exception A wife who, in her husband's presence, and under his coercion, commits a crime, is, generally, excused, and when a wife has committed a crime in her husband's presence, it is presumed,

(*c*) For instance, by interpleader, as to which see the judgm of Maule, J in *Hollier* v *Laurie*, 3 C B 334, at pp 341, 342, of Rolfe, B , in *Abbott* v *Richards* 15 M & W 194, at p 197, and of Alderson, B , in *Slaney* v *Sidney*, 14 Id 800

(*d*) *Per* Vaughan, B , in *Garland* v *Carlisle*, 2 C & M 31, at p 77

(*e*) Judgm in *Howden* v *Standish* 6 C B 504, at p 520 As to the sheriff s duty in respect of executing criminals capitally convicted, see *R* v *Antrobus* 2 A & E 788

(*f*) 1 Hale, P C 54 *Garland* v *Carlisle*, *supra*

(*g*) See particularly *Stockdale* v *Hansard* 11 A & E 253 *Christopherson* v *Burton*, 3 Exch 160 *per* Jervis, C J , in *Gregory* v *Cotterell* 5 E & B 571 at pp 584 *et seq* *Hooper* v *Lane*, 6 H L Cas 443

(*h*) 1 Hale P C 434 1 East P C 225

until the contrary be proved, that she did it under his coercion, but this presumption is always rebuttable (*i*), and moreover the husband's coercion is never an excuse for crimes done by the wife in his absence (*k*)

There has been some uncertainty upon the question, for what crimes may the wife be excused upon the ground of her husband's coercion (*l*) The better opinion seems to be that she may be excused upon that ground for all crimes, including misdemeanors (*m*), except murder or treason, for which she cannot be so excused on account of the heinousness of those crimes (*n*)

The reason, given by Lord Bacon, why the husband's coercion does not excuse the wife if she join him in committing treason, is because it is against the commonwealth, and he cites the maxims, *privilegium non valet contra rempublicam*, and *necessitas publica major est quam privata* He seems to be on firm ground, when he observes, in respect of these maxims, that "death is the last and farthest point of particular necessity, and the law imposeth it upon every subject, that he prefer the urgent service of his prince and country before the safety of his life" (*o*)

SUMMA RATIO EST QUÆ PRO RELIGIONE FACIT (*Co Litt* 341 *a*) —*The best rule is that which advances religion*

This saying, which Coke cites to support the proposition that a parson cannot alienate his glebe to his successor's prejudice, is borrowed from the Roman law, where Papinian observes (*p*) that it ought never to be overlooked *in ambiguis religionum quæstionibus*

Under this maxim Noy (*q*) states that if any general custom were "directly against the law of God," or if a statute were

(*i*) 1 Hale, P C 516, *R* v *Cohen*, 11 Cox, C C 99, *R* v *Torpey*, 12 Cox, C C 45

(*k*) 1 Hale P C 45, *R* v *Morris* R & R 270, *R* v *John*, 13 Cox, 100, *Brown's Case*, [1898] A C 234

(*l*) See the cases collected in Archbold, Cr Pl, 26th ed, pp 22, 23

(*m*) See *R* v *Price*, 8 C & P 19, *R* v *Torpey*, 12 Cox, C C 45, at p 49, Stephen, Dig Cr L, 6th ed, § 31

(*n*) 1 Hale, P C 45, 47, 48, 1 Hawk c 1, s 11, where robbery is also excepted, but see *R* v *Torpey*, *supra*, *R* v *Dykes*, 15 Cox, C C 771

(*o*) Bac Max, reg 5, Noy, Max, 9th ed 34

(*p*) Dig 11, 7, 43 As to the relation of our ecclesiastical law to the civil law, see *Mackonochie* v *Penzance*, 6 App Cas 425, at p 446

(*q*) Noy, Max, 9th ed 2, citing Doct & Stud, 18th ed 15, 16

made directly contrary thereto—for instance, if it were enacted that no one should give alms to any object in ever so necessitous a condition—such custom or statute would be void, and similarly Blackstone (*r*) says that, if any human law should enjoin us to commit an offence against the divine law, we are bound to transgress that human law But such statements are not to be regarded as good law In deciding doubtful points of law our courts can give due weight to moral considerations, but where our law, whether by statute or otherwise, is clear, they are bound to administer the law as they find it, irrespective of opinions upon its morality (*s*), and there is no remedy but an appeal to Parliament for its reform

With regard to foreign laws, however, when they are brought to their notice, the attitude of our courts is different They do not feel compelled by what is called the comity of nations to violate our own laws, or the laws of God and nature, upon which our laws have been considered to be founded (*t*) For alleged wrongs committed abroad, actions do not lie in this country, if nothing has been done which our laws regard as an actionable wrong (*u*), nor can contracts, made abroad with reference to foreign laws, and legal thereunder, be enforced by action here, if the contracts conflict with what are deemed in England to be essential public or moral interests (*r*), or if they are to be performed in this country and the performance would according to our laws be illegal (*y*) Similarly, although actions can generally be maintained here upon foreign judgments (*z*) yet there have been cases in which our judges have refused to recognise such judgments on the ground that, in their opinion, they were given in violation of elementary principles of natural justice (*a*)

(*r*) 1 Bl Comm 43, cited in *Forbes* v *Cochrane*, 2 B & C 448, at p 470, cf Finch L 75 76

(*s*) If it were mischievous in its operation and necessarily mischievous, it would, to my mind, be no argument, if the statute expressly authorised the thing ", *per* Ld Halsbury in *Lock* v *Queensland, &c , Co* , [1896] A C 461 467 Our duty upon this occasion is to administer and not to make the law , *per* Ld Herschell in *Russell* v *Russell*, [1897] A C 395, at p 460

(*t*) See *per* Best, J , in *Forbes* v *Cochrane* 2 B & C 448, at p 471

(*u*) *Phillips* v *Eyre*, L R 6 Q B 1, at p 28

(*x*) *Santos* v *Illidge*, 6 C B N S 841, 8 Id 861 *Grell* v *Levy* 16 Id 73, *Kaufman* v *Gerson*, [1904] 1 K B 591, *Soc des Hôtels Réunis* v *Hawker*, 29 T L R 578, *Wild* v *Simpson*, [1919] 2 K B 544

(*y*) *Rousillon* v *Rousillon*, 14 Ch D 351, *Moulis* v *Owen*, [1907] 1 K B 746 (*z*) See cases collected in 2 Smith, L C , 12 ed pp 813 *et seq*

(*a*) See *Simpson* v *Fogo*, 32 L J Ch 249, 29 Id 657, *Liverpool Marine Credit Co* v *Hunter*, L R 4 Eq 62, *Meyer* v *Ralli*, 1 C P D 358

DIES DOMINICUS NON EST JURIDICUS (*Noy, Max* 2)—*Sunday is not a day for judicial or legal proceedings*

The Sabbath-day is not *dies juridicus*, for that day ought to be consecrated to divine service (*b*) The Houses of Parliament indeed may, in case of necessity, be assembled on a Sunday, or continue a sitting from Saturday into Sunday morning, and have occasionally done one or other of these things (*c*), but the judges cannot sit, nor can any judicial act be done, on a Sunday (*d*), although ministerial acts may be executed on that day (*e*)

This always has been, and still is, law except in so far as is otherwise provided by statute The Sunday Observance Act, 1677, s 6 provides that (except in cases of treason, felony, or breach of the peace) (*f*), no writ, process, warrant, order, judgment, or decree may be served or executed on Sunday, but under the Indictable Offences Act, 1848, s 4, a justice may now issue a search warrant, or a warrant to arrest for an indictable offence, upon a Sunday

Except as regards judicial acts, Sunday is not a *dies non* at common law (*g*) Thus, rent falling due on a Sunday is in strict law payable on that day (*h*)

Statute "The Lord's Day Act"

The principal Act relating to Sunday is the Sunday Observance Act, 1677 (29 Car 2, c 7), which (s 1 (3)) enacts that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of his ordinary calling on Sunday (other than works of necessity or charity or the cooking and preparing of "meat" for such "as cannot otherwise be provided" (*i*)), and that every person of the age of fourteen years offending in the premises shall forfeit 5s The effect of this enactment is that,

(*b*) Co Litt 135 a, Wing Max 5 (p 7), Finch's Law, 7 arg *Winsor* v *R*, 6 B & S 143, at p 164

(*c*) May Parl Prac, 12th ed, pp 170—1

(*d*) *Mackalley's Case*, 9 Rep 65 a, *Asmole* v *Goodwin*, 2 Salk 624

(*e*) Ibid Ibid

(*f*) Which includes all offences involving an actual or constructive breach of the peace (*Rawlins* v *Ellis*, 16 M & W 172), and probably all indictable offences

(*g*) See *Drury* v *Defontaine*, 1 Taunt 131, *per* Ld Mansfield, at p 135

(*h*) *Child* v *Edwards*, [1909] 2 K B 753

(*i*) See *R* v *Younger*, 5 T R 449 Keeping open a "fish and chips shop is within the exception (*Bullen* v *Ward*, 74 L J K B 916) Ice cream is not 'meat' for the purposes of the Act (*Slater* v *Evans*, [1916] 2 K B 403) The possession of a refreshment house licence does not give exemption from the operation of the Act (*Amorette* v *Ward*, [1915] 1 K B 124, at p 131)

if a man, in the exercise of his ordinary calling (*k*), make a contract on a Sunday, that contract is void, so as to prevent a party, who was privy to what made it illegal, from suing upon it, but not so as to relieve the seller from liability to prosecution if the article sold, being an article of food, was adulterated (*Elder* v *Kelly*, [1919] 2 K B 179), or if, for instance (see *dictum* of Lawrence, J , *ibid* p 182), the article sold, being a firearm, was sold to an uncertificated person in contravention of s 2 of the Firearms Act, 1920 A horse-dealer, for instance, cannot maintain an action upon a contract for the sale of a horse made by him upon a Sunday (*l*), though, if the contract be not completed on the Sunday, it will not be affected by the statute (*m*)

It has been decided that farmers and barbers are not included in the description "tradesman, artificer, workman or labourer or other person whatsoever," for "other person" means "other person *ejusdem generis* with those before enumerated" (*n*)

In *Drury* v *Defontaine* (*o*) Lord Mansfield said, so far back as 1808, "if any man in the exercise of his ordinary calling should make a contract on the Sunday, that contract would be void" But where, in an action for breach of the warranty of a horse, it appeared that the defendant alone was exercising his ordinary calling, and the plaintiff did not know what his calling was, so that only the defendant had violated the statute, Bayley, J , in 1828 held—but merely *obiter*—that it would be against justice to allow the defendant to take advantage of his own wrong, so as to defeat the rights of the plaintiff, who was innocent (*p*) In an action by the indorsee against the acceptor of a bill of exchange drawn on a Sunday (*q*), it was held in 1834 that the plaintiff might recover, there being no evidence that it had been accepted on that day, but Garrow, B , said, although the point was not before him, that, if it had

(*k*) See *R* v *Whitmarsh*, 7 B & C 596, *Smith* v *Sparrow*, 4 Bing 84, *Peate* v *Dicken*, 1 Cr M & R 422, *Scarfe* v *Morgan*, 4 M & W 270

(*l*) *Fennell* v *Ridler*, 5 B & C 406

(*m*) *Bloxsome* v *Williams*, 3 B & C 232, *Smith* v *Sparrow*, 4 Bing 84 See also *Williams* v *Paul*, 6 Bing 653 (observed upon in *Simpson* v *Nicholls*, 3 M & W 240), *Beaumont* v *Brengeri*, 5 C B 301, *Norton* v *Powell*, 4 M & Gr 42

(*n*) *R* v *Silvester*, 38 L J M C 39, *Palmer* v *Snow*, [1900] 1 Q B 725

(*o*) 1 Taunt 131, at p 135

(*p*) *Bloxsome* v *Williams*, 3 B & C 232, cited *Fennell* v *Ridler*, 5 B & C 406, at p 408

(*q*) A bill is not invalid by reason only that it bears date on a Sunday Bills of Exchange Act, 1882 (45 & 46 Vict c 61), s 13 (2)

been accepted on a Sunday, and such acceptance had been made in the ordinary calling of the defendant, and if the plaintiff had known these facts when he took the bill, he would be precluded from recovering on it, though the defendant would not be permitted to set up his own illegal act as a defence to an action by an innocent holder (*r*), and in *Brightman* v *Tate* McCardie, J (*s*), indicated his concurrence with these *obiter dicta* But the Court of Appeal has now (*t*) decided that they are wholly erroneous The law, therefore, is as stated by Lord Mansfield, and neither party to any contract, which is illegal because it was made upon a Sunday, or which is otherwise illegal, can in any circumstances sue upon it (*u*)

A person can commit but one offence on the same day by exercising his worldly calling in violation of the statute of Charles, and if a justice convict him in more than one penalty for the same day, it is an excess of jurisdiction (*x*) By the Sunday Observance Prosecution Act, 1871, no proceeding can be instituted for an offence against the statute, except with the consent in writing of the chief officer of police of the district or of two justices (*y*)

The Sunday Observance Act, 1780 (*z*), imposes penalties for opening houses, rooms, or other places of entertainment, and conducting entertainments therein, on Sundays (*a*)

In addition to cases decided under the Sunday Observance Act, 1677, we may refer to one of a somewhat different description, in which, however, the principle of public policy which dictated that statute was discussed In this case a question arose as to the validity of a bye-law, by which the navigation of a canal was ordered to be closed on every Sunday (works of necessity alone excepted) In support of this bye-law was

(*r*) *Begbie* v *Levi*, 1 Cr & J 180

(*s*) [1919] 1 K B 463, at p 472

(*t*) *Mahmond* v *Ispahani*, [1921] 2 K B 716

(*u*) See Bills of Exchange Act, 1882 (45 & 46 Vict c 61) s 14

(*x*) *Crepps* v *Durden*, Cowp 640, cited in the *Westbury upon Severn Case*, 4 E & B 314, at p 322 As to circumstances under which cumulative penalties may be recovered for separate acts, see *Milnes* v *Bale*, L R 10 C P 591 *Apothecaries Co* v *Jones*, [1893] 1 Q B 89

(*y*) 34 & 35 Vict c 87, s 1, and see *Thorpe* v *Priestnall*, [1897] 1 Q B 159

(*z*) 21 Geo III c 49

(*a*) *Terry* v *Brighton Aquarium Co* L R 10 Q B 306 *Girdlestone* v *The Same*, 3 Ex D 137 (followed in *Forbes* v *Samuel*, [1913] 3 K B 706), *Girdlestone* v *The Same*, 4 Ex D 107, *Reid* v *Wilson*, [1895] 1 Q B 315 It was a matter of doubt whether the Crown had power to remit the whole or any part of the penalties, but the Remission of Penalties Act, 1875 (38 & 39 Vict c 80), expressly conferred the power

urged the reasonableness of the restriction sought to be imposed thereby, and its conformity in spirit with enactments prohibiting Sunday trading, the Court, however, held that the navigation company had no power, under their Act, to make the bye-law, their power being confined to the making of laws for the government and orderly use of the navigation, and not extending to the regulation of moral or religious conduct, which must be left to the general law of the land, and to the laws of God (*b*) Railway companies are bound to deliver up luggage deposited at their luggage and cloak offices, on Sunday as on other days, unless protected by special conditions printed on the receipt tickets (*c*)

§ II —RULES OF LEGISLATIVE POLICY

In this section certain maxims are considered relating to the operation of statutes, and the leading canons of their construction These maxims are 1, that a later repeals an earlier and conflicting statute, 2, that laws should not have a retrospective operation, and 3, that enactments are framed with a view to ordinary rather than extraordinary occurrences We shall hereafter have occasion to consider the rules applicable to the construction of statutes, and may for the present confine our attention to the three maxims of legislative policy just enumerated

LEGES POSTERIORES PRIORES CONTRARIAS ABROGANT (1 *Rep* 25 *b*, 11 *Rep* 62 *b*)—*Later laws repeal earlier laws inconsistent therewith*

Clausula derogatoria

The legislature, which possesses the supreme power in the State, possesses, as incidental thereto, the right to change, modify, and abrogate the existing laws To assert that one Parliament can by its ordinances bind another would in fact be to contradict this plain proposition, if, therefore, an Act of Parliament contain a clause "that it shall not be lawful for the King, by authority of Parliament during the space of seven years, to repeal this Act," such a clause, which is technically termed "*clausula derogatoria*," is void, and the Act may be

(*b*) *Calder & Hebble Nav Co* v *Pilling*, 14 M & W 76
(*c*) *Stallard* v *G W Ry Co*, 2 B & S 419

repealed within seven years, for *non impedit clausula derogatoria quo minus ab eadem potestate res dissolvantur a quibus constituentur* (*d*), and *perpetua lex est nullam legem humanam ac positivam perpetuam esse, et clausula quæ abrogationem excludit ab initio non valet* (*d*) The principle thus set forth seems to be of universal application, and as regards our own Parliament, an Act may be altered, amended, or repealed in the same session in which it is passed (*e*)

Repeal by implication

It is, then, an elementary rule that an earlier Act must give place to a later, if the two cannot be reconciled—*lex posterior derogat priori* (*f*)—*non est novum ut priores leges ad posteriores trahantur* (*g*)—and one Act may repeal another by express words or by implication for it is enough if there be words which by necessary implication repeal it (*h*) But a repeal by implication is never to be favoured, and must not be imputed to the legislature without necessity (*i*), or strong reason (*k*), to be shown by the party imputing it (*l*) It is only effected where the provisions of the later enactment are so inconsistent with, or repugnant to, those of the earlier that the two cannot stand together, unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal cannot be implied, and special Acts are not repealed by general Acts unless there be some express reference to the previous legislation, or a necessary inconsistency in the two Acts standing together (*m*), which prevents the maxim *generalia*

(*d*) Bac Max , reg 19

(*e*) Interpretation Act, 1889 (52 & 53 Vict c 63), s 10

(*f*) See Mackeld Civ L 5

(*g*) D 1 3, 26 *Constitutiones tempore posteriores potiores sunt his quæ ipsas præcesserant* D 1, 4 4

(*h*) *Per* Willes, J , in *Great Central Gas Co* v *Clarke* 11 C B N S 814, at p 835 In *Birkenhead Docks Trustees* v *Laird*, 23 L J Ch 457, Turner L J , is reported as saying that one *private* Act cannot repeal another except by *express* enactment, but this *dictum* is not to be found in the cases as reported in 4 D M & G 732, and was regarded by some other judges as slightly too wide (See *Green* v *R* , 1 App Cas 513, *Altrincham Union* v *Cheshire Lines* 15 Q B D 597) It was, however, accepted by Byles, J , in *Purnell* v *Wolver hampton Waterworks Co* , 10 C B N S 591, but not by Erle, C J , Williams, J , and Willes, J (who also heard that case) Repeal by implication was clearly regarded as possible by the Court in *Wyatt* v *Gems*, [1893] 2 Q B 225 and in *Sheffield Corporation* v *Sheffield Electric Light Co* , [1898] 1 Ch 203, such repeal was held to have taken place

(*i*) Judgm in *Dobbs* v *Gr Junction Waterworks Co* , 9 Q B D 151, at p 158

(*k*) *Per* Ld Bramwell in *G W Ry Co* v *Swindon Ry Co* , 9 App Cas 787, at p 809

(*l*) *Per* Chitty, J , in *Lybbe* v *Hart*, 29 Ch D 8, at p 15

(*m*) *Per* A L Smith, J , in *Kutner* v *Phillips*, [1891] 2 Q B 267, at p 272

specialibus non derogant from being applied (*n*) For where there are general words in a later Act capable of reasonable application without being extended to subjects specially dealt with by earlier legislation, then, in the absence of an indication of a particular intention to that effect, the presumption is that the general words were not intended to repeal the earlier and special legislation (*o*), or to take away a particular privilege of a particular class of persons (*p*) "The law will not allow the exposition to revoke or alter by construction of general words any particular statute, where the words may have their proper operation without it" (*q*)

An affirmative Act which gives a new right does not destroy an existing statutory right, unless the intention be apparent that the two rights should not co-exist (*r*), and where two Acts are merely affirmative, and the substance such that both may stand together, the later does not repeal the earlier, but they both have concurrent efficacy (*s*) Thus, if by one Act an offence be triable at quarter sessions, and another Act makes the same offence triable at assizes, without adding such express negative words as "and not elsewhere," the jurisdiction of the sessions remains, and the offence may be tried before either court (*t*) The general rule undoubtedly is that where an Act does not create a duty or offence, but only adds a remedy in respect of an existing duty or offence, it is to be construed as cumulative, but this rule must always be applied with due attention to the language of the particular Act (*u*) It is, for

(citing *Gregory's Case*, 6 Rep 19 b), *Middleton* v *Crofts*, 2 Atk 675, *Thorpe* v *Adams*, L R 6 C P 125 See also *Thames Conservators* v *Hall*, L R 3 C P 415, *R* v *Champneys*, 6 Id 384

(*n*) See *per* Willes, J in *Daw* v *Metr Bd of W*, 12 C B N S 161, at p 178

(*o*) *Per* Ld Selborne in *Seward* v *Vera Cruz*, 10 App Cas 59, at p 68 (citing *Hawkins* v *Gathercole*, 6 D M & G 1) See also *Plymouth Corporation and Walter, In re*, [1918] 2 Ch 354 at 359, *Brit Columb Elect Ry Co* v *Gentile*, [1914] W N 278

(*p*) *Per* Ld Blackburn in *Garnett* v *Bradley* 3 App Cas 944, at p 969, see also *Rockett* v *Chippingdale*, [1891] 2 Q B 293, at p 299

(*q*) *Lyn* v *Wyn*, O Bridg 122, at p 127 (cited in *Thames Conservators* v *Hall*, L R 3 C P 415, at p 421, in *Thorpe* v *Adams*, 6 Id 125, at p 135, and in *Dodds* v *Shepherd*, 1 Ex D 75, at p 78) See *Re Smith's Estate*, 35 Ch D 595

(*r*) *O Flaherty* v *M'Dowell*, 6 H L Cas 142, at p 157

(*s*) *Foster's Case*, 11 Rep 56 b, at p 62, *Hill* v *Hall*, 1 Ex D 411

(*t*) 1 Blac Com 93 See *R* v *St Edmund's Salisbury*, 2 Q B 72, *R* v *JJ of Suffolk*, Id 85

(*u*) Judgm in *Richards* v *Dyke*, 3 Q B 256, at p 268, cf *per* Willes, J, in *Wolverhampton New Waterworks Co* v *Hawkesford*, 6 C B N S 336, at p 356

example, a well-recognised principle that an Act describing the quality of an offence, or prescribing a particular punishment for it, is impliedly repealed by a later Act altering the quality of the offence, or prescribing some other punishment for it (*x*), and this principle seems not to be affected by the statutory enactment, whereby, when an act constitutes an offence under two Acts, the offender shall, unless the contrary intention appears, be liable to be prosecuted under either Act, but shall not be liable to be punished twice for the same offence (*y*) For that enactment can only apply where both Acts are in force (*z*)

Effect of repeal

It was a well-established rule, at common law, that, when an Act was repealed without any saving clause, "it was to be considered, except as to transactions passed and closed (*a*), as if it had never existed" (*b*) Accordingly, where an indictment was drawn in a form sanctioned by an Act, but insufficient at common law, and before the trial the Act was repealed without any reference to depending prosecutions, the Queen's Bench arrested a judgment given against the defendants on such indictment (*c*), and when a bye-law is made under an Act of Parliament, the repeal of the Act abrogates the bye-law, unless the repealing Act preserves the bye law by means of a saving clause or otherwise (*d*) One consequence of this rule was that, if nothing inconsistent with such an intention appeared, a repealed Act was revived by the repeal of the Act which had repealed it (*e*) In order, however, to avoid the constant repetition of saving clauses, Parliament has now provided new rules with regard to modern repealing Acts A repealing enactment passed since 1850 is not to be construed

(*x*) Judgm in *Fortescue* v *St Matthew, Bethnal Green* [1891] 2 Q B 170 at p 177 (citing *Davis's Case*, 1 Leach C C 271, and *Mitchell* v *Brown* 1 E & E 267) see also *Henderson* v *Sherborne*, 2 M & W 236, at p 239, *A G* v *Lockwood*, 9 Id 378, at p 391 *Robinson* v *Emerson*, 4 H & C 352 at p 355

(*y*) Interpretation Act, 1889 (52 & 53 Vict c 63) s 33

(*z*) See *Keep* v *St Mary's, Newington*, [1894] 2 Q B 524

(*a*) See, for instance, *Gwynne* v *Drewitt*, [1894] 2 Ch 616

(*b*) *Surtees* v *Ellison*, 9 B & C 750, at p 752, *per* Ld Tenterden, cited in *R* v *Denton (Inhabitants)*, 18 Q B 761, at p 771, in *Butcher* v *Henderson* L R 3 Q B 335 at p 338, and in *Rimini* v *Van Praagh*, L R 8 Q B 1, at p 5 See *A G* v *Lamplough*, 3 Ex D 214 In the case of *temporary* Acts, the extent of the restrictions imposed and the duration of the provisions are matters of construction, *per* Parke, B, in *Steavenson* v *Oliver*, 8 M & W 234, at p 241

(*c*) *R* v *Denton*, 18 Q B 761

(*d*) *Watson* v *Winch*, [1916] 1 K B 688

(*e*) *The Bishop's Case* 12 Rep 7, *Tattle* v *Grimwood*, 3 Bing 493, at p 496, *Hellawell* v *Eastwood*, 6 Exch 295

as reviving any enactment previously repealed, unless words are added reviving that enactment (*f*), and if it substitutes provisions for the repealed enactment, the latter remains in force until the substituted provisions come into operation (*g*) And in the case of a repealing enactment passed since 1889, the repeal, unless the contrary intention appears, not only does not revive anything not in force or existing at the time when the repeal takes effect, nor affect anything done or suffered under the repealed enactment but further does not affect any right or liability acquired, accrued, or incurred thereunder, or any penalty or punishment incurred for an offence committed against the repealed enactment, or any legal proceeding or remedy in respect of any such right, liability, penalty, or punishment, and the legal proceeding may be enforced, and the penalty or punishment may be imposed, as if the repealing Act had not been passed (*h*)

It was a general rule of construction that, when a statute was incorporated by reference into a second statute, the repeal of the first by a third did not affect the second (*i*) This rule, however, is now varied, as regards a repealing Act passed since 1889, which re-enacts with or without modification the provisions of the repealed Act, for references in other Acts to the repealed provisions are, unless the contrary intention appears, to be construed as references to the provisions re-enacted (*k*)

When Act begins to operate

Before 1793 every Act, unless it contained a direction to the contrary, was considered to commence from the first day of the session of Parliament in which it was passed (*l*), but in 1793 it was enacted (*m*) that it should be the duty of the clerk of the Parliaments to indorse on every Act the day, month, and year when the same receives the royal assent, and the date so indorsed on an Act is the date of its commencement (*n*) where no other commencement is therein provided When, therefore,

(*f*) Interpretation Act, 1889 (52 & 53 Vict c 66), s 11 (1)

(*g*) Ibid s 11 (2) See *Levi* v *Sanderson*, and *Mirfin* v *Attwood*, L R 4 Q B 390, *Mount* v *Taylor*, L R 3 C P 645, *Butcher* v *Henderson*, L R 3 Q B 335

(*h*) Interpretation Act, 1889 (52 & 53 Vict c 66), s 38 (2) See *Heston U D C* v *Grout*, [1897] 2 Ch 306, *Abbott* v *Minister for Lands*, [1894] A C 425, *Re Brandon's Patent*, 9 App Cas 589, *Hamilton Gell* v *White*, [1922] 2 K B 422, *Union Nationale Inter Syndicale, &c , In re*, [1922] 2 Ch 653

(*i*) See *per* Brett, L J , in *Clarke* v *Bradlaugh*, 8 Q B D 63, at p 69

(*k*) 52 & 53 Vict c 63, s 38 (1)

(*l*) *Patten* v *Holmes*, 4 T R 660

(*m*) By the Act of Parliament (Commencement) Act, 1793 (33 Geo III c 13)

(*n*) See *Tomlinson* v *Bullock*, 4 Q B D 230

two Acts, passed in the same session, are repugnant or contradictory to each other, that which last received the royal assent now prevails, and has the effect of repealing the other wholly or *pro tanto* (*o*) The same principle, moreover, applies where a proviso in an Act is directly repugnant to the enacting part, for in this case the proviso stands, and is held to be a repeal of the substantive enactment, as it speaks the last intention of the makers (*p*)

Common law gives place to statute

Not merely does an old statute give place to a new one, but, where the common law and the statute differ, the common law gives place to the statute so far as they are repugnant (*q*) In like manner an ancient custom may be abrogated by the express provisions of a statute, or where inconsistent with and repugnant to its positive language (*r*) But "the law and custom of England cannot be changed without an Act of Parliament, for the law and custom of England is the inheritance of the subject, which he cannot be deprived of without his assent in Parliament" (*s*)

Statutes, however, 'are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare, therefore in all general matters the law presumes the Act did not intend to make any alteration, for if Parliament had had that design they would have expressed it in the Act" (*t*)

NOVA CONSTITUTIO FUTURIS FORMAM IMPONERE DEBET, NON PRÆTERITIS (2 *Inst* 292)—*A new law ought to be prospective, not retrospective, in its operations*

General principle of legislation

Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which

(*o*) *R* v *JJ of Middlesex*, 2 B & Ad 818, *Paget* v *Foley*, 2 Bing N C 679, at p 691, *Brit Columb Elect Ry Co* v *Stewart*, [1913] A C 816

(*p*) *A G* v *Chelsea Waterworks Co* Fitzgib 195 (cited in *R* v *Middlesex JJ*, 2 B & Ad 818 at p 826) cf *Re Watson*, [1893] 1 Q B 21

(*q*) Bac Abr, 7th ed *Statute* (G), *per* Alderson, B, in *Mayor of London* v *R*, 13 Q B 1, at p 33, note (*d*), *Stevens* v *Chown*, [1901] 1 Ch 894, and authorities there referred to

(*r*) *Merchant Taylors Co* v *Truscott*, 11 Exch 855, *Salters Co* v *Jay*, 3 Q B 109, *Huxham* v *Wheeler*, 3 H & C 75, *Green* v *R*, 1 App Cas 513

(*s*) *Ex officio Oaths Case*, 12 Rep 29

(*t*) *Per* Trevor, C J, in *Arthur* v *Bokenham*, 11 Mod 148, at p 150, see also *per* Ld Cairns in *River Wear Commrs* v *Adamson*, 2 App Cas 743, at p 751, and *per* Bowen, L J, in *Rendall* v *Blair*, 45 Ch D 139, at p 155

the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law (*u*) *Nemo potest mutare consilium suum in alterius injuriam* (*v*) was a general maxim of the Roman law, which the civilians (*y*) specifically applied as a restriction upon the law-giver, in conformity with the principle that *leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit* (*z*) Accordingly, it has been said that every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past, must be deemed retrospective in its operation, and opposed to sound principles of legislation (*a*)

General principle of our law

It is a general principle of our law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require that construction (*b*), and this involves the subordinate rule that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary (*c*) Except in special cases, a new Act ought to be so construed as to interfere as little as possible with vested rights (*d*), and where the words admit of another construction, they should not be so construed as to impose disabilities not existing at the passing of the Act (*e*)

Moon v *Durden*

Moon v *Durden* (*f*) is a leading case upon this subject It was an action upon a wager, commenced before the passing of the Gaming Act, 1845 (*g*), which enacts that all contracts by way of wagering "shall be null and void," and that "no suit

(*u*) *Per* Willes, J , in *Phillips* v *Eyre*, L R 6 Q B 1, at p 23
(*x*) D 50, 17, 75
(*y*) Taylor, Elem Civ Law, 168
(*z*) Cod 1, 14, 7, cited by Willes, J , in *Phillips* v *Eyre*, L R 6 Q B 1, at p 23
(*a*) *Per* Lopes, L J , in *Re Pulborough School Board*, [1894] 1 Q B 725, at p 737
(*b*) *Mid Ry Co* v *Pye*, 10 C B N S 179, at p 191
(*c*) *Per* Lindley, L J in *Lauri* v *Renad* [1892] 3 Ch 402, at p 421 Cf *per* Bowen, L J , in *Reid* v *Reid*, 31 Ch D 402, at p 409 See also *Re Norman*, [1893] 2 Q B 369 *Allhusen* v *Brooking*, 26 Ch D 559
(*d*) *Per* Bowen, L J , *loc cit supra*
(*e*) *Per* Davey, L J , *Re Pulborough School Board*, *supra*
(*f*) 2 Exch 22 (followed in *Pettamberdass* v *Thackoorseydass*, 7 Moo P C 239)
(*g*) 8 & 9 Vict c 109

shall be brought or *maintained*" for recovering money alleged to be won upon a wager This Act was passed while the action was pending, and the question was whether it operated to defeat the plaintiff's claim The Court of Exchequer decided that it did not "The language of the clause," said Parke, B, "if taken in its ordinary sense, as in the first instance we ought to take it, applies to all contracts, both past and future, and to all actions, both present and future, on any wager, whether past or future But it is, as Lord Coke says, 'a rule and law of Parliament that regularly, *nova constitutio futuris formam imponere debit, non præteritis*' This rule, which is in effect that enactments in a statute are generally to be construed to be prospective, and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and has been acted upon in many cases (*h*) But this rule, which is one of construction only, will certainly yield to the intention of the legislature, and the question in this and in every similar case is, whether that intention has been sufficiently expressed" The judgments of Rolfe and Alderson, BB, were to the same effect, and it is safe to say that, where a statute is passed while an action is pending, strong and distinct words are necessary to alter the vested rights of either litigant as they stood at the commencement of the action (*i*) Moreover, in the absence of clear words to that effect, a statute will not be construed as taking away a vested right of action acquired before it was passed (*k*)

Vested rights

No suitor, however, has a vested interest in the course of procedure, or a right to complain, if during his litigation the procedure is changed, provided that no injustice be done (*l*) Alterations in the form of procedure are always retrospective,

Procedure and evidence

(*h*) He cited *Gillmore* v *Shuter*, Jones, T, 108, where it was held that the Statute of Frauds did not affect actions upon verbal promises made before the statute came into force see *Edmonds* v *Lawley*, 6 M & W 285, and *Moore* v *Phillips*, 7 Id 536, where it was decided that rights already vested in a bankrupt s assignee were not defeated by the passing of the 2 & 3 Vict c 29

(*i*) See *Mid Ry Co* v *Pye*, 10 C B N S 179, *Marsh* v *Higgins*, 9 C B 551, *Chappell* v *Purday*, 12 M & W 303 *Hitchcock* v *Way* 6 A & E 943, *Paddon* v *Bartlett*, 3 Id 884 See also *Turnbull* v *Forman*, 15 Q B D 234, *Hough* v *Windus*, 12 Id 224, *Barton Regis Union* v *Liverpool Overseers*, 3 Id 295, *Young* v *Hughes*, 4 H & N 76

(*k*) *Smithies* v *National Association of Plasterers*, [1909] 1 K B 310, *Knight* v *Lee*, [1893] 1 Q B 41 *Wright* v *Greenroyd*, 1 B & S 758 *Jackson* v *Woolley*, 8 E & B 787, *Williams* v *Smith*, 4 H & N 559, *Waugh* v *Middleton*, 8 Exch 352, *Larpent* v *Bibby*, 5 H L Cas 481

(*l*) *Per* Mellish, L J, in *Costa Rica* v *Erlanger*, 3 Ch D 62, at p 69 Cf *per* Bowen, L J, in *Turnbull* v *Forman*, 15 Q B D 234, at p 238

unless there be some good reason to the contrary (*m*), and so are alterations in the law of evidence in matters both civil and criminal (*m*)

In *Colonial Sugar Refining Co* v *Irving* (*n*) the Judicial Committee advised that an Act of Parliament which took away the right of appeal to the King in Council was not retrospective, as the result of holding the contrary would be to deprive the appellant of a vested right to appeal to a higher tribunal But in another case the Court for Crown Cases Reserved held that an Act which extended the time within which a prosecution might be commenced related to procedure only and was retrospective (*o*)

General limitation of rule

The maxim under consideration is only a guide where the intention of the legislature is obscure, it does not modify the clear words of a statute (*p*) For instance, in *Stead* v *Carey* (*q*), the plaintiff, having obtained for his invention letters patent, which by their terms were to become void if the specification were not enrolled within four months, through inadvertence failed to procure such enrolment within that time The specification having been subsequently enrolled, he obtained an Act of Parliament which, after reciting these facts, enacted that the letters patent should be considered to be as valid and effectual to all intents and purposes as if the specification had been enrolled within the four months He then brought the action for an infringement of his patent against the defendant, who, before the passing of the Act and whilst the patent had no validity by reason of the non-enrolment, had obtained letters patent for an improvement of the same invention It was held that the plain words of the Act operated as a complete confirmation of the plaintiff's patent, although they imposed upon the defendant the hardship of having his patent destroyed by an *ex post facto* law

R v *Vine*

Again, in *R* v *Vine* (*r*), where the question was whether the enactment that "every person convicted of felony shall for

(*m*) *Per* Ld Blackburn in *Gardner* v *Lucas*, 3 App Cas 582, at p 603 See *Wright* v *Hale*, 6 H & N 227 *A G* v *Sillem*, 10 H L Cas 704 at p 763, *Kimbray* v *Draper*, L R 3 Q B 160 *Curtis* v *Stovin*, 22 Q B D 513, *The Ydun*, [1899] P 236 For an instance of a good reason to the contrary, see *Pinhorn* v *Souster*, 8 Exch 138

(*n*) [1905] A C 369

(*o*) *R* v *Chandra Dharma*, [1905] 2 K B 335

(*p*) *Per* Bowen L J , in *Quilter* v *Mapleson* 9 Q B D 677

(*q*) 1 C B 496

(*r*) L R 10 Q B 195

ever be disqualified from selling spirits by retail" affected a person convicted of felony before the passing of the Act, the Court held that it did affect him, and rendered his licence void "The object of the enactment," said Cockburn, C J, 'is not to punish offenders, but to protect the public against public-houses being kept by persons of doubtful character On looking at the Act, the words used seem to import the intention to protect the public against persons convicted in the past as well as the future" (*s*)

Other cases have occurred in which Acts altering the law have been construed as retrospective (*t*), but they have generally turned, as it has been said (*u*), "on the peculiar wording of these Acts, which appeared to the Courts to compel them to give the law an *ex post facto* operation" Statutes of limitations have been construed as affecting existing claims where an interval of time was allowed for their enforcement (*v*), and if the language admits of that construction, the Courts, looking at the object of an enactment, sometimes construe its remedial provisions retrospectively (*y*) The argument that an Act must not be so construed as to take away existing rights is inapplicable to Acts which are in their nature declaratory (*z*), and although, as a rule, words not requiring a retrospective operation ought not to be so construed, yet in all cases it is necessary to ascertain (from the language used) what the legislature meant (*a*)

Criminal cases

It manifestly shocks our sense of justice that an act legal at the time when it was done should be made unlawful by a new enactment (*b*), and the injustice and impolicy of *ex post facto* or retrospective legislation is most apparent in the case

(*s*) Lush J dissented on the ground that the intention of the Act was not clear and in *Re Pulborough School Board* [1894] 1 Q B 725 Lopes, L J stated that he preferred the reasoning of that Judge

(*t*) See for instance *Hodgkinson* v *Wyatt*, 4 Q B 749, *Brooks* v *Bockett* 9 Id 847, *R* v *St Mary, Whitechapel*, 12 Id 120, *R* v *Christchurch* 12 Id 149 *Mackenzie* v *Sligo Ry Co* 18 Id 862, *A G* v *Bristol Water works Co*, 10 Exch 884 *Ansdell* v *Ansdell*, 5 P D 138, *Re Williams*, [1891] 2 Q B 257

(*u*) *Per* Ld Denman in *Hitchcock* v *Way*, 6 A & E 945, at p 951

(*x*) *Pardo* v *Bingham*, 4 Ch App 735 *Cornill* v *Hudson*, 8 E & B 429 *R* v *Leeds Ry Co*, 18 Q B 349 (recognising *Towler* v *Chatterton* 6 Bing 258, upon which see *per* Rolfe B in *Moon* v *Durden*, 2 Exch 22, at p 36, and *per* Cresswell, J, in *Marsh* v *Higgins*, 9 C B 551, at p 569)

(*y*) See, for instance *Quilter* v *Mapleson*, 9 Q B D 672, *Page* v *Bennett*, 29 L J Ch 398, *The Ironsides*, 1 Lush Adm 465

(*z*) *Per* Pollock, B, in *A G* v *Theobald*, 24 Q B D 557, at p 559 (citing *A G* v *Hertford*, 3 Exch 670)

(*a*) *Reynolds* v *A G for Nova Scotia*, [1896] A C 240, 244

(*b*) *Per* Erle, C J, in *Mid Ry Co* v *Pye*, 10 C B N S 179, at p 191

of new criminal laws To these the maxim of Paulus (*c*), adopted by Lord Bacon (*d*), applies *nunquam crescit ex post facto præteriti delicti æstimatio* The law does not allow a later fact, a circumstance or matter subsequent, to extend or amplify an offence Unless the intention of the legislature is clearly expressed to that effect, criminal offences are not to be created by giving a retroactive operation to statutes (*e*) There is a great difference between making an unlawful act lawful and making an innocent action criminal (*f*)

AD EA QUÆ FREQUENTIUS ACCIDUNT JURA ADAPTANTUR (2 *Inst* 137)—*The laws are adapted to those cases which more frequently occur*

Laws ought to be, and usually are, framed with a view to such cases as are of frequent rather than such as are of rare or accidental occurrence, or, in the language of the civil law, *jus constitui oportet in his quæ ut plurimum accidunt, non quæ ex inopinato* (*g*), for, *neque leges neque senatusconsulta ita scribi possunt ut omnes casus qui quandoque inciderint comprehendantur, sed sufficit ea quæ plerumque accidunt contineri* (*h*), laws cannot be so worded as to include every case which may arise, but it is sufficient if they apply to those things which most frequently happen All legislation proceeds upon the principle of providing for the ordinary course of things (*i*), and to this principle frequent reference is to be found, in the reports, in answer to arguments, often speciously advanced, that the words of an Act cannot have a particular meaning, because in a certain contingency that meaning might work a result of

(*c*) D 50, 7 138, § 1

(*d*) Bac Max reg 8

(*e*) *R* v *Griffiths*, [1891] 2 Q B 145

(*f*) See *Phillips* v *Eyre*, L R 6 Q B 1, at p 26

(*g*) D 1, 3, 3 See Ld Camden's judgment in *Entick* v *Carrington*, 19 St Tr 1030, at p 1061 Sir R Atkyns observes that 'laws are fitted *ad ea quæ frequentius accidunt*, and not for rare and extraordinary events and accidents" See his 'Enquiry into the Power of dispensing with Penal Statutes,' cited 11 St Tr 1200 'The rule is *ad ea quæ frequentius accidunt leges adaptantur*' *per* Bramwell, B, in *East Counties, &c, Ry Companies* v *Marriage*, 9 H L Cas 32, at p 52, *per* Willes, J, in *R* v *Saddlers' Co*, 10 H L Cas 404, at p 429

(*h*) D 1, 3, 10

(*i*) *Per* Blackburn, J, in *Maxted* v *Paine*, L R 6 Ex 132, at p 172

which nobody would approve In *Miller* v *Salomons* (*k*) it was argued that Parliament could not have intended that a Jew, before sitting in the House of Commons, must use the words "on the true faith of a Christian," prescribed in the oath of abjuration of 6 Geo 3, c 53, because any person, refusing to take the same oath when tendered by two justices, would, under the 1 Geo 1, st 2, c 13, be deemed to be a popish recusant, and would be liable to penalties as such, and to enforce these provisions against a Jew, it was said, would be the merest tyranny But Baron Parke (*l*) thus replied to this argument — 'If in the vast majority of possible cases—in all of ordinary occurrence—the law is in no degree inconsistent or unreasonable, construed according to its plain words, it seems to me to be an untenable proposition, and unsupported by authority, to say that the construction may be varied in *every* case, because there is one possible but highly improbable one in which the law would operate with great severity, and against our own notions of justice The utmost that can be reasonably contended is, that it should be varied in that particular case, so as to obviate that injustice—no further"

Another illustration of the maxim is afforded by *St Margaret's Burial Board* v *Thompson* (*m*) There the right of a parish sexton to enter and perform his functions upon burial ground formed under the Burial Act, 1852 (*n*), was contested, and it was urged that the Act could not be supposed to confer such an absolute right, because by the common law the rector could dismiss the sexton, or exclude him from the churchyard, in the event of his misconduct The Court, however, considered that the Act should be construed as "framed with a view to the ordinary position of rector and sexton in respect of the latter's duties"

Where an insurance society obtained a private Act, which enacted that all actions and suits might be commenced in the name of their secretary, as nominal plaintiff, it was held that this Act did not enable the secretary to petition, on behalf of the society, for a commission of bankruptcy against their debtor, for the expression "to sue," generally speaking, means to bring

(*k*) 7 Exch 475 8 Id 778
(*l*) In *Miller* v *Salomons*, 7 Exch 475, at p 549
(*m*) L R 6 C P 445
(*n*) 15 & 16 Vict c 85, s 32

actions, and the legislature was providing for every-day and not for exceptional occurrences (*o*)

Again, when the construction was under consideration, of the Distress for Rent Act, 1737 (*p*) (which gives a remedy to a landlord, whose tenant has fraudulently removed goods from the demised premises, unless they have been *bonâ fide* sold to one not privy to the fraud), and it was urged that it ought to be implied that the landlord was not empowered by the statute to enter the close of a third person, or to break his locks, for the purpose of seizing the goods, unless he was a party to, or at least cognizant of, the fraudulent removal, and further that the breaking open of his gates without a previous request to open them was unjustifiable the Court held that neither of these conditions need be observed as necessary to the exercise of the right given by the statute, 'for, generally, goods fraudulently removed are not secreted in a man's close or house without his privity or consent The legislature may be presumed to have had this (*q*) in their contemplation *ad ea quæ frequentius accidunt jura adaptantur*'

The reader will also find the maxim forcibly applied by Lord Blackburn in *Dixon* v *Caledonian Ry Co* (*r*), and two other judgments (*s*) of the same great authority demonstrate that it has force, not only as a canon of construction of statute law, but also as a principle of the common law

Casus omissus

It is then true that, 'when the words of a law extend not to an inconvenience rarely happening, but do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is *casus omissus*, and that the law intended *quæ frequentius accidunt*" "But, 'on the other hand, "it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom" (*t*) A *casus omissus* ought not

(*o*) *Guthrie* v *Fisk* 8 B & C 178 Arg *A G* v *Jackson* 2 Cr & J 101, at p 108, Wing Max 716 *Argumentum a communiter accidentibus in jure frequens est*, Gothofred, ad D 44, 2, 6

(*p*) 11 Geo II c 19

(*q*) *Williams* v *Roberts*, 7 Exch 618, at p 628 see *Thomas* v *Watkins* Id 630

(*r*) 5 App Cas 820, at p 838

(*s*) *Clarke* v *Wright*, 6 H & N 849 at p 862, *Dalton* v *Angus* 6 App Cas 740, at p 818

(*t*) *Per* Vaughan C J, in *Bole* v *Horton* Vaugh 360 at p 373 see also *Fenton* v *Hampton*, 11 Moore, P C 345, at p 365

to be created by interpretation, save in some case of strong necessity (*u*) Where, however, a *casus omissus* does really occur, either through the inadvertence of the legislature (*v*), or on the principle *quod semel aut bis existit præterevunt legislatores* (*y*), the rule is that the particular case, thus left unprovided for, must be disposed of according to the law as it existed before such statute—*Casus omissus et oblivioni datus dispositioni communis juris relinquitur* (*z*), "a *casus omissus*," observed Buller, J (*a*), "can in no case be supplied by a court of law, for that would be to make laws"

(*u*) *Per* Ld Fitzgerald in *Mersey Docks Board* v *Henderson*, 13 App Cas 595, at p 607

(*x*) *R* v *Denton* 5 B & S 821, at p 828, *Cobb* v *Mid Wales Ry Co* L R 1 Q B 342, at pp 348, 349

(*y*) D 1, 3, 6

(*z*) *Bishop's Case*, 5 Rep 37 b See *Robinson* v *Cotterell*, 11 Exch 476

(*a*) *Jones* v *Smart* 1 T R 52 see also *per* Ld Abinger in *Lane* v *Bennett* 1 M & W 70, at p 73, arg *Shepherd* v *Hills*, 11 Exch 55, at p 64

CHAPTER II

MAXIMS RELATING TO THE CROWN

THE principal attributes of the Crown are sovereignty or pre-eminence, perfection, and perpetuity, and these attributes are attached to the wearer of the crown by the constitution, and may be said to form his constitutional character and royal dignity On the other hand, the principal duty of the sovereign is to govern his people according to law, and this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest In this chapter are collected some of the more important technical rules, embodying the above general attributes of the Crown (*a*)

REX NON DEBET ESSE SUB HOMINE, SED SUB DEO ET SUB LEGE, QUIA LEX FACIT REGEM (*Bract Lib* 1 *fo* 5, 12 *Rep* 65)—*The king is under no man, yet he is under God and the law, for the law makes the king*

Two fold character of the sovereign

The head of the State is regarded by our law in a twofold character—as an individual liable like any other to the accidents of mortality and its frailties, also as a corporation sole (*b*), endowed with certain peculiar attributes, the recognition whereof leads to important consequences Politically, the sovereign is regarded in this latter character, and is invested with various functions, which the individual, as such, could not discharge

(*a*) On the subject of this chapter, see further Allen on the Royal Prerogative Chitty on the Prerogative of the Crown, particularly chaps I, II, XV XVI, Fortescue de Laud Leg Ang, by Amos, chap IX, Finch's Law, 81, Plowd Com, chap XI, Bracton, bk 1, chap VIII

(*b*) Mr Allen, however, observed (Royal Prerog, p 6), that 'there is some thing higher, more mysterious, and more remote from reality in the conception which the law of England forms of the king than enters into the notion of a corporation sole'

"The person of the king," it has been said (*c*), "is by law made up of two bodies a natural body, subject to infancy, infirmity, sickness, and death, and a political body, perfect, powerful, and perpetual" These two bodies are inseparably united together, so that they may be distinguished, but cannot be divided More often, however, the sovereign would seem to be regarded by our law in his political than in his individual and natural capacity, and the attributes of his former are blended with those of his latter character As conservator of the public peace, the Crown in any criminal proceeding represents the community at large, prosecutes for offences committed against the public, and can alone exercise the prerogative of pardoning As the fountain of justice, no Court can have compulsory jurisdiction over the sovereign, an action for a personal wrong, therefore, will not lie against the king, for which rule, indeed, another more technical reason has been assigned—that the king cannot by his writ command himself to appear *coram judice* As the dispenser of law and equity, the king is present in all his Courts, whence it is that he cannot be nonsuit in an action, nor does he appear by attorney (*d*)

The king is beneath the law

The *Case of Prohibitions* (*e*) shows, however, that the king is not above the law, for he cannot in person assume to decide any case, civil or criminal, but must do so by his judges, the law being "the golden met-wand and measure to try the causes of the subjects, and which protected his majesty in safety and peace"—the king being thus in truth, *sub Deo et lege* This case shows also that an action will not lie against the Crown for a personal tort, for it is there laid down that "the king cannot arrest a man for suspicion of treason or felony, as others of his lieges may", the reason given being that, if a wrong be thus done to an individual, the party grieved cannot have remedy against the king But although in these and other respects, presently to be noticed, the king is greatly favoured by the law, being exempted from the operation of various rules applicable to the subject, he is on the whole, and essentially, beneath not superior to it, theoretically in some respects above, but practically bound and directed by its ordinances (*f*)

(*c*) Bagshaw, Rights of the Crown of England, 29 see also *Duchy of Lancaster Case*, Plowd 212, at pp 213, 217, *Willion* v *Berkley*, Id 223, at p 238, Allen Royal Pre 26, Bac Abr Prerogative (E 2)

(*d*) 1 Blac Com 270, Finch's Law (by Pickering), 82

(*e*) *Prohibitions del Roy*, 12 Rep 63

(*f*) See the Debate in the House of Lords on Life Peerages, Hansard, vol 140,

REX NUNQUAM MORITUR (*Branch, Max*, 5*th ed* 197)—*The king never dies*

Immortality ascribed theoretically to the king

The law ascribes to the king, in his political capacity, an absolute immortality, and immediately upon the decease of the reigning prince in his natural capacity, the kingly dignity and the prerogatives and politic capacities of the supreme magistrate, by act of law, without any interregnum or interval, vest at once in his successor, who is, *eo instante*, king, to all intents and purposes (*g*), and this is in accordance with the maxim of our constitution, *In Anglia non est interregnum* (*h*) "It is true," said Lord Lyndhurst (*i*), "that the king never dies, the demise is immediately followed by the succession, there is no interval The sovereign always exists, the person only is changed"

So tender, indeed, is the law of supposing even a possibility of the death of the sovereign, that his natural dissolution is generally called his demise—*demissio regis vel coronæ*—an expression which signifies merely a transfer of property, and when we speak of the demise of the Crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic (*j*), the kingdom is transferred to his successor, and so the royal dignity remains perpetual (*k*) It has, doubtless, usually been thought prudent, when the sovereign is of tender years at the period of the devolution upon him of the royal dignity, to appoint a protector, guardian, or regent to discharge the functions of royalty for a limited time, but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority (*l*), for he has no legal guardian, and the appointment of a regent must, therefore, be regarded merely as a provision made by the legislature to meet a special and temporary emergency (*m*)

pp 263, *et seq* In *Howard* v *Gosset*, 10 Q B 359, at p 386, Coleridge, J, observed that "the law is supreme over the House of Commons, as over the Crown itself" See also *post*, p 34

(*g*) 1 Blac Com 249

(*h*) Jenk Cent 205 See Cooper's Account of Public Records, vol 2, 323, 324, Allen, Royal Prerog 44

(*i*) *Canterbury* v *A G*, 1 Phill 306, at p 322

(*j*) *Ante*, p 31

(*k*) 1 Blac Com 249

(*l*) Bac Abr Prerogative (A)

(*m*) 1 Blac Com 248, Plowd Com 177, 234 And see the Regency Act, 1910 (10 Edw 7 and 1 Geo 5, c 26)

It seems that the Duchy of Cornwall vests in the king's eldest son and heir apparent at the instant of his birth, without gift or creation, and as if minority could no more be predicated of him than of the sovereign himself (*n*)

The title of the sovereign is regulated by succession as well as descent, and if lands be given to the king and his "heirs," this word "heirs" includes the "successors" to the Crown, although on the demise of the sovereign, according to the course of descent recognised at the common law, the land might have gone in some other channel Hence, if the king die without issue male, but leaving two daughters, lands held to him and his heirs go to his eldest daughter as succeeding to the Crown, whereas, in the case of a subject, lands whereof he was seised would pass to his daughters, in default of male issue, as coparceners (*o*) Similarly, if real estate be given to the king and his heirs, and afterwards the reigning dynasty be changed, and another family be placed upon the throne, the land in question would go to the successor, and then descend in the new line (*p*) And a grant of land to the king for ever creates in him an estate of perpetual inheritance (*q*), whereas the like words would but give an estate for life to any of his subjects

In regard also to personal property, the Crown is differently circumstanced from an individual or from a corporation sole, for, by the ordinary rule, such property does not, in the case of a corporation sole, go to the successor—in the king's case, by our common law, it does (*r*) And it is worthy of remark that the maxim, "the king never dies," founded manifestly on notions of expediency, and on the apprehension of danger which would result from an interregnum, does not hold in regard to other corporations sole Thus a parson, though clothed with the same rights and reputed to be the same person as his predecessor, is not deemed by our law to be continuously in possession of his office, nor is it deemed essential to the preservation of his official privileges that one incumbent should, without any interval of time, follow another Such a corporation sole may, during an interval of time, cease to be visibly *in esse*, whereas the king never dies—his throne and office are never vacant

(*n*) *Per* Ld Brougham in *Clayton* v *A G*, 1 Coop *temp* Cott 97, at p 125
(*o*) Grant on Corporations, 627 See also the Crown Private Estates Acts, 1862 and 1873 (25 & 26 Vict c 37, and 36 & 37 Vict c 61)
(*p*) Grant, Corp 627 (*q*) 2 Blac Com 216 (*r*) Grant, Corp 626

Yet it would be an error to say that this fiction of the constitution as to the continuity of the Royal Person is always followed to its logical conclusions One limitation is illustrated by *A -G* v *Kohler* (*s*), where the question was discussed, whether money which by mistake had been paid to the Treasury during the reign of one sovereign could be recovered under his successor, and it was held that the sovereign could not be responsible for money paid in error to, and spent by, a predecessor, which that predecessor might lawfully have disposed of for his own use, supposing it to have come rightfully to his hands

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REX NON POTEST PECCARE (2 *Rolle, R* 304)—*The king can do no wrong*

Meaning of maxim

It is an ancient and fundamental principle of the English constitution that the king can do no wrong (*t*) But this maxim must not be understood to mean that the king is above the laws, in the unconfined sense of those words, and that everything he does is necessarily just and lawful Its true meaning is, first, that the sovereign, individually and personally, and in his natural capacity, is independent of and is not amenable to any other earthly power or jurisdiction, and that anything amiss in the condition of public affairs is not to be imputed to the king, so as to render him personally answerable for it to his people Secondly, the maxim means that the prerogative of the Crown extends not to do any injury, because, being created for the benefit of the people, it cannot be exerted to their prejudice, and it is therefore a fundamental general rule that the king cannot sanction an act forbidden by law, so that, from this point of view, he is under and not above the laws, and is bound by them equally with his subjects (*u*) If, then, the sovereign personally command an unlawful act to be done, the offence of the instrument is not thereby indemnified, for though the king is not himself under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which makes the act

(*s*) 9 H L Cas 654

(*t*) *Rex quod est injustum facere non potest*, Jenk Cent 9, 308

(*u*) Chitty, Prerog 5, Jenk Cent 208 See Fortescue de Laud Leg Ang (by Amos), 28

itself invalid if unlawful, and so renders the instrument of execution thereof obnoxious to punishment (*x*) As in affairs of State the ministers of the Crown are held responsible for advice tendered to it, or even for measures which might possibly be known to emanate directly from the sovereign, so may the agents of the sovereign be civilly or criminally answerable for lawless acts done—if that may be imagined—by his command

Grant from Crown when void

The king, moreover, is incapable not only of doing wrong, but even of thinking wrong Whenever, therefore, it happens that, by misinformation or inadvertence, the Crown has been induced to invade the private rights of a subject—as by granting a franchise to a subject contrary to reason, or in a way prejudicial to the commonwealth or a private person—the law will not suppose that the king meant either an unwise or an injurious action, for *eadem mens præsumitur regis qua est juris et qua esse debet præsertim in dubiis* (*y*), but declares that the king was deceived in his grant, and thereupon such grant becomes void upon the supposition of deception either by or upon those agents whom the Crown has thought proper to employ (*z*) In like manner, also, the king's grants are void whenever they tend to prejudice the course of public justice (*a*) And, in brief, to use the words of a learned judge (*b*), the Crown cannot, in derogation of the right of the public, unduly fetter the exercise of the prerogative which is vested in the Crown for the public good The Crown cannot dispense with anything in which the subject has an interest (*c*), nor make a grant in violation of the common law (*d*), or injurious to vested rights (*e*) In this manner it is that, while the sovereign himself is, in a personal sense, incapable of doing wrong, yet his acts may in themselves be contrary to law, and, on that account, be set aside by the law

It must further be observed that, even where the king's grant purports to be made *de gratia speciali, certa scientia, et*

(*x*) 1 Hale, P C 43, 44, 127 *Per* Coleridge, J , in *Howard* v *Gossett*, 10 Q B 359, at p 386

(*y*) *Cole* v *Clover* Hob 140, at p 154

(*z*) 2 Blac Com 246, see *Gledstanes* v *Sandwich*, 5 Scott, N R 689, at p 719, *R* v *Kempe*, 1 Raym Ld 49, Finch s Law, 101, *Vigers* v *Dean of St Paul s*, 14 Q B 909

(*a*) Chitty, Prerog 385

(*b*) See *per* Platt, B , in *E Archipelago Co* v *R* , 2 E & B 856, at p 894

(*c*) *Thomas* v *Waters*, Hard 443, at p 448

(*d*) 2 Roll Abr 164

(*e*) *R* v *Butler*, 3 Lev 220, cited *per* Parke, B , in *E Archipelago Co* v *R* , 2 E & B at p 894

mero motu, the grant will be void, if it appears to the Court that the king was deceived in the purpose and intent thereof, and this agrees with a text of the civil law, which says that the above clause *non valet in his in quibus præsumitur principem esse ignorantem*, therefore, if the king grant such an estate as by law he could not grant, forasmuch as the king was deceived in the law, his grant is void (*f*) Thus the Crown cannot by grant of lands create in them a new estate of inheritance, or give them a new descendible quality (*g*), and the power of the Crown is similarly restricted as regards the grant of a peerage or honour (*h*)

Act of Parliament

The above doctrine cannot, however, be extended to invalidate an act of the legislature, on the ground that it was obtained by a *suggestio falsi*, or *suppressio veri* It would indeed be something new, as forcibly observed by Cresswell, J (*i*), to impeach a statute by a plea stating that it was obtained by fraud

In connection with this part of our subject, it is worthy of remark that the power which the Crown possesses of calling back its grants, when made under mistake, is not like any right possessed by individuals, for, when it has been deceived, the grant may be recalled notwithstanding any derivative title depending upon it, and those who have deceived it must bear the consequences (*k*)

Patent

The doctrine just stated applies also in the case of a patent which has in some way improvidently emanated from the Crown Thus, in *Morgan* v *Seaward* (*l*), Parke, B , observed as follows "That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the Crown, is a maxim of the common law, and such a grant is void, not against the Crown merely, but in a suit against a third person (*m*) It is on the same principle that a patent for two or more inventions, where one is not new, was held to be

(*f*) *Case of Alton Woods*, 1 Rep 53

(*g*) *Per* Ld Chelmsford in *Wiltes Peerage*, L R 4 H L 126, at p 152

(*h*) *Wiltes Peerage*, L R 4 H L 126, and see *Buckhurst Peerage*, 2 App Cas 1, at pp 20, 21, *per* Ld Cairns

(*i*) In *Stead* v *Carey*, 1 C B 496, at p 516 see also *per* Tindal C J , Id at p 522

(*k*) Judgm , *Cumming* v *Forrester*, 2 Jac & Walk 334, at p 342

(*l*) 2 M & W 544 at p 561 (cited arg in *Nickels* v *Ross*, 8 C B 679, at p 710, in *Beard* v *Egerton*, Id 165, at p 207, and in *Croll* v *Edge*, 9 C B 479, at p 486) See *R* v *Betts*, 15 Q B 540, at p 547

(*m*) Citing *Travell* v *Carteret*, 3 Lev 134, at p 135, and *Alcock* v *Cooke*, 5 Bing 340

altogether void in *Hill* v *Thompson* (*n*), and *Brunton* v *Hawkes* (*o*), for although the statute (*p*) invalidates a patent for want of novelty, and consequently by force of the statute the patent would be void, so far as related to that which was old, yet the principle on which the patent has been held to be void altogether is, that the consideration for the grant is the novelty of all, and the consideration failing, or, in other words, the Crown being deceived in its grant, the patent is void, and no action maintainable upon it" (*q*)

The rule upon the subject now touched upon has been yet more fully laid down (*r*), as follows —"If the king has been deceived by any false suggestion as to what he grants or the consideration for his grant, if he appears to have been ignorant or misinformed as to his interest in the subject-matter of his grant, if the language of his grant be so general that you cannot in reason apply it to all that might literally fall under it, or if it be couched in terms so uncertain that you cannot tell how to apply it with that precision which grants from one so especially representing the public interest ought in reason to have, or if the grant reasonably construed would work a wrong, or something contrary to law, in these and such like cases the grant will be either wholly void or restrained according to circumstances, and equally so, whether the technical words, *ex certa scientia et mero motu*, be used or not But this is held upon the very same principle of construction on which a grant from a subject is construed, viz , the duty of effectuating the intention of the grantor" To hold the grants valid or unrestrained in the cases just put would be, as it is said, *in deceptione domini regis*, and not *secundum intentionem* It must, however, at the same time be noted that long modern possession will often make good and valid a title defective on account of vagueness or uncertainty in the original grant This is effected by a presumption of a supplementary and confirmatory grant, so as to preserve the fiction of royal impeccability (*s*)

Petition of Right

The principle that the king can do no wrong led to the institution of the Petition of Right, which is founded upon

(*n*) 8 Taunt 375

(*o*) 4 B & Ald 542

(*p*) The Statute of Monopolies, 1623 (21 Jac 1, c 3), s 6 See now also the Patents and Designs Act, 1907 (7 Edw 7, c 29), s 7 (4)

(*q*) See also judgment of Pollock, C B , in *Hills* v *Lond Gaslight Co* , 5 H & N 312, at p 340

(*r*) *R* v *E Archipelago Co* , 1 E & B 310, at pp 337, 338

(*s*) *Des Barres* v *Shey*, 29 L T 592

the theory that the king, of his own free will, graciously orders right to be done (*soit droit fait al partie*) (*t*) This proceeding is open to a subject in cases where his lands or goods or moneys have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if that cannot be given, then compensation in money (*u*) It is also open to him for the purpose of recovering moneys due to him under a contract made on behalf of the Crown, as for goods supplied to the Crown or for the public service (*v*), or unliquidated damages for breaches of the contract (*y*), or moneys payable by servants of the Crown to the suppliant under a grant of the Crown (*z*) But it is not open to him in other cases, and he cannot thereby obtain compensation for a wrongful act done by a servant of the Crown in the purported performance of his duties, or for a trespass (*a*), or the alleged infringement of letters patent (*b*)

The maxims, *qui facit per alium facit per se* and *respondeat superior*, have no application where the servants of the Crown commit a tort, what the sovereign does personally, the law presumes will not be wrong, what he does by command to his servants, cannot be wrong in him, for, if the command be unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command (*c*)

Procedure

The procedure in Petition of Right is now regulated by the Petition of Right Act, 1860 (*d*), which was passed to simplify the procedure, but did not extend the remedy to new cases (*e*) The petition is left with the Home Secretary for the considera-

(*t*) 3 Blac Com 254—256 It has been said that the petition took its origin under Edward I, and was substituted for a præcipe against the king, see *Tobin* v *R*, 16 C B N S 310, at p 356

(*u*) *Per curiam* in *Feather* v *R*, 6 B & S 257, at p 294

(*v*) Ibid

(*y*) *Thomas* v *R*, L R 10 Q B 31, *Windsor & Annapolis Ry Co* v *R*, 11 App Cas 607

(*z*) *Kildare County Council* v *R*, [1909] 2 Ir R 199, see *Dublin Corp* v *R*, [1911] 1 Ir 83, at p 110

(*a*) *Tobin* v *R*, 16 C B N S 310

(*b*) *Feather* v *R*, *supra* See *Dixon* v *London Small Arms Co*, 1 App Cas 632

(*c*) *Tobin* v *R* *supra*, at pp 354, 360, *Viscount Canterbury* v *R*, 1 Phillips, 306, at p 321

(*d*) 23 & 24 Vict c 34 For a succinct account of the earlier procedure, see 3 Blac Com 256 See further Chitty, Prerog 340 *et seq* It is well illustrated by *De Bode's Case*, 8 Q B 208

(*e*) 23 & 24 Vict c 34, s 7, *ad fin*

tion of the king, who, if he think fit, may grant his fiat that right be done (*f*) Upon the fiat, for which no fee is payable (*f*), being obtained, a copy of the petition and fiat, indorsed with the prescribed prayer, is left with the Treasury solicitor, and then the Crown has twenty-eight days within which to answer, plead, or demur to the petition (*g*) Proceedings can be stayed where the petition is founded upon a contract containing an arbitration clause, but a stay may be refused where an important constitutional question is involved (*h*) In the absence of a stay, subsequent procedure resembles, in general, that of ordinary actions (*i*), but though the Crown may have "discovery" from the suppliant (*k*), he cannot have it from the Crown (*l*) The Court has power to order the petition to be tried without a jury, though, if it had been an action between subject and subject, either party would have been entitled to a jury (*m*), and if the suppliant obtain a judgment the ordinary methods of execution are not open to him

Judgment

Formerly, the judgment, if in his favour, was that of *ouster le main*, or *amoveas manus*, or in full, *quod manus domini regis amoveantur et possessio restituatur petenti, salvo jure domini regis* the last being always added, because no *laches* was ever imputed to the sovereign (*n*) By such judgment the Crown is instantly out of possession, so that there needs not the indecent interposition of his own officers to transfer the seizin from the king to the party aggrieved (*n*) Now, the Court may give judgment that the suppliant is entitled wholly or in part to the relief sought, or to such other relief as the Court may think right, and this judgment has the same effect as that of *amoveas manus* (*o*) Costs follow the rule prevailing in ordinary actions (*p*)

The royal fiat

The right of a subject to the royal fiat has been much discussed But it seems clear that, under the 23 & 24 Vict c 34, the Courts have no jurisdiction until the fiat has been

(*f*) 23 & 24 Vict c 34, s 2
(*g*) Ss 3—6
(*h*) *Anglo Newfoundland Development Co , Ld* v *R* , [1920] 2 K B 214 (C A)
(*i*) S 7
(*k*) *Tomline* v *R* , 4 Ex D 252
(*l*) *Thomas* v *R* , L R 10 Q B 44 Cf *A G* v *Newcastle upon Tyne*, [1897] 2 Q B 384
(*m*) S 7, *Marconi s Wireless Tel Co , Ld* v *R* , [1918] 1 K B 193 (C A)
(*n*) 3 Blac Com 257
(*o*) 23 & 24 Vict c 34, ss 9, 10
(*p*) S 12 As to satisfaction, see further ss 13 14

obtained, and that its improper refusal would be a matter with which Parliament alone could deal The Act evidently leaves a discretion to the Crown, and cases might be suggested in which interests of State would forbid the publication in open court of matters relied upon by the suppliant On the other hand, notwithstanding the supplicating language of the petition, it never was the theory of the constitution that this remedy was one of pure grace and favour (*q*), it is substantially, as well as nominally, a petition of *right* (*r*), and the prayer is grantable *ex debito justitiæ*, being referred by many to the clause in Magna Charta, *nulli negabimus justitiam vel rectum* "I am far from thinking," said Lord Langdale, "that it is competent to the king, or rather to his responsible advisers, to refuse capriciously, to put into a due course of investigation, any proper question raised on a petition of right The form and application being, as it is said, to the grace and favour of the king appear no foundation for any such suggestion" (*s*) It is now the common practice of the Home Office to indorse "let right be done" as a matter of course, without even referring the case to the Attorney-General (*t*)

The grant of the fiat is not a step in the proceedings within the meaning of the Arbitration Act, 1889 (52 & 53 Vict c 49), s 4 (*u*)

After the royal fiat has been obtained, the Crown may still raise the question whether the case is one in which petition of right may be brought, and this is usually raised by demurrer, notwithstanding that demurrers were abolished, so far back as 1883, by R S C Order XXV, and that s 7 of the Petition of Right Act, 1860, makes the current practice applicable to petitions of right The cases in which a petition of right may be brought have already been stated, but in considering whether it is applicable to a particular claim, it must be remembered that the petition never lies unless there has been the violation of a *right*, for which, but for the immunity from

(*q*) See *per* Bowen, L J, in *Nathan, In re*, 12 Q B D 461, at p 479

(*r*) Chitty, Prerog 345

(*s*) *Ryves* v *Wellington*, 9 Beav 579, at p 600, see also 3 Inst 240, 2 Petition of right is a legal remedy which excludes *mandamus*, *R* v *Comrs of Inland Rev*, 12 Q B D 461

(*t*) *Per* Jervis, C J, in *E Archipelago Co* v *R*, 2 E & B 856, at p 914 See, however, a pamphlet (published by V & R Stephens, 1863), on the case of Mr Irwin, in which much interesting matter as to Petition of Right is collected

(*u*) *Anglo Newfoundland Development Co* v *R*, [1920] 2 K B 214 (C A)

process with which the law surrounds the person of the sovereign, an act at law or in equity might be maintained

Although a petition of right does not lie for a tort committed by servants of the Crown (*x*), yet the servants who commit it, whether spontaneously or by order of a superior power, are answerable therefor in an ordinary action, for the civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice if its agents were not personally responsible (*y*), and that a servant of the Crown is liable to the subject for a trespass done, even with the sanction of the highest authority of the State, "rests on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other" (*z*) In *Madrazo* v *Willes* (*a*), a captain of a British man-of-war who destroyed a Spanish trading ship wrongfully, but, as he believed, in performance of his duty, was held liable to the owners Again, in *Walker* v *Baird* (*b*), the captain of a British man-of-war, who destroyed a lobster factory on the coast of Newfoundland, was held liable to the owners, and it was decided that he could not justify an interference with private rights, not authorised by the legislature, under the provisions of a treaty made between the Crown and the French Government In such actions the wrongdoers must be sued as individuals, and not in their official capacity (*c*), and this rule applies even where they are incorporated (*d*) A superior official is not answerable for the act of his subordinates, unless it was substantially his own act (*e*)

Torts by servants of the Crown

It may be added that in some of our colonies actions against the Government in respect of tortious acts have been authorised by ordinance or colonial legislation (*f*)

(*x*) *Tobin* v *R*, 16 C B N S 310, *Feather* v *R*, 6 B & S 257

(*y*) *Rogers* v *Rajendoo Dutt*, 13 Moo P C 209, at p 236 *Nireaha Tamaki* v *Baker*, [1901] A C 561

(*z*) *Per curiam*, *Feather* v *R*, 6 B & S 257 (*a*) 3 B & Ald 353

(*b*) [1892] A C 491, where the Crown's rights in case of a treaty of *peace* were discussed

(*c*) *Raleigh* v *Goschen*, [1898] 1 Ch 73, *China Mutual Steam Navigation Co* v *MacLay*, [1918] 1 K B 33

(*d*) *Roper* v *Public Works Commissioners*, [1915] 1 K B 45

(*e*) *Raleigh* v *Goschen*, *supra*, *Bainbridge* v *Postmaster General*, [1906] 1 K B 178 See *O'Byrne* v *Hartington*, I R 11 C L 445, at p 453, and cf *Mersey Trustees* v *Gibbs*, L R 1 H L 93, at pp 124, 128

(*f*) See *A G of Straits Settlements* v *Wemyss*, 13 App Cas 192 *Farnell* v *Bowman*, 12 App Cas 643, *Hettihewage Siman Appu's Case*, 9 App Cas 571

Contracts

In the absence of some statutory provision to the contrary, servants of the Crown, civil as well as military, hold their offices only during the pleasure of the Crown, and though they be engaged for a fixed period, yet it is an implied term of the contract that they may be dismissed sooner if the Crown please (*g*) No petition of right therefore lies for their dismissal Moreover, as a rule, they have no remedy against the agent of the Crown who engaged them, for, unless he has expressly agreed to be personally liable, a Crown agent is not answerable for breaches of contracts made by him in his public capacity, nor does he impliedly warrant his authority to make them (*h*) Where an agent of the Crown has, in his public capacity, made a contract which he had authority to make, the remedy for its breach by officials of the Crown is by petition of right (*i*), and not by action against the agent, for the Government revenues cannot be reached by a suit against a public officer (*k*)

Funds received by the Crown through treaty

Questions have arisen with respect to claims to participate in funds which the Crown has acquired through war or treaty with foreign States In *Baron de Bode's Case* (*l*), the petition of right suggested that, under conventions with the French Government, the Crown had received moneys for the purpose of compensating its subjects whose property had been confiscated during the wars which followed the French Revolution The petitioner, as one of such subjects, made a claim in respect of a sum which remained in the Treasury after the claims of others had been satisfied It was held that, as a statute had been passed, which provided a particular mode for the distribution of the moneys, the petitioner's rights depended entirely upon the effect of that statute But the question was left open, whether, if the statute had not been passed, the Crown would have been answerable, as a trustee, for the moneys (*m*) This question was afterwards decided in the Crown's favour in *Rustomjee* v *The Queen* (*n*) There a claim was made in

(*g*) *Dunn* v *R* [1896] 1 Q B 116, and the cases there cited, see *Gould* v *Stuart*, [1896] A C 575, *Young* v *Waller*, [1898] A C 661, *Young* v *Adams*, [1898] A C 469

(*h*) *Dunn* v *Macdonald*, [1897] 1 Q B 401, 555

(*i*) *Thomas* v *R*, L R 10 Q B 31, see *Churchward* v *R*, L R 1 Q B 173 See, however, *Graham* v *Commissioners of Works*, [1901] 2 K B 781

(*k*) *Palmer* v *Hutchinson*, 6 App Cas 619

(*l*) 8 Q B 208, 13 Id 364, 3 H L Cas 449

(*m*) See *per* Parke, B, at 13 Q B 383

(*n*) 1 Q B D 487, 2 Id 69

respect of a sum paid to the Crown by the Emperor of China under the treaty of Nankin on account of debts due from Chinese to British merchants The notion that the sovereign, by receiving moneys under a treaty, could become the agent of, or trustee for, any of his subjects was described by Cockburn, C J , as wild and untenable, and Lord Coleridge said that, if the sovereign had failed to administer the moneys according to the stipulations of the treaty, the failure was one which Parliament might correct, but with which courts of law could not deal (*o*) A somewhat similar question arose in *Kinloch* v *Secretary of State for India* (*p*), where an attempt was made to compel the defendant to account, as a trustee, for booty which the Queen by royal warrant had "granted" to "the Secretary of State for India in Council for the time being," "in trust" for the members of certain forces, amongst whom it was to be distributed according to a prescribed scale, all doubtful claims being determined by the Secretary unless the Queen should otherwise order It was held that the warrant did not transfer the property, or create a trust enforceable in equity, and that no action lay against the defendant, who was merely the agent of the Crown for a specific purpose

Monstrans de droit

Closely analogous to petition of right was the *Monstrans de droit* (*q*) This procedure was formerly employed when the facts upon which the suppliant and the Crown relied had already been established, whether by commission, inquest of office, or otherwise, and the judgment of the Court was required as upon a special case Although now obsolete, this procedure was once of great importance, and almost superseded that by petition (*r*)

Where title of Crown is indirectly questioned

Where the Crown is actually in possession of lands or chattels, we have seen that its title can be directly questioned only by petition of right There sometimes arises a question between subject and subject in which the rights of the Crown may be indirectly involved, so that a judgment as between the parties may affect the interests of the Crown In such cases (*s*) the Attorney-General must have notice of the proceedings, and

(*o*) It was decided in this case that the Crown could not plead the Statute of Limitations

(*p*) 7 App Cas 619

(*q*) Chitty, Prerog 352

(*r*) 3 Blac Com 256

(*s*) See, for instance, *Hovenden* v *Annesley (Lord)*, 2 Sch & Lef 607, 617 618, *A G* v *Norstedt*, 3 Price, 97, *A G for N S Wales* v *Williams*, [1915] A C 573, *Esquimalt and Nanaimo Ry Co* v *Wilson*, [1920] A C 358, *Chamberlain's Settlement, Re*, [1921] 2 Ch 533

be made a party, otherwise the Courts will not adjudicate The necessity of making the Attorney-General a party also extends to cases where the sovereign is interested as *parens patriæ*, or protector of the rights of his subjects, as, for instance, in actions concerning testamentary dispositions, where the subject-matter is appropriated for general charitable purposes (*t*)

NON POTEST REX GRATIAM FACERE CUM INJURIA ET DAMNO ALIORUM (3 *Inst* 236)—*The king cannot confer a favour on one subject to the injury and damage of others*

It is an ancient and constant rule of law (*u*) that the king's grants are invalid when they destroy or derogate from rights, privileges, or immunities previously vested in another subject the Crown, for example, cannot enable a subject to erect a market so near to the legally established market of another as to be a disturbance thereof (*x*) Nor can the king grant the same thing in possession to one which he or his progenitors have granted to another (*y*) If the king's grant, reciting that A holds the manor of Blackacre for life, grants it to B for life, the law implies that the second grant is to take effect after the determination of the first (*z*) And if the king, being tenant for life of certain land, grant it to one and his heirs, the grant is void, for the king has taken upon himself to grant a greater estate than he lawfully could grant (*a*)

On the same principle, the Crown cannot *at common law* (*b*) pardon an offence against a penal statute after

(*t*) 2 Blac Com 427

(*u*) 3 Inst 236, *Thomas* v *Sorrell*, Vaugh 330, at p 338 The maxim was cited by Talfourd, J, in *E Archipelago Co* v *R*, 2 E & B 856, at p 864 A similar doctrine prevailed in the civil law, see Cod 7, 38, 2

(*x*) Chitty, Prerog 119, 192, 386, *Re Islington Market Bill*, 3 Cl & F 513 See *G E Ry Co* v *Goldsmid*, 9 App Cas 927

(*y*) *Per* Cresswell, J, in *Stead* v *Carey*, 1 C B 496, at p 523, arg *R* v *Amery*, 2 T R 515, at p 565, Chitty, Prerog 125 But a mere licence from the Crown, or a grant during the king's will, is determined by the demise of the Crown, Id 400

(*z*) *Lord Rutland's Case*, 8 Rep 56 b

(*a*) *Case of Alton Woods*, 1 Rep 26 b, at 44 a

(*b*) By the Remission of Penalties Act, 1859 (22 Vict c 32), the Crown may "remit, in whole or in part, any sum of money which, under any Act now in force, or hereafter to be passed, may be imposed as a penalty or forfeiture on a convicted offender, although such money may be, in whole or in part, payable to some party other than the Crown"

information brought, for thereby the informer has acquired a private property in his part of the penalty Nor can the king pardon a private nuisance while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine, and the reason is that, though the prosecution is vested in the Crown to avoid multiplicity of suits, yet (during its continuance) this offence savours more of the nature of a private injury to each individual in the neighbourhood, than of a public wrong (*c*) So, if the king grant lands, forfeited to him upon a conviction for treason, to a third person, he cannot afterwards, by his grant, devest the property so granted in favour of the original owner

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NULLUM TEMPUS OCCURRIT REGI (2 *Inst* 273)—*Lapse of time does not bar the right of the Crown*

In pursuance of the principle already considered, of the sovereign's incapability of doing wrong, the law also determines that in the Crown there can be no negligence or *laches*, and, therefore, it was formerly held that no delay in resorting to his remedy would bar the king's right, for the time and attention of the sovereign must be supposed to be occupied by the cares of government, nor is there any reason that he should suffer by the negligence of his officers, or by their fraudulent collusion with the adverse party (*d*), and although, as we shall hereafter see, the maxim, *vigilantibus et non dormientibus jura subveniunt*, is a rule for the subject, yet *nullum tempus occurrit regi* is, in general, the king's plea (*e*) From this doctrine it followed, not only that the civil claims of the Crown sustained no prejudice by lapse of time, but that criminal prosecutions for felonies or misdemeanors might be commenced at any distance of time from the commission of the offence, and this is, to some extent, still law, though it has been qualified by the legislature in modern times, for instance, by the Crown Suits Act, 1769 (commonly called the Nullum Tempus Act) (*f*),

(*c*) *Thomas* v *Sorrell*, Vaugh 310, at p 333

(*d*) *Coke's Case*, Godb 289, at p 295, *Sheffield* v *Ratcliffe*, Hob 334, at p 347, Bac Abr, 7th ed, "*Prerogative* (E 6)

(*e*) Hob 347

(*f*) 9 Geo 3, c 16, amended by the Crown Suits Act, 1861 (24 & 25 Vict c 62) See also 21 Jac 1, c 14, which enables the defendant in an action of intrusion, if the Crown has been out of possession for twenty years, to plead the

in suits relating to landed property, the lapse of sixty years and adverse possession for that period operate as a bar even against the prerogative, in derogation of the above maxim (*g*), that is, provided the acts relied upon as showing adverse possession are acts of ownership done in the assertion of a right, and not mere acts of trespass not acquiesced in on the part of the Crown (*h*) Again, although the Limitation Act, 1623 (21 Jac 1, c 16), s 3, does not bind the king (*i*), yet by s 225 of the Municipal Corporations Act, 1882, the Crown is barred, in informations in the nature of *quo warranto* for usurping corporate offices, by the lapse of twelve months, and different statutes have imported into our criminal jurisprudence various periods of limitation for crimes (*k*)

An important instance of the application of the doctrine, *nullum tempus occurrit regi*, presents itself where church preferment lapses to the Crown Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary, by neglect of the patron to present, to the metropolitan, by neglect of the ordinary, and to the Crown, by neglect of the metropolitan the term in which the title to present by lapse accrues from one of these parties to the other is six calendar months, after the expiration of which period the right becomes forfeited by the person neglecting to exercise it But no right of lapse can accrue when the original presentation is in the Crown, and in pursuance of the above maxim, if the right of presentation lapses to the Crown, prerogative intervenes, and, in this case, the patron shall never recover his right till the Crown has presented, and if, during the delay of the Crown, the patron himself presents, and his clerk is instituted, the Crown, by presenting another, may turn out the patron's clerk, or, after induction, may remove him by *quare impedit* (*l*), though if neither of these courses is

general issue, *i e*, to throw on the Crown the burden of proving its title, and to retain possession until the title of the Crown is proved See *Emmerson* v *Maddison*, [1906] A C 569

(*g*) *See Doe d Watt* v *Morris*, 2 Scott, 276, *Goodtitle* v *Baldwin*, 11 East, 488, and *A G for British Honduras* v *Bristowe* 6 App Cas 143

(*h*) *Doe d King Will* 4 v *Roberts*, 13 M & W 520 The Crown certainly may dedicate a road to the public, and be bound by long acquiescence in public user " (*per* Ld Denman in *R* v *East Mark*, 11 Q B 876, at pp 882—883), see *Turner* v *Walsh*, 6 App Cas 636

(*i*) Judgm in *Lambert* v *Taylor*, 4 B & C 138, at pp 151, 152, Bac Abr, 7th ed, '*Prerogative*" (E 5)

(*k*) Archbold, Cr Pl, 26th ed, pp 63—66

(*l*) *Boswell's Case*, 6 Rep 48, at 50

adopted, and the patron's clerk dies incumbent, or is canonically deprived, the right of presentation is lost to the Crown (*m*)

Again, if a bill of exchange be seized under an extent before it has become due, the neglect of the officer of the Crown to give notice of dishonour, or to make presentment of the bill, will not discharge the drawer or indorsers, and this likewise results from the general principle that *laches* cannot be imputed to the Crown (*n*)

To high constitutional questions involving the prerogative, the maxim under our notice must doubtless be applied with much caution, for it would be dangerous and absurd to hold a power which has once been exercised by the Crown —no matter at how remote an epoch—has necessarily remained inherent in it, and we might vainly attempt to argue in support of so general a proposition During the discussion in the House of Lords on life peerages, it was said that, although the rights and powers of the Crown do not suffer from lapse of time, nevertheless one of the main principles on which our constitution rests is the long-continued usage of Parliament, and that to go back for several centuries in order to select a few instances in which the Crown has performed a particular act by virtue of its prerogative before the constitution was formed or brought into a regular shape—to rely on such precedents, and to make them the foundation of a change in the composition of either House of Parliament—would be grossly to violate the principles and spirit of our constitution (*o*) But although the most zealous advocate of the prerogative could not by precedents, gathered from remote ages, shape successfully a sound constitutional theory touching the powers and privileges of the Crown, it would be far from correct to affirm that its rights can fall into desuetude, or, by mere non-user, become abrogated For instance, assuming that the right of veto upon a bill which has passed through Parliament has not been exercised since 1707, none could deny that such a right is still vested in the Crown (*p*)

(*m*) 2 Blac Com 450—452, cited arg *Storie* v *Bp of Winchester*, 9 C B 62 at p 90, *Baskerville's Case* 7 Rep 28 a Bac Abr 7th ed, *Prerogative* (E 6), *Winchcombe* v *Winchester*, Hob 165, at p 166, Finch's Law, 90

(*n*) West on Extents, 28—30

(*o*) Hansard, vol 140, pp 268 *et seq*

(*p*) Hansard, vol 140, p 284

QUANDO JUS DOMINI REGIS ET SUBDITI CONCURRUNT JUS REGIS PRÆFERRI DEBET (9 *Rep* 129)—*Where the title of the king and the title of a subject concur, the king's title must be preferred* (*q*)

King cannot be joint owner of chattel

In this case *detur digniori* is the rule (*r*) Accordingly, if a chattel be bequeathed to the king and a subject jointly, the king shall have it, there being this peculiar quality inherent in the prerogative, that the king cannot have a joint property with any person in one entire chattel, or such property as is incapable of division or separation, where the titles of the king and of a subject concur, the king takes the whole The peculiarity of this doctrine, so favourable to the prerogative, may justify our giving a few illustrations of its operation If the king, by grant or contract, become joint tenant with another person of a chattel real, he will *ipso facto* become entitled to the whole in severalty, if a horse be given to the king and a private person, the king shall have the sole property therein, if a bond be made to the king and a subject, the king shall have the whole penalty, if two persons own a horse jointly, or have a joint debt owing to them on bond, and one of them assign his part to the king, the king shall have the entire horse or debt, for it is not consistent with the dignity of the Crown to be partner with a subject, and where the king's title and that of a subject concur, or are in conflict, the king's title is to be preferred (*s*) By applying this maxim to one possible state of facts, a curious result was arrived at if one of two joint tenants of a chattel was guilty of felony, the felony worked a forfeiture of one undivided moiety of the chattel to the Crown, who being thus in joint possession with a subject took the whole (*t*)

Execution at suit of Crown

Further, the king's debts shall, in suing out execution, be preferred to that of every other creditor who had not obtained judgment before the king commenced his suit (*u*) The king's judgment formerly affected all land which his debtor had at

(*q*) Co Litt 90 b

(*r*) *Woodward* v *Fox*, 2 Ventr 267, at p 268

(*s*) 2 Blac Com 409, see Lindley on Partnership, 8th ed, pp 403, 655, note (*o*)

(*t*) See Plowd 253, the Forfeiture Act, 1870 (33 & 34 Vict c 23) abolished forfeitures for felony

(*u*) 33 Hen 8, c 39, s 74 See also the Administration of Estates Act, 1869 (32 & 33 Vict c 46), *Re Bentinck*, [1897] 1 Ch 673

or after the time of contracting the debt (*x*), but now no debts or liabilities to the Crown, incurred since 1st November, 1865, affect land as to a *bona fide* purchaser for valuable consideration or a mortgagee, whether with or without notice, unless before the conveyance or mortgage and the payment of the money, the writ or process of execution has been issued and registered (*y*)

Again, the rule is that, where the sheriff seizes under a *fi fa*, and, after seizure, but before sale (*z*) under such writ, a writ of extent is sued out and delivered to the sheriff, the Crown is entitled to priority, and the sheriff must sell under the extent, and satisfy the Crown's debt, before he sells under the *fi fa* Nor does it matter whether the extent is in chief or in aid, *i e*, whether it is directly against the king's debtor, or brought to recover a debt due from some third party to such debtor, it having been the practice in ancient times that, if the king's debtor was unable to satisfy the king's debt out of his own chattels, the king would betake himself to any third person who was indebted to the king's debtor (*a*), and would recover of such third person what he owed to the king's debtor, in order to get payment of the debt due from the latter to the Crown (*b*) The same principle applies where goods in the hands of the sheriff under a *fi fa*, and before sale, are seized by officers of the customs under a warrant to levy a penalty incurred by the defendant for an offence against the revenue laws (*c*), and where the Crown levies a distress upon goods after a subject has distrained upon them, but before he has completed his distress by sale (*d*)

In *R* v *Eduards* (*e*), decided in 1853 under the then existing bankruptcy law, an official assignee having been appointed to a bankrupt's estate, later on the day of his appointment an extent issued at the suit of the Crown against the bankrupt for a Crown debt, and the question was which

(*x*) 13 Eliz c 4

(*y*) Land Charges Act, 1900 (63 & 64 Vict c 26), s 2, replacing the Crown Suits, etc, Act, 1865 (28 & 29 Vict c 104), ss 48, 49 As to the previous legislation on this subject, see Williams, Real Prop, 23rd ed, pp 908—9

(*z*) See *R* v *Sloper*, 6 Price, 114

(*a*) See *R* v *Larking*, 8 Price, 683

(*b*) *Giles* v *Grover*, 9 Bing 128, at p 191 (recognising *R* v *Cotton*, Park Exch 112), see *A G* v *Trueman*, 11 M & W 694, *A G* v *Walmsley*, 12 Id 179, *R* v *Austin*, 10 Id 691 As to the rights of a surety to the Crown, who has paid the debts of his deceased principal, see *Re Churchill*, 39 Ch D 174

(*c*) *Grove* v *Aldridge*, 9 Bing 428

(*d*) *A G* v *Leonard*, 38 Ch D 622

(*e*) 9 Exch 32 and 628

should have priority The Court decided that, where the title of the Crown and of the subject accrue on the same day, the king's title shall be preferred The seizure under the extent, therefore, was upheld, and the title of the official assignee was ignored This decision may, however, be supported on another principle, viz , that "whether between the Crown and a subject, or between subject and subject, *judicial* proceedings are to be considered as having taken place at the earliest period of the day on which they are done" (*f*)

Bankruptcy

Under s 150 of the Bankruptcy Act, 1883, the provisions of that Act relating to the remedies against the property of a debtor, the priorities of debts, and the effect of a discharge bound the Crown (*g*) but in the case of a colonial bankruptcy Act which contained no such express provision it was held that the Crown was entitled to preferential payment over all other creditors (*h*), and it seems clear that the provisions of the Bankruptcy Act, 1914, except those specified in s 151, do not bind the Crown (*i*)

Goods of the Crown privi leged from distress

In the administration of the assets of a company which is in liquidation, the Crown—as the result of ss 186 and 209 of the Companies (Consolidation) Act, 1908 (8 Edw 7, c 69)—has priority in respect of assessed taxes, land tax, and income tax, but not in respect of other debts due to the Crown by the company (*k*), and the abrogation of the Crown's prerogative, which is affected by those sections, takes away also the prerogative of the Crown to recover, outside the liquidation, by distress, execution, extent, or otherwise, debts other than those in respect of which it is expressly given priority (*l*)

The chattels of the Crown on land occupied by a subject are privileged from distress for rent The title of the Crown, as owner of the chattels, is preferred to the rights which the landlord has by reason of their being on the land (*m*)

Sale in market overt

In connection with the maxim before us we may add that

(*f*) *Wright* v *Mills*, 4 H & N 491 See also judgm in *R* v *Edwards*, 9 Exch 631 *Evans* v *Jones*, 3 H & C 423 but see *Clarke* v *Bradlaugh*, 7 Q B D 151 and 8 Id 63, *Re North*, [1895] 2 Q B 264

(*g*) 46 & 47 Vict c 52 s 150 (now replaced by the Bankruptcy Act, 1914 (4 & 5 Geo 5, c 59), s 151)

(*h*) *Commissioners of Taxation for N S Wales* v *Palmer*, [1907] A C 179

(*i*) See *Re Bonham*, 10 Ch D 595

(*k*) *Food Controller* v *Cork*, [1923] A C 647, affirming the decision of the C A in the same case *sub nom Webb & Co In re*, [1922] 2 Ch 369

(*l*) *Per* Younger, L J , in *Webb & Co , In re, supra*

(*m*) *Sec of State for War* v *Wynne*, [1905] 2 K B 845

the king is not bound by a sale in market overt, but may seize to his own use his chattel, although it has been sold in market overt (*n*)

ROI N'EST LIE PER ASCUN STATUTE, SI IL NE SOIT EXPRESSEMENT NOSME (*Jenk Cent* 307)—*The king is not bound by any statute, if he be not expressly named to be so bound* (*o*)

Statement of rule

In general the king is not bound by a statute, unless mentioned expressly, or referred to by necessary implication (*p*), "for it is inferred, *prima facie*, that the law made by the Crown, with the assent of the Lords and Commons, is made for subjects, and not for the Crown" (*q*), and the general rule is that 'the Crown is never bound by a statutory enactment unless the intention of the legislature to bind the Crown is clear and unmistakable (*r*) Thus, upon the question what is the occupation of real property rateable under the Poor Relief Act, 1601 (43 Eliz c 2), s 1, it has been observed (*s*) that "the only occupier of property exempt from the operation of the Act is the king, because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself, also come within the exemption No exemption is thereby given to charity or to public purposes beyond that which is strictly involved in the position that the Crown is not bound by the Act" So the prerogative of the Crown to remove into the High Court a cause which touches its revenue has not been affected by the County Court Acts (*t*) Nor does the Lands Clauses Consolidation Act (8 & 9 Vict c 18) affect the interests of the Crown (*u*) Neither was the prerogative of the Crown

(*n*) 2 Inst 713

(*o*) Jenk Cent 307, Wing Max 1

(*p*) *Henley, In re*, 9 Ch D 469

(*q*) *Per* Alderson, B, in *A G* v *Donaldson* 10 M & W 117 at p 124 (citing *Wilkon* v *Berkley* Plowd 223, at p 236), *De Bode* v *R*, 13 Q B 364, at pp 373, 375, 378 *Per* Ld Cottenham in *Ledsam* v *Russell* 1 H L Cas 687 at p 697, *Doe* d *R* v *Archbishop of York*, 14 Q B 81, at p 95

(*r*) *Per* Lindley L J, in *Wheaton* v *Maple* [1893] 3 Ch 48, at p 64

(*s*) *Per* Ld Westbury in *Mersey Docks* v *Cameron*, 11 H L Cas 443, at pp 501, 503 *R* v *McCann* L R 3 Q B 141, at pp 145, 146

(*t*) *Mountjoy* v *Wood*, 1 H & N 58, *Stanley of Alderley* v *Wild*, [1900] 1 Q B 256, *Ulmann* v *Cowes Commissioners*, [1909] 2 K B 1

(*u*) *Re Cuckfield Burial Board*, 19 Beav 153, *Re Lowestoft Manor*, 24 Ch D 253 See also *R* v *Beadle*, 7 E & B 492

to plead and demur without leave to a petition of right affected by the Petition of Right Act, 1860 (*x*)

So, too, the Crown is not bound (except where expressly mentioned) by the provisions of the Bankruptcy Acts (*y*), nor by the Locomotives Act, 1865, which regulates the speed at which locomotives may proceed on highways (*z*), nor by the Public Health Act, 1875, or other Acts imposing pecuniary burdens on property (*a*) or restricting the use of property (*b*)

Rule how restricted

It has been said that the rule above stated only applies where the property or peculiar privileges of the Crown are affected, and this distinction has been laid down, that though, where the king has any prerogative, estate, right, title, or interest, he shall not be barred of them by the general words of an Act, if he be not named therein (*c*), yet, if a statute be intended to give a remedy against a wrong, the king, though not named, shall be bound by it (*d*), and the king is impliedly bound by statutes passed for the public good, the preservation of public rights, and the suppression of public wrongs, the relief and maintenance of the poor, the general advancement of learning, religion, and justice, or for the prevention of fraud (*e*), and, though not named, he is bound by the general words of statutes which tend to perform the will of a founder or donor (*f*), and the king may likewise take the benefit of any particular Act, though he be not especially named therein (*g*)

But the later cases above referred to seem to indicate that

(*x*) 23 & 24 Vict c 34 See *Tobin* v *R*, 14 C B N S 505 and 16 Id 310, *Feather* v *R*, 6 B & S 257, at p 293

(*y*) *In re Henley*, 9 Ch D 469, *Re Bonham* 10 Ch D 595, *Commissioners of Taxation for N S Wales* v *Palmer*, [1907] A C 179, *Re Oriental Bank Corp*, 28 Ch D 643

(*z*) *Cooper* v *Hawkins*, [1904] 2 K B 164

(*a*) *Hornsey U D C* v *Hennell*, [1902] 2 K B 73, and cases there cited

(*b*) *Gorton L B* v *Prison Commissioners*, [1904] 2 K B 165 n

(*c*) *Magdalen College Case*, 11 Rep 74 b (cited Bac Abr, '*Prerogative*, (E 5)), Com Dig, '*Parliament* R 8 See the qualifications of this proposition laid down in Dwarr Stats, 2nd ed, pp 523 *et seq*

(*d*) *Willion* v *Berkley*, Plowd 223, at pp 239, 244 See the authorities cited arg *R* v *Wright*, 1 A & E 434, at pp 436 *et seq*

(*e*) *Magdalen College Case*, 11 Rep 66 b, at 70 b 72, Chitty Prerog 382

(*f*) Vin Abr, *Statutes*" (E 10), pl 11, *Willion* v *Berkley*, Plowd 223, at p 236

(*g*) *Willion* v *Berkley*, Plowd 223, at p 240, *Case of a Fine*, 7 Rep 32 a, *R* v *Wright*, 1 A & E 434 at p 447 In *A G* v *Radloff*, 10 Exch 84, at p 94, Pollock, C B, observed that the Crown is not bound with reference to matters affecting its property or person, but is bound with respect to the practice in the administration of justice In *Clarke* v *Bradlaugh*, 8 App Cas 354, at p 358, Ld Selborne thought that *express* words are not necessary to make a penalty originally appertaining to the Crown recoverable by popular action

the rule may be best expressed by saying that the Crown is not bound by any statute unless expressly mentioned, except where the Crown must have been intended to be bound by necessary implication, because otherwise the statute would be meaningless (*h*) So neither the Statutes of Limitation, nor the Statute of Frauds, nor the Apportionment Act, 1870 (*i*), nor the Maritime Conventions Act, 1911 (*k*), binds the Crown (*l*), nor does a local Act imposing tolls and duties (*m*)

NEMO PATRIAM IN QUA NATUS EST EXUERE NEC LIGEANTIÆ DEBITUM EJURARE POSSIT *(Co Litt 129 a)—A man cannot abjure his native country nor the allegiance which he owes to his sovereign*

"The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal states or conditions, one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*, another by virtue of which he has ascribed to him the character of a citizen of some particular country, and, as such, is possessed of certain municipal rights and subject to certain obligations which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status* The political *status* may depend on different laws in different countries, whereas the civil *status* is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil *status*, for it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend" (*n*)

(*h*) See *per* Day, J, in *Gorton L B* v *Prison Commissioners*, [1904] 2 K B 165 n And in addition to the cases above referred to, see *A G* for *New South Wales* v *Curator of Intestate Estates*, [1907] A C 519

(*i*) *Rochester (Bishop)* v *Le Fanu*, [1906] 2 Ch 513

(*k*) *The Loredano*, [1922] P 209

(*l*) Chitty, Prerog 366, 383 Vin Abr, "*Statutes*" (E 10)

(*m*) *Mayor of Weymouth* v *Nugent*, 6 B & S 22, at p 35

(*n*) *Per* Ld Westbury in *Udny* v *Udny*, L R 1 Sc & Dev 441, at p 457 See *Moorhouse* v *Lord*, 10 H L Cas 272, *Shaw* v *Gould*, L R 3 H L 55

Allegiance has been defined to be "a true and faithful obedience of the subject due to his sovereign" (*o*)

Allegiance is the tie which binds the subject to the Crown in return for that protection which the Crown affords to the subject, and is distinguished by our customary law into two species, the one natural, the other local Natural allegiance is such as is due from all men born within the dominions of the Crown, immediately upon their birth, and to this species of allegiance it is that the above maxim is applicable (*p*) It cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature The natural-born subject of one prince cannot, by any act of his own, not even by swearing allegiance to another, put off or discharge his natural allegiance to the former (*q*) *origine propria neminem posse voluntate sua eximi manifestum est* (*r*), for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be devested without the concurrent act of that prince to whom it was first due (*s*) Hence, although a British subject may, in certain cases, forfeit his rights as such by adhering to a foreign power, he yet remains at common law always liable to his duties, and if, in the course of such adherence, he violates the laws of his native country, he will be exposed to punishment when he comes within reach of her tribunals (*t*)

The tie of natural allegiance may, however, be severed with the concurrence of the legislature For instance, upon the recognition of the United States of America, as free, sovereign, and independent, natural-born subjects of the English Crown adhering to the United States ceased to be subjects of the Crown of England, and became aliens incapable of inheriting lands in England (*u*)

(*o*) *Calvin's Case*, 7 Rep 5, Broom's Const L 4, and Note thereto Id 26 *et seq*, where the cases which concern allegiance at common law and the operation of statutes affecting it are considered And see the Legitimacy Declaration Act, 1858 (21 & 22 Vict c 93) (and as to Ireland the Legitimacy Declaration Act (Ireland), 1868 (31 & 32 Vict c 20)) which enables a person to establish, under the circumstances specified in and as provided by the Act, his right to be deemed a natural born subject

(*p*) Foster, Cr Law, 184

(*q*) See *per* Jervis, C J, in *Barrick* v *Buba* 16 C B 492 (citing *Albretcht* v *Sussmann*, 2 Ves & B 323)

(*r*) Cod 10, 38, 4

(*s*) See Foster, Cr Law, 184, Hale, P C 68, Judgm in *Wilson* v *Marryat*, 1 B & P 430

(*t*) 2 Steph Com 425

(*u*) *Doe* d *Thomas* v *Acklam*, 2 B & C 779, *Doe* d *Stansbury* v *Arkwright*,

While the Crowns of two countries are held by the same sovereign, the natives of the one country are not aliens in the other, but when the union of the Crowns ends, the union of allegiance ceases, and the natives of the one country become aliens in the other, and have not the right to elect to which sovereign they will be subjects The decision upon this latter point arose out of the severance in 1837 of the Crown of Hanover from our Crown (*x*)

Local allegiance is such as is due from an alien, or stranger born, whilst he continues within the king's dominion and protection, but it is merely of a temporary nature, and ceases the instant such alien departs from this kingdom into another (*y*) For, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and, in point of locality, to the dominions of the British Empire (*z*) the rule being that *protectio trahit subjectionem et subjectio protectionem* (*a*), a maxim which extends not only to those who are born within the king s dominions, but also to foreigners who live within them, even though their sovereign is at war with this country, for they equally enjoy the protection of the Crown (*b*)

British Nationality and Status of Aliens Act, 1914

The British Nationality and Status of Aliens Act, 1914 (*c*), provides means whereby persons who were born British subjects may declare themselves aliens, and cease to be British subjects It also enacts that anyone who voluntarily becomes naturalized in a foreign country shall cease to be a British subject (*d*), while five years' residence in the king's dominions or service under the Crown may, under certain conditions, make an alien eligible for a certificate of naturalization, the effect of which

5 C & P 575 The Naturalization Act, 1870 (33 & 34 Vict c 14) removed disabilities of foreigners in respect of property it has been repealed and replaced by the Brit Nat and Stat of Aliens Act, 1914

(*x*) *Re Stepney Election* 17 Q B D 54, where the *dicta* in *Calvin's Case*, 7 Rep 1, were not followed

(*y*) 1 Blac Com 370

(*z*) Chitty, Prerog 16 See *Wolff* v *Oxholm*, 6 M & S 92, *R* v *Johnson*, 6 East, 583

(*a*) *Calvin s Case*, 7 Rep 1, at 5 a *Craw* v *Ramsay*, Vaugh 274, at p 279, Co Litt 65 a

(*b*) Chitty, Prerog 12 13

(*c*) 4 & 5 Geo 5, c 17, amended by the Brit Nat & Stat of Aliens Act, 1918 (8 & 9 Geo 5, c 38)

(*d*) Brit Nat and Stat of Aliens Act, 1914, s 13, see *Re Trufort*, 36 Ch D 600

is to make him a British subject (*e*) for all purposes, as regards the king's dominions generally

(*e*) *Re Bourgoise*, 41 Ch D 310, is no longer in point, the qualification in par 3 of s 7 of the Naturalization Act, 1870 (upon which it was decided) is not re enacted in s 3 of the Act of 1914

CHAPTER III

§ I —THE JUDICIAL OFFICE

THE maxims contained in this section exhibit briefly the more important of those duties which attach to persons filling judicial offices, and discharging the functions which appertain thereto It would have been inconsistent with the plan and limits of this volume to treat of such duties at greater length, and would not, it is believed, have materially added to its utility

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BONI JUDICIS EST AMPLIARI JURISDICTIONEM (*Chanc Prec* 329) *It is the duty of a judge to extend his jurisdiction*

Maxim how to be understood

This maxim, as above worded and literally rendered, is erroneous Lord Mansfield suggested that for the word *jurisdictionem*, *justitiam* should be substituted (*a*), and Sir R Atkyns (*b*) had previously remarked "it is indeed commonly said *boni judicis est ampliare jurisdictionem*, but I take that to be better advice which was given by Lord Chancellor Bacon to Mr Justice Hutton upon the swearing him one of the Judges of the Court of Common Pleas,—that he should take care to contain the jurisdiction of the Court within the ancient mere-stones without removing the mark" (*c*)

The true maxim of our law is "to amplify its remedies, and, without usurping jurisdiction, to apply its rules, to the advance-

(*a*) "The true text is, *boni judicis est ampliare justitiam*, not *jurisdictionem*, as it has been often cited,' *per* Ld Mansfield in *R* v *Phillips*, 1 Burr 292 at p 304

(*b*) Arg *R* v *Williams*, 13 St Tr 1370, at p 1430, and see *per* Cresswell, J, in *Dart* v *Dart*, 32 L J P M & A 125

(*c*) Bacon's Works, by Montague, vol VII, p 271 As on the one hand a judge cannot extend his jurisdiction, so, on the other hand, 'the superior Courts at Westminster, and the judges, are not at liberty to decline a jurisdiction imposed upon them by Act of Parliament (Judgm in *Furber* v *Sturmey*, 3 H & N 521, at p 531)

ment of substantial justice" (*d*), the principle upon which our Courts act is, to enforce the performance of contracts not injurious to society, and to administer justice to a party who can make his claim to redress appear, by enlarging the legal remedy, if necessary, in order to do justice, for the common law is the birthright of the subject (*e*) and *bonus judex secundum aquum et bonum judicat, et æquitatem stricto juri præfert* (*f*) "I commend the judge," observed Lord Hobart (*g*), "that seems fine and ingenious, so it tend to right and equity, and I condemn them that either out of pleasure to show a subtle wit will destroy, or out of incuriousness or negligence will not labour to support, the act of the party by the art or act of the law"

Money had and received

The old form of action for money had and received is peculiarly illustrative of the principle above set forth, the foundation of this action being that the plaintiff is in conscience entitled to the money sought to be recovered, and it has been observed that this kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged It lies only for money which, *ex æquo et bono*, the defendant ought to refund (*h*) "The ground," observed Tindal, C J, in *Edwards* v *Bates* (*i*), "upon which an action of this description is maintainable, is that the money received by the defendants is money which, *ex æquo et bono*, ought to be paid over to the plaintiff Such is the principle upon which the action has rested from the time of Lord Mansfield When money has been received without consideration, or upon a consideration that has failed, the recipient holds it, *ex æquo et bono*, for the plaintiff" (*j*)

(*d*) *Per* Ld Abinger in *Russell* v *Smyth*, 9 M & W 810, at p 818 (cited arg in *Kelsall* v *Marshall*, 1 C B N S 241, at p 255), see also *per* Ld Mansfield in *Alderson* v *Temple*, 4 Burr 2235, at p 2239

(*e*) *Per* Buller, J, in *Master* v *Miller*, 4 T R 320, at p 344

(*f*) Co Litt 24 b

(*g*) In *Pits* v *James* Hob 121, at p 125 Cf *Clarrickarde's Case*, Id 273, at p 277, where he says, I do exceedingly commend the judges that are curious and almost subtle to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act (cited by Turner, V C, in *Squire* v *Ford*, 9 Hare 47 at p 57)

(*h*) *Per* Ld Mansfield in *Moses* v *Macfarlane* 2 Burr 1005, at p 1012, *Lutt* v *Martindale* 18 C B 314, *per* Pollock, C B, in *Aiken* v *Short* 1 H & N 210, at p 214, *Holt* v *Ely*, 1 E & B 795, *Somes* v *British Empire Shipping Co*, 8 H L Cas 338 (*i*) 8 Scott, N R 406, at p 414

(*j*) See *Martin* v *Andrews*, 7 E & B 1, *Garton* v *Bristol and Exeter Ry Co*, 1 B & S 112, *Barendale* v *G W Ry Co*, 14 C B N S 1, and 16 Id 137, *Roberts* v *Aulton*, 2 H & N 432, *Barnes* v *Braithwaite*, Id 569, *per* Smith, L J, in *Phillips* v *Lond School Board*, [1898] 2 Q B 447, 453

Power to amend

The power of allowing amendments of writs and pleadings, as to which the judges now have extensive powers (*k*), may likewise be instanced as one which is confided to them by the legislature, in order that it may be applied "to the advancement of substantial justice"

Jurisdiction of judge at chambers

The maxim under consideration of course applies with reference to the jurisdiction of a judge at chambers, and to the duties there discharged by him The proceeding by application to a judge at chambers has been adopted by the Courts, under the sanction of the legislature, to prevent the delay, expense, and inconvenience which must ensue if application to the Court were, under all circumstances, indispensably necessary A judge at chambers is usually described as acting under the delegated authority of the Court, and his jurisdiction differs from that of a judge sitting at nisi prius, in the former case the judge has a wider field for the exercise of his discretion, which appellate Courts are most reluctant to review, and with which they will only interfere where he is shown to have been clearly wrong (*l*) In a case, where it was held that a judge at chambers had jurisdiction to fix the amount of costs to be paid as the condition of making an order, the maxim to which we have here directed attention, was expressly applied "As to the power of the judge to tax costs, remarked Vaughan, J, "if he is willing to do it, and can save expense, it is clear that what the officer of the Court may do, the judge may do, and *boni judicis est ampliare jurisdictionem*, i e, *justitiam*" (*m*)

Qualification of maxim

Although necessarily many things, especially in the domain of procedure, are left to the discretion of our judges, the maxim is also observed in our jurisprudence, *optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi* (*n*)—that system of law is the best, which leaves least to the discretion (*o*) of the judge—that judge the best, who relies least on his own opinion And although, where discretion is left to

(*k*) See Order XXVIII of the Rules of the Supreme Court

(*l*) *Inman* v *Jenkins* L R 5 C P 738 *Per* Ld Ellenborough in *Alner* v *George*, 1 Camp N P 392 Cf *per* Ld Herschell in *Hulbert* v *Cathcart*, [1896] A C 470, at p 475

(*m*) *Collins* v *Avon*, 4 Bing N C 233, at p 235 See *Clement* v *Weaver*, 4 Scott, N R 229, and cases cited Id 231 n (44)

(*n*) See *per* Wilmot, C J, in *Collins* v *Blantern*, 2 Wils K B 341, *per* Buller, J, in *Master* v *Miller*, 4 T R 320 at 344 (affirmed, in error, 2 Hy Bl 141), Co Litt 24 b, Bac Aphorisms, 46

(*o*) 4 Inst 41, cited by Tindal, C J in *R* v *Darlington School*, 6 Q B 682 at p 700 See *Rooke's Case*, 5 Rep 99 b, *Burgess* v *Wheate*, 1 Wm Bla 152 *R* v *Peters*, 1 Burr 570 *Gough* v *Howard*, 3 Bulstr 128

a judge, he is to a great extent unfettered in its exercise, Coke's definition still holds good, *discretio est discernere per legem quid sit justum* (*o*), and "discretion, when applied to a Court of justice, means sound discretion guided by law It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful, but legal and regular" (*p*)

Therefore, if, in the presumed exercise of discretion, a judge has decided in a manner absolutely unreasonable and opposed to justice, his error will be corrected on appeal "Whatever the law may have been before the Judicature Acts," said Jessel, M R (*q*), "the exercise of discretion is now the subject of appeal It has been very truly said that a very strong case must be made out before the exercise of discretion can be overruled The Court of Appeal must be satisfied that it has been wrongly exercised" Although there must be a clear case to justify the Court of Appeal in interfering with the discretion of the Court below, the discretion will be reviewed if it be exercised in consequence of an erroneous view of the law (*r*), or an obvious mistake of fact, or where it is impossible to say that there has been a reasonable exercise of discretion (*s*)

Further, there is no Court in England which is entrusted with the power of administering justice without restraint That restraint has been imposed from the earliest times And, although instances are constantly occurring where the Courts might profitably be employed in doing simple justice between the parties, unfettered by precedent or by technical rules, the law has wisely considered it inconvenient to confer such power upon those whose duty it is to preside in Courts of Justice (*t*) Even the House of Lords is bound, upon a question of law, by its own previous decisions, for *interest reipublicæ ut sit finis litium* (*u*) The Judicial Committee of the Privy Council is, however, not strictly bound to follow an earlier decision of the Committee, and may dissent therefrom if, after examining the reasons, they find themselves forced to do so (*t*) Moreover,

(*o*) See note (*o*), p 59

(*p*) *Per* Ld Mansfield in *R* v *Wilkes*, 4 Burr 2527, at 2539

(*q*) *R* v *Maidenhead Corporation*, 9 Q B D 494, at p 503

(*r*) *Hunt* v *Chambers*, 20 Ch D 365 at p 369

(*s*) *Wigney* v *Wigney*, 7 P D 177, at p 182, *Wallingford* v *Mutual Soc*, 5 App Cas 685, *Ormerod* v *Todmorden Mill Co*, 8 Q B D 664, *Berdan* v *Greenwood*, 20 Ch D 764 n, at p 767, *Crowther* v *Elgood*, 34 Id 691, *Re Smith*, [1893] 2 Ch 1, at p 15, *Ollier* v *Ollier*, [1914] W N 301

(*t*) *Barton* v *Muir*, L R 6 P C 134, *Tooth* v *Power*, [1891] A C 284, at p 292 (*u*) *London Street Tramways Co* v *Lond C C*, [1898] A C 375

Parliament is not so fettered, for "certain it is that *Curia Parliamenti suis propriis legibus subsistit*" (*x*)

DE FIDE ET OFFICIO JUDICIS NON RECIPITUR QUÆSTIO, SED DE SCIENTIA SIVE SIT ERROR JURIS SIVE FACTI (*Bac Max*, reg 17)—*The honesty and integrity of a judge cannot be questioned, but his decision may be impugned for error either of law or of fact*

General rule
No action lies against a judge

The law, said Lord Bacon, has so much respect for the certainty of judgments, and the credit and authority of judges, that it will not permit any error to be assigned which impeaches them in their trust and office, and in wilful abuse of the same (*y*) It is, moreover, a general rule of great antiquity, that no action will lie against a judge of record for any act done by him in the exercise of his judicial functions, provided such act, though done mistakenly, was within the scope of his jurisdiction (*z*) "The rule that a judicial officer cannot be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction, and also the rule, that a matter of fact so adjudicated by him cannot be put in issue in an action against him, have been uniformly maintained" (*a*)

This freedom from action at the suit of an individual, it has been observed, is given by our law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be, and it is not to be supposed beforehand, that those who are selected for the administration of justice will make an ill use of the authority vested in them

(*x*) 4 Inst 50 Some remarks as to the interpretation of statutes which might, perhaps, have been relevant under this maxim have been postponed until Chap VIII which deals generally with that subject

(*y*) Bac Max, reg 17, *Bushell's Case*, Vaugh 135, at pp 138, 139, *Floyd* v *Barker*, 12 Rep 23, at 25, *per* Holt, C J, in *Groenvelt* v *Burwell*, 1 Raym Ld 454 at p 468

(*z*) *Smith* v *Boucher*, Cas t H 69, *Calder* v *Halket*, 3 Moo P C 28, with which cf *Gahan* v *Lafitte*, Id 382, *Scott* v *Stansfeld*, L R 3 Exch 220, *Taaffe* v *Downes*, 3 Moo P C 36, n (a), *Houlden* v *Smith*, 14 Q B 841, Judgm in *Mostyn* v *Fabrigas* Cowp 161, *Phillips* v *Eyre*, L R 4 Q B 225, at p 229, *Pease* v *Chaytor*, 1 B & S 658, *Hamilton* v *Anderson*, 3 Macq 368

(*a*) Judgm in *Kemp* v *Neville*, 10 C B N S 523, at p 549, see *per* Erle, C J, in *Wildes* v *Russell*, L R 1 C P 722, at p 730

There is, however, an important distinction between the liability of judges of superior Courts and that of judges of inferior Courts No action lies against a judge of a superior Court even though he has exceeded his jurisdiction It is for him to determine his jurisdiction, and if he wrongly determines it his error can be called in question only by appeal, and not by action in the same or another Court of co-ordinate jurisdiction No act of his done in his judicial capacity can be the foundation of an action against him, though he has acted oppressively, maliciously, and to the perversion of justice (*b*) The jurisdiction of an inferior Court, however, may always be called in question in a superior Court, and therefore if a judge of an inferior Court acts without jurisdiction his having done so may be determined in an action brought against him in another Court (*c*) Accordingly if a judge of an inferior Court in the execution of his office causes a trespass to be committed to the person or property of another by reason of his making an order without jurisdiction, an action lies against him for such trespass, provided he had knowledge, or means of knowledge of which he ought to have availed himself, of facts which showed his want of jurisdiction (*d*) So where it appeared on the face of a summons that a magistrate had no jurisdiction and he made an order notwithstanding, he was held liable in an action for the trespass committed in executing the order (*e*) But a judge of an inferior Court can only be made liable, if at all, for anything done within his jurisdiction, if he act maliciously and without reasonable and probable cause And as it is competent to him to decide the facts necessary to found his jurisdiction, his honest determination of those facts cannot be called in question in an action brought against him (*f*) In the imperfection of human nature, it is better that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it Corruption is quite another matter, so also are neglect of duty and miscon-

(*b*) *Anderson* v *Gorrie* [1895] 1 Q B 668

(*c*) See *Taafe* v *Downes* 3 Moore, P C 36 n

(*d*) *Per* Parke, B, in *Calder* v *Halket*, 3 Moore, P C 28, at p 77, *Houlden* v *Smith*, 14 Q B 841

(*e*) *Polley* v *Fordham*, [1904] 2 K B 345

(*f*) *Pease* v *Chaytor*, 3 B & S 620, *Cave* v *Mountain*, 1 M & G 257, *Somerville* v *Mirehouse*, 1 B & S 652, *Pedley* v *Davis*, 10 C B N S 492, *Gelen* v *Hall*, 2 H & N 379 See also, as to justices of the peace, the Justices Protection Act, 1848 (11 & 12 Vict c 44)

duct For such things there is, and always will be, some due course of punishment by public prosecution (*g*), though not by action

An action, then, does not lie against a judge, civil (*h*) or ecclesiastical (*i*), acting judicially in a matter within the scope of his jurisdiction (*k*) Nor can a suit be maintained against persons so acting with a more limited authority, as the steward of a Court baron (*l*), or commissioners of a Court of request, and, as already intimated, magistrates, acting in discharge of their duty, and within the bounds of their jurisdiction, are irresponsible even where the circumstances under which they are called upon to act would not have supported the complaint, provided that such circumstances were not disclosed to them at the time of their adjudication (*m*)

Distinction to be observed in applying rule

Having thus briefly stated the broad rule applicable to the right of action against persons invested with judicial functions, we may remark that there is one extensive class of cases which may, on a cursory observation, appear to fall within its operation, but which is, in fact, governed by a different, although not less important principle We refer to cases in which the performance of some public duty is imposed by law upon an individual who, by neglecting or refusing to perform it, causes an injury to some other party, here, as a general rule, the injury occasioned by the breach of duty, without proof of *mala fides*,

(*g*) *Garnett* v *Ferrand*, 6 B & C 611, at pp 625 626, *Thomas* v *Churton*, 2 B & S 475 See *R* v *Johnson*, 6 East, 583, and 7 East 65 in which case one of the judges of the Court of Common Pleas in Ireland was convicted of publishing a pamphlet amounting to a libel The judges are not liable to removal, except upon addresses of both Houses of Parliament, see the Act of Settlement (12 & 13 Will 3, c 2), s 3 (7), and the statute 1 Geo 3 c 23, s 2, both of which enactments were repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict c 59), and had previously been replaced by s 5 of the Judicature Act, 1875 (38 & 39 Vict c 77)

(*h*) *Dicas* v *Brougham*, 6 C & P 249, *Kemp* v *Neville*, 10 C B N S 523, where the action was brought against the Vice Chancellor of Cambridge University, *Tinsley* v *Nassau*, Moo & Mal 52, *Johnstone* v *Sutton* 1 T R 510 at p 513 *per* Holt, C J , in *Groenvelt* v *Burwell*, 1 Raym Ld 454, at p 468 *Garnett* v *Ferrand*, 6 B & C 611

(*i*) *Ackerley* v *Parkinson*, 3 M & S 411, at p 425, *Beaurain* v *Scott*, 3 Camp N P 388

(*k*) See *Beaurain* v *Scott*, *supra* *Wingate* v *Waite*, 6 M & W 739, at p 746, *Hamilton* v *Anderson* 3 Macq 363

(*l*) *Holroyd* v *Breare* 2 B & Ald 473, see also *Bradley* v *Carr*, 3 Scott, N R 521 at p 528, *Carratt* v *Morley*, 1 Q B 18 *Andrews* v *Marris*, Id 3, and cases there cited, *Morris* v *Parkinson*, 1 Cr M & R 163

(*m*) *Pike* v *Carter* 3 Bing 78 *Lowther* v *Radnor*, 8 East 113, *Brown* v *Copley*, 8 Scott, N R 350, *Pitcher* v *King*, 9 A & E 288, 2 Roll Abr 552, pl 10

lays the foundation for an action for damages (*n*) This principle, moreover, applies where persons required to perform ministerial acts are at the same time invested with the judicial character, and in accordance therewith, in the celebrated *Auchterarder Case* (*o*), the members of the presbytery were held liable, collectively and individually, to make compensation for refusing to take the presentee to a church on trial, as they were bound to do, according to the law of Scotland The legislature, observed Lord Brougham, in that case, can, of course, do no wrong, and its branches are equally placed beyond all control of the law, and after explaining the immunity from liability of Courts of justice when exercising judicial functions or discretionary powers, he continued —"But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, every body, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey, and with the exception of the legislature and its branches, every body is liable for the consequences of disobedience, that is, its members are liable, through whose failure or contumacy the disobedience has arisen, and the consequent injury to the parties interested in the duty being performed" (*p*)

Appeal

But although the honesty of a judge acting in his judicial capacity cannot be questioned, his errors may be corrected by appellate tribunals in all cases where the law allows of an appeal In most civil causes there is a right of appeal, but not in all For example, there can be no appeal from a judge, who has discretion as to costs, upon a question of costs, except by leave of the judge whose decision it may be desired to question (*q*) Again, in the case of County Courts there can be no appeal on a question of fact, nor, as a rule, except by leave of the judge who tried the action, on a question of law, where the plaintiff's claim does not exceed £20 (*r*)

New trial

The discretion to grant a new trial is a judicial discretion,

(*n*) See *Barry* v *Arnaud*, 10 A & E 646 (cited *Mayor of Lichfield* v *Simpson*, 8 Q B 65) *Per* Ld Brougham in *M'Kenna* v *Pape*, 1 H L Cas 6, at p 7, *Steel* v *Schomberg*, 4 E & B 620, *Scott* v *Mayor of Manchester*, 2 H & N 204

(*o*) *Ferguson* v *Kinnoul*, 9 C & F 251

(*p*) Ibid at pp 289, 290, *per* Ld Brougham, whose judgment has throughout an especial reference to the subject of judicial liability See *Gathercole* v *Miall*, 15 M & W 319, at pp 332 338

(*q*) Judicature Act, 1873 (36 & 37 Vict c 66), s 49

(*r*) County Courts Act, 1888 (51 & 52 Vict c 43), ss 120, 124

not to be exercised arbitrarily, and a litigant who has obtained a judgment is entitled not to be deprived of it without very solid grounds *interest reipublicæ ut sit finis litium* (*s*)

QUI JUSSU JUDICIS ALIQUOD FECERIT NON VIDETUR DOLO MALO FECISSE, QUIA PARERE NECESSE EST (10 *Rep* 76)—*A person who does an act by command of a judge is not considered to act from a wrongful motive, because it is his duty to obey* (*t*)

When a Court has jurisdiction of a cause, and proceeds *inverso ordine*, or erroneously, the officer of the Court who executes according to its tenor (*u*) the precept or process of the Court, is not liable to an action (*v*) But when the Court has not jurisdiction of the cause, the whole proceeding is *coram non judice* (*w*), and actions lie against the officer without any regard to the precept or process, for in this case it is not necessary to obey one who is not judge of the cause, any more than it is to obey a mere stranger, for the rule is, *judicium a non suo judice datum nullius est momenti* (*y*) General rule

Accordingly, in *Gosset* v *Howard* (*z*), it was held that the warrant of the Speaker of the House of Commons, having issued Examples *Gosset* v *Howard*

(*s*) *Brown* v *Dean*, [1910] A C 373

(*t*) This maxim is derived from the Roman law, see D 50 17, 167, § 1

(*u*) See *Munday* v *Stubbs*, 10 C B 432

(*v*) See *Prentice* v *Harrison* 4 Q B 852, *Broun* v *Jones*, 15 M & W 191 Judgm in *Ex p Story* 8 Exch 195, at p 201 See *Cotes* v *Michill*, 3 Lev 20, *Moravia* v *Sloper*, Willes, 30, at p 94

(*w*) See *Tinniswood* v *Pattison*, 3 C B 243 *Factum a judice quod ad officium ejus non pertinet ratum non est* (D 50, 17, 170)

(*y*) *Marshalsea Case*, 10 Rep 68 a at 76 b, *Taylor* v *Clemson*, 2 Q B 978, at pp 1014, 1015, and 11 C & F 610 (cited *Ostler* v *Cooke* 13 Q B 143, at p 162), *Morrell* v *Martin*, 4 Scott N R 300, at pp 313, 314, *Jones* v *Chapman*, 14 M & W 124, *Bayliss* v *Strickland*, 1 Scott, N R 540, *Marshall* v *Lamb*, 5 Q B 115, *Watson* v *Bodell* 14 M & W 57, *Thomas* v *Hudson*, Id 353, *Van Sandau* v *Turner*, 6 Q B 773 *Lloyd* v *Harrison*, 6 B & S 86, *Andrews* v *Marris*, 1 Q B 3, at pp 16, 17 (recognised in *Carratt* v *Morley*, Id 18, at p 29, and distinguished in *Dews* v *Risley*, 11 C B 434, at p 444), *Levy* v *Moylan*, 10 C B 189 As to the liability of the party at whose suit execution issued, or of his attorney, see *Carratt* v *Morley*, *supra*, *Coomer* v *Latham*, 16 M & W 713, *Ewart* v *Jones*, 14 Id 774 *Green* v *Elgie*, 5 Q B 99 *Kinning* v *Buchanan*, 8 C B 271, *Abley* v *Dale*, 11 Id 378, at p 389, *post*, p 88, n (*g*) As regards the liability of ministerial officers, there is an important distinction between cases where there has been an adjudication and cases where there has been only an order, see *Foster* v *Dodd*, L R 3 Q B 67, at p 76

(*z*) 10 Q B 411 See *Ex p Fernandes*, 10 C B N S 3

in a matter over which the House had jurisdiction, was to be construed on the same principle as a mandate or writ issuing out of a superior Court acting according to the course of common law, and that it afforded a valid defence to an action for assault and false imprisonment brought against the Serjeant-at Arms, who acted in obedience to such warrant

In this case it is observable that the matter in respect of which the warrant issued was admitted to be within the jurisdiction of the House, and it is peculiarly necessary to notice this, because, in the previous case of *Stockdale* v *Hansard* (*a*), it was held to be no defence at law to an action for libel, that the defamatory matter was part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by order of the House, published by the defendant The decision in this case resulted from the opinion entertained by the Court that the privilege under which the defendant sought to justify the alleged wrongful act did not exist, and in consequence of this decision the Parliamentary Papers Act, 1840 (*b*), was passed, which enacts that all proceedings, whether by action or criminal prosecution, similar to the above, shall be stayed upon the production of a certificate of the Chancellor or of the Speaker to the effect that the publication in question is by order of either House of Parliament, together with an affidavit verifying such certificate (*c*)

Stockdale v *Hansard*

Constable—liability of, at common law

The case of a justification at common law by a constable under the warrant of a justice of the peace offers another illustration of the rule under consideration If the warrant issued by the justice, in the shape in which it is given to the officer, is such that the party may lawfully resist it (*d*), or, if taken on it, will be released on *habeas corpus*, it is a warrant which, in that shape, the justice has no jurisdiction to issue, which, therefore, the officer need not obey, and which, at common law, on the principle above laid down, does not protect him against an action by the party injured (*e*) Where the cause is expressed but

(*a*) 9 A & E 1 (*b*) 3 & 4 Vict c 9

(*c*) *Entick* v *Carrington*, 19 Howell, St Tr 1030, is the leading case in regard to the power of arresting the person, and seizing papers, under a Secretary of State s warrant See *Leach* v *Money*, *Wilkes* v *Wood*, and *Entick* v *Carrington*, Broom s Const L pp 525, 548, 558 and Note thereto, Id pp 613 *et seq* , *Foster* v *Dodd*, L R 3 Q B 67

(*d*) *R* v *Tooley*, 2 Raym Ld 1296, at p 1302

(*e*) As to the legality of an arrest under a warrant which is not in possession of the constable, in felony and misdemeanor, see *Gallard* v *Laxton*, 2 B & S

imperfectly, the officer may not be expected to judge as to the sufficiency of the statement, and, therefore, if the subject-matter be within the magistrate's jurisdiction, he may be bound to execute it, and, as a consequence, be entitled to protection, but where no cause is expressed, there is no question as to the want of jurisdiction (*f*)

"A rule," said Lord Denman, in *R* v *Stainforth* (*g*), "has been often recognised in respect of proceedings by magistrates, requiring all the facts to be stated which are necessary to show that a tribunal has been lawfully constituted and has jurisdiction There is good reason for the rule where a special authority is exercised which is out of the ordinary course of common law, and is confined to a limited locality, as in case either of warrants for arrest, commitment, or distress, or of convictions, or orders by local magistrates where the duty of promptly enforcing the instrument is cast on officers of the law, and the duty of unhesitating submission on those who are to obey It is requisite that the instrument so to be enforced and obeyed should show on inspection all the essentials from which such duties arise" A plea of justification by a constable acting under the warrant of a justice is accordingly bad by the common law, if it does not show that the justice had jurisdiction over the subject-matter upon which the warrant is granted

Effect of 24 Geo 2, c 44

By the Constables' Protection Act, 1750 (*h*), it is enacted that no action shall be brought against a constable, or a person acting by his order or in his aid, for anything done in obedience (*i*) to a warrant under the hand or seal of a justice, until demand shall have been made for the perusal and copy of such warrant, and the same refused or neglected for the space of six days after such demand, that in case, after such demand and compliance therewith (*j*), any action for any such cause be brought against such constable or person, without making the justice who signed or sealed the warrant a defendant, then, on proof of such warrant at the trial, the jury shall give their

363, *R* v *Chapman*, 12 Cox C C 4, *Codd* v *Cabe*, 1 Ex D 352, *Creagh* v *Gamble*, 24 L R I 458

(*f*) *Per* Coleridge J, in *Houard* v *Gosset*, 10 Q B 359, at p 390 See in illustration of the above remarks, *Clark* v *Woods*, 2 Exch 395, and cases there cited

(*g*) 11 Q B 66 at p 75 See also *R* v *Inhabs of Totnes*, Id 80, *Agnew* v *Jobson*, 14 Cox, C C 625

(*h*) 24 Geo 2, c 44, s 6

(*i*) See *Bell* v *Oakley*, 2 M & S 259

(*j*) *Jones* v *Vaughan*, 5 East, 445

verdict for the defendant, notwithstanding any defect of jurisdiction in such justice, and if such action be brought against the justice and constable jointly, then, on proof of such warrant, the jury shall find for such constable, notwithstanding such defect of jurisdiction And this Act applies as well where the justice has acted without jurisdiction, as where the warrant which he has granted is improper (*k*)

It should be observed, however, that the officer must show that he acted in obedience to the warrant (*l*), and can only justify that which he *lawfully* did under it (*m*), and where the justice cannot be liable, the officer is not entitled to the protection of the Act, for the Act was intended to make the justice liable instead of the officer where, therefore, the officer makes such a mistake as will not make the justice liable, the officer cannot be excused

Statutory protection

Besides the last-mentioned Act, there are other enactments, which, on grounds of public policy, specially extend protection to persons who act *bona fide*, though mistakenly, in pursuance of their provisions, and as throwing light upon their practical operation, attention may be directed to *Hughes* v *Buckland* (*n*), which was an action of trespass against the defendants, being servants of A , for arresting the plaintiff whilst fishing at night near the mouth of a river in which A had a several fishery At the trial, much evidence was given to show that A s fishery included the place where the plaintiff was arrested, the jury, however, defined the limits of the fishery so as to exclude that place by a few yards, but they also found that A , and the defendants, "*bona fide* and reasonably" believed that the fishery extended over that spot It was held that the defendants were entitled to the protection of the 7 & 8 Geo 4, c 29, s 75 (*o*), which was framed for the protection "of persons acting in the

(*k*) *Per* Ld Eldon in *Price* v *Messenger* 2 B & P 158 at p 161, see also *Atkins* v *Kilby*, 11 A & E 777

(*l*) See *Hoye* v *Bush*, 2 Scott, N R 86

(*m*) *Per* Alderson, B , in *Peppercorn* v *Hofman*, 9 M & W 618, at p 628

(*n*) 15 M & W 346

(*o*) That section provided (*inter alia*) that ' for the protection of persons acting in the execution of this Act ' all actions brought against any person for anything done in pursuance of this Act ' should be laid and tried in the county where the fact was committed It was held that as in arresting the plaintiff the defendants acted *bona fide* in the belief that they were pursuing the Act of Parliament the action must be tried in the county where the arrest was made The statute 7 & 8 Geo 4, c 29, is now repealed and many of its provisions are re enacted in the Larceny Act, 1861 The Public Authorities Protection Act, 1893 (56 & 57 Vict c 61), contains general provisions for the protection of persons doing any act in pursuance, or execution or intended execution of any Act of Parliament "

execution" of that Act, and doing anything in pursuance thereof "The object of the clause," observed Pollock, C B, "was to give protection to all parties who honestly pursued the statute Now, every act consists of *time*, *place*, and *circumstance* With regard to *circumstance*, it is admitted, that, if one magistrate acts where two are required, or imposes twelve months' imprisonment where he ought only to impose six, he is protected if he has a general jurisdiction over the subject-matter, or has reason to think he has With respect to *time*, *Cann* v *Clipperton* (*p*) shows that a party may be protected although he arrests another after the time when the statute authorises the arrest *Place* is another ingredient, and I am unable to distinguish the present case from that of a magistrate who is protected, although he acts out of his jurisdiction A party is protected if he acts *bona fide*, and in the reasonable belief that he is pursuing the Act (*q*) And the proper question for the jury in a case such as that referred to is this - 'Did the defendant honestly believe in the existence of those facts which, if they had existed, would have afforded a justification under the statute?'--the belief of the defendant resting upon some reasonable grounds (*r*)

Territorial limits of jurisdiction

Lastly, we may observe, that, when considered with reference to foreign communities, the jurisdiction of every Court, whether *in personam*, or *in rem*, must so far as regards the compelling obedience to its decrees (*s*), necessarily be bounded by the limits of the kingdom in which it is established, and unless, by virtue of international treaties (*t*), such jurisdiction has been extended, it clearly cannot enforce process beyond those natural limits, according to the maxim, *extra territorium jus dicenti impune non paretur* (*u*) Moreover, it is to be observed that, although

(*p*) 10 A & E 582

(*q*) 'A thing is considered to be done in pursuance of a statute when the person who does it is acting honestly and *bona fide*, either under the powers which the Act confers, or in discharge of the duties which it imposes', *per* Parke B in *Jowle* v *Taylor* 7 Exch 58, at p 61, see also *Downing* v *Capel*, L R 2 C P 461 *Poulsum* v *Thirst* Id 449 *Whatman* v *Pearson* 3 Id 422

(*r*) *Per* Williams, J, in *Roberts* v *Orchard*, 2 H & C 769, at p 774 as explained in *Leete* v *Hart* L R 3 C P 322 at pp 324, 325 see also *Heath* v *Brewer*, 15 C B N S 803, *Chamberlain* v *King* L R 6 C P 474, *Lea* v *Facey*, 19 Q B D 352

(*s*) See *per* Ld Cranworth in *Hope* v *Hope* 4 De G M & G 328 at pp 345 346, *per* Ld Herschell in *Brit S Africa Co* v *Co de Mocambique* [1893] A C 602, at p 624

(*t*) See *Re Trenan* 5 B & S 645

(*u*) D 2, 1, 20, *R* v *Lewis*, Dears & B C C 182, *R* v *Anderson*, L R 1 C C 161

the laws of a state *proprio vigore* have no force beyond its territorial limits, they are frequently permitted, by the courtesy of another, to operate in the latter, when neither that state nor its citizens will suffer inconvenience from the application of the foreign law This is the principle of International Comity

Municipal law may provide that proceedings may be instituted, and judgments and decrees lawfully pronounced, against natural-born subjects when absent abroad, and even against aliens who are not resident within the state when the subject-matter is peculiarly within the jurisdiction of the Courts The conditions under which a writ will be allowed in this country to issue are regulated by Order XI of the Rules of the Supreme Court, 1883

Even Parliament, though its enactments may extend to the King's subjects while they are abroad (*v*), has no power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown (*w*) "It is clear," observed Parke, B , in *Jefferys* v *Boosey* (*x*), "that the legislature has no power over any persons except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom The legislature can impose no duties except on them, and when legislating for the benefit of persons, must *primâ facie* be considered to mean the benefit of those who owe obedience to our laws and whose interests the legislature is under a correlative obligation to protect"

AD QUÆSTIONEM FACTI NON RESPONDENT JUDICES AD QUÆSTIONEM LEGIS NON RESPONDENT JURATORES (8 *Rep* 155) —*It is the office of the judge to instruct the jury in points of law—of the jury to decide on matters of fact* (*y*)

The object in view on the trial of a cause is to find out, by due examination, the truth of the points in issue between the parties, in order that judgment may thereupon be given, and

(*v*) *Trial of Earl Russell* [1901] A C 446, *Re De Wilton*, [1900] 2 Ch 481

(*w*) *Lopez* v *Burslem*, 4 Moo P C 300, at p 305

(*x*) 4 H L Cas 815, at p 926 See *Macleod* v *A G for N S Wales* [1891] A C 455, *R* v *Jameson*, [1896] 2 Q B 425, *Badische Fabrik* v *Johnson*, [1897] 2 Ch 322, *Re Pearson* [1892] 2 Q B 263, *Colquhoun* v *Heddon*, 25 Q B D 129, *Colquhoun* v *Brooks*, 19 Q B D 400, at p 406

(*y*) Co Litt 295 b, *Bowman's Case* 9 Rep 1 at 13 a, *Meath* v *Winchester*, 3 Bing N C 183 at p 217 *Bushell's Case*, Vaugh 135, at p 149, *per* Ld Westbury in *Fernie* v *Young*, L R 1 H L 63, at p 78

therefore the facts of the case must, in the first instance, be ascertained (usually through the intervention of a jury), for *ex facto jus oritur*—the law arises out of the fact (*z*) If the fact be perverted or misrepresented the law which arises thence will unavoidably be unjust or partial, and, in order to prevent this, it is necessary to set right the fact and establish the truth contended for, by appealing to some mode of probation or trial which the law of the country has ordained for a criterion of truth and falsehood (*a*)

Before the Common Law Procedure Act, 1854 (*b*), all issues of fact in common law actions in the Superior Courts were decided by juries But now many common law actions, as well as Chancery actions, in the High Court (*c*) and in County Courts (*d*), are tried by judges sitting without juries, and in such cases the judges have to find the facts as well as to decide the law But even in these cases it is necessary to distinguish between the two functions of the judge, and the above maxim must retain considerable importance

Examples showing application of rule

A few instances must suffice to show its application Thus, there are two requisites to the validity of a deed 1, that it be sufficient in law, on which the Court decides, 2, that certain matters of fact, as sealing and delivery, be duly proved, on which it is the province of the jury to determine (*e*), and where interlineations or erasures are apparent on the face of a deed, it is now the practice to leave it to the jury to decide whether the erasing or interlining was done before the delivery (*f*)

Written instruments

Again, it is the duty of the Court to construe all written instruments (*g*) as soon as the true meaning of any words of art or commercial phrases used therein, and the surrounding circumstances, if any, have been ascertained as facts by the jury (*h*),

(*z*) See, for instance *Catterall* v *Hindle*, L R 2 C P 368

(*a*) 2 Inst 49

(*b*) 17 & 18 Vict c 125, s 1

(*c*) R S C, Order XXXVI r 2, 6, as made in 1922 in consequence of s 2 (q v) of the Administration of Justice Act, 1920 (10 & 11 Geo 5, c 81)

(*d*) Administration of Justice Act, 1920, s 3

(*e*) Co Litt 255 a, *Altham s Case*, 8 Rep 148 a, at 155 a, *Leyfield s Case*, 10 Rep 88 a, at 92 b (cited *Jenkin* v *Peace*, 6 M & W 722, at p 728)

(*f*) Co Litt 225 b See *Doe* d *Fryer* v *Coombs*, 3 Q B 687, *Alsager* v *Close*, 10 M & W 576

(*g*) "The construction of a specification, like other written documents is for the Court If the terms used require explanation, as being terms of art or of scientific use, explanatory evidence must be given, and with its aid the Court proceeds to the office of construction" (*per* Ld Chelmsford in *Simpson* v *Holliday* L R 1 H L 315, at p 320)

(*h*) Even where a written instrument has been lost, and parol evidence of its

and it is the duty of the jury to take the construction from the Court either absolutely, if there be no words to be construed or explained (*i*), as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained,—or conditionally, when those words or circumstances are necessarily referred to them (*k*) The convenience of this course is apparent, for a misconstruction by the Court may be set right upon appeal or new trial, but a mistake by the jury is not easily corrected (*l*) Accordingly, the construction of a doubtful document given in evidence to defeat the Statute of Limitations is for the Court (*m*), and not for the jury, but if it be explained by extrinsic facts, from which the intention of the parties may be collected, they are for the consideration of the jury (*n*)

Mercantile contracts

With respect to mercantile contracts, the law is clearly explained by Lord Cairns in *Bowes* v *Shand* (*o*) It is for the Court, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of the custom of the trade, to place the construction upon the contract, and it seems that the evidence of custom must be strong to overrule the natural meaning of words of common parlance This rule is based upon and limited by the principle which allows parol evidence to explain, but not to contradict, a written document, upon which basis also depends the function of a jury to put a meaning upon expressions in mercantile contracts, which, apart from mercantile usage, are obscure or meaningless (*p*) It may indeed be laid

contents has been received, its construction is for the Court (*Berwick* v *Horsfall* 4 C B N S 450)

(*i*) *See Elliott* v *South Devon Ry Co*, 2 Ex 725 *Bank of N Z* v *Simpson*, [1900] A C 182

(*k*) Parcel or no parcel " is a question of fact for the jury but the judge should tell the jury what is the proper construction of any documents which ought to be considered in deciding that question (*Lyle* v *Richards*, L R 1 H L 222)

(*l*) Judgm in *Neilson* v *Harford*, 8 M & W 806, at p 823 See also *per* Erskine, J , in *Shore* v *Wilson*, 5 Scott, N R 958 at p 988, *Cheveley* v *Fuller* 13 C B 122, *per* Maule, J , in *Doe* d *Strickland* v *Strickland*, 8 C B 724, at pp 743 744, *Booth* v *Kennard*, 2 H & N 84, *Bovill* v *Pimm*, 11 Exch 718, *Lindsay* v *Janson*, 4 H & N 699, at p 704, *Parker* v *Ibbetson*, 4 C B N S 846

(*m*) *Chasemore* v *Turner*, L R 10 Q B 500, *Quincey* v *Sharpe* 1 Ex D 72, *Skeet* v *Lindsay*, 2 Ex D 314, *Myerhoff* v *Froelich*, 3 C P D 333, and 4 Id 63, *Banner* v *Berridge*, 18 Ch D 254

(*n*) *Morrell* v *Frith*, 3 M & W 402, *Doe* d *Curzon* v *Edmonds*, 6 M & W 295 See *Worthington* v *Grimsditch*, 7 Q B 479 *Rackham* v *Marriott*, 2 H & N 196, *Sidwell* v *Mason*, 2 H & N 306, *Godwin* v *Culling*, 4 Id 373, *Cornforth* v *Smithard* 5 H & N 13, *Buckmaster* v *Russell*, 10 C B N S 745 *Holmes* v *Mackrell*, 3 C B N S 789, *Cockrill* v *Sparkes*, 1 H & C 699, *Francis* v *Hawkesley*, 1 E & E 1052

(*o*) 2 App Cas 455 (*p*) *Ashford* v *Redford*, L R 9 C P 20

down generally, that although it is the province of the Court to construe a written instrument, yet where its effect depends not merely on the construction and meaning of the instrument, but upon collateral facts and extrinsic circumstances, the inferences to be drawn from them are to be left to the jury (*q*) And where a contract is made out partly by written documents and partly by oral evidence, the whole must be submitted to the jury so that they may decide as to the truth or falsehood of the oral evidence, and, under the direction of the judge, determine what was the real contract, if any (*r*)

Malicious prosecution

In actions for malicious prosecution the plaintiff has to prove, first, that he was innocent of the offence for which he was prosecuted, and that the prosecution ended in his favour (*s*), secondly, that there was a want of reasonable and probable cause for the prosecution (*t*), and thirdly, that the defendant instituted the prosecution maliciously, that is to say, from an improper motive, and not from the honest belief that the plaintiff was guilty and the desire to bring an offender to justice (*t*) The onus of establishing all these three points lies upon the plaintiff (*t*), but whereas the first and third points are matters to be left to the jury, the second has to be decided by the judge (*u*) If, however, any facts upon which the question whether there was want of reasonable and probable cause for the prosecution depends are in dispute, the jury have to find what the facts are, and the judge has to decide the question upon the facts as found by them (*u*) This arrangement has been sometimes described as productive of difficulty and confusion (*v*) In practice the judge often leaves the jury to find a general verdict, after explaining to them how his opinion on the question of reasonable and probable cause differs according to whether they take one or another view of the facts in dispute, but sometimes he first requires the jury to find the facts which specifically

(*q*) See *Smith* v *Thompson*, 8 C B 44

(*r*) *Bolckow* v *Seymour* 17 C B N S 107, *Rogers* v *Hadley* 2 H & C 227 The construction of a foreign contract is for the judge, who may avail himself as far as necessary, of expert evidence, *De Sora* v *Phillips*, 10 H L Cas 624, at p 633

(*s*) *Barber* v *Lesiter*, 7 C B N S 175, *Castrique* v *Behrens* 30 L J Q B 163, *Basebé* v *Matthews*, L R 2 C P 684 As to *ex parte* proceedings, see *Steward* v *Grommett*, 7 C B N S 191

(*t*) *Abrath* v *N E Ry Co*, 11 App Cas 247, *Bradshaw* v *Waterlow & Sons* [1915] 3 K B 527

(*u*) *Abrath* v *N E Ry Co* *supra* *Panton* v *Williams*, 2 Q B 169, *Lister* v *Perryman*, L R 4 H L 521

(*v*) See the judgments in *Lister* v *Perryman*, *supra*

bear upon that question, and only submits to them the further question of malice if and when he has ruled that the want of reasonable and probable cause has been proved (*x*) Upon this question of malice, the fact that the defendant prosecuted without reasonable and probable cause is evidence from which the jury may infer that he acted maliciously, but it is not conclusive evidence, and if the jury think that he honestly believed in the plaintiff's guilt and acted upon that belief in prosecuting him, then the defendant, however hastily he may have proceeded, is nevertheless entitled to their verdict (*y*)

Libel

The question of the respective functions of judge and jury in actions and prosecutions for libel was once very warmly canvassed, and was the subject of the Libel Act, 1792, popularly known as Fox's Act (*z*) This Act, which was occasioned by the State Trials in the reign of Geo III , enacts (s 1) that in trials for libel the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and shall not be directed or required to find the defendant guilty or not guilty merely on proof of publication (s 2) The judge shall, according to his discretion, give his opinion upon the matters in issue (*a*) to the jury, who may (s 3) find a special verdict It is customary under this Act for the judge, whether in civil or criminal causes, to give a definition of libel to the jury, and then leave to them the entire question He may, as a matter of mere advice, give his own opinion as to the nature of the publication, but is not bound to do so (*b*) It is his duty to say whether or not the writing complained of is capable of the meaning ascribed, but if satisfied of that, he must leave it to the jury to say whether it actually has that meaning (*c*) Again, it is for the judge to say whether a communication is privileged or not, but if the privilege is not an absolute one, as that enjoyed by witnesses in a cause, the further question remains whether it was made *bona fide* and without malice, and this is always for

(*x*) The various methods of procedure are explained by Bowen, L J , in *Abrath* v *N E Ry Co* , 11 Q B D 440, at p 458

(*y*) *Brown* v *Hawkes*, [1891] 2 Q B 718 As to the materiality of motive in this kind of action, see *per* Lords Watson and Herschell, in *Allen* v *Flood*, [1898] A C 1, at pp 93, 125

(*z*) 32 Geo 3, c 60, s 1

(*a*) *Bayls* v *Lawrence*, 11 Ad & E 920, at p 924

(*b*) *Parmiter* v *Coupland*, 6 M & W 105, at p 108, *R* v *Watson*, 2 T R 199, at p 206

(*c*) *Per* Wilde, C J , in *Sturt* v *Blagg*, 10 Q B 906, *Hunt* v *Goodlake*, 43 L J C P 54 As to slander, see *Hemmings* v *Gasson*, E B & E 346, and see *Bushell's Case*, Vaugh 135, at p 147, *Ewart* v *Jones*, 14 M & W 774

the jury (*d*) It is to be remembered that where this qualified privilege is established, the plaintiff has to prove malice on the part of the defendant If he fail to give evidence beyond that of mere defamation, it is the duty of the judge to direct a verdict for the defendant (*e*)

Exceptions to rule

Although the general principle is as laid down in the maxim under consideration, there are many exceptions to it (*f*) Thus, questions of reasonableness—reasonable cause, reasonable time, and the like—are, strictly speaking, matters of fact, even where it falls within the province of the judge or the Court to decide them (*g*), but are properly left to the judge, as requiring legal training for their appreciation So, where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the judge, and not by the jury If the opposite course were adopted, it would be equivalent to leaving it to the jury to say whether a particular thing were evidence or not (*h*) And the question whether a document comes from the proper custody or whether it is properly stamped must be decided by the judge, for the jury are not sworn to try any such issues (*i*)

No case

If at the close of the plaintiff's case there is no evidence upon which the jury could reasonably and properly find a verdict for him, the judge ought to direct a verdict for the defendant (*k*) Formerly, if there were a *scintilla* of evidence in support of a case, the judge was held bound to leave it to the jury But a course of decisions, many of which are referred to in *Ryder* v *Wombwell* (*l*), "has established a more reasonable rule, viz, that in every case, before the evidence is left to the jury, there is

(*d*) *Stace* v *Griffith*, L R 2 P C 420

(*e*) *Taylor* v *Hawkins*, 16 Q B 308, at p 321, *Spill* v *Maule* L R 4 Ex 232

(*f*) Judgm in *Watson* v *Quilter*, 11 M & W 760, at p 767

(*g*) See *per* Ld Abinger in *Startup* v *Macdonald*, 7 Scott, N R 269, at p 280 Co Litt 566, *Burton* v *Griffiths*, 11 M & W 817, *Graham* v *Van Diemen's Land Co*, 11 Exch 101, *per* Crompton, J, in *G W Ry Co* v *Crouch*, 3 H & N 183, at p 189, *Hogg* v *Ward* Id 417 *Goodwyn* v *Cheveley*, 4 H & N 631 *Brighty* v *Norton*, 3 B & S 305, *Massey* v *Sladen*, L R 4 Ex 13, *Shoreditch Vestry* v *Hughes*, 17 C B N S 137

(*h*) *Per* Alderson, B, in *Bartlett* v *Smith*, 11 M & W 483, *Boyle* v *Wiseman*, 11 Ex 360

(*i*) *Per* Pollock, C B, in *Heslop* v *Chapman*, 23 L J Q B 49, at p 52, *Siordet* v *Kuczynski*, 17 C B 251 *per* Pollock, C B, in *Sharples* v *Rickard* 2 H & N 57, *Tattersall* v *Fearnly*, 17 C B 368 See the judgment of Ld Abinger in *Watson* v *Quilter*, 11 M & W 760, for other instances in which, under particular statutes or at common law, questions of fact were for the Court

(*k*) See *Fox* v *Star Co*, [1900] A C 19

(*l*) L R 4 Ex 32

a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed" (*m*) But where there is conflicting evidence upon a question of fact, whatever may be the opinion of the judge as to the value of that evidence, he must leave the consideration of it for the jury (*n*)

Misdirection

Whenever mixed questions of law and fact arise in a case tried before judge and jury, it is the judge's duty to give to the jury such a direction upon the law as will enable them to understand its bearing upon the facts (*o*) If his direction be wrong in giving them a wrong guide, or imperfect in not giving them the right guide which it was his duty to give (*o*), and some substantial wrong or miscarriage be thus occasioned (*p*), the appellate Court, in a civil case (*q*), other than one in the Divorce Court (*r*), should order a new trial But in cases where the verdict is so far against the weight of the evidence as to be unreasonable or perverse (*s*), and where the Court is satisfied that it has all the material facts before it, the Court of Appeal may now, on motion for a new trial, give judgment for the party in whose favour the verdict ought to have been given (*t*)

In conclusion, it may be observed that, though there is a tendency to dispense with juries in many purely civil actions, yet in cases of a criminal and quasi-criminal nature, most persons will probably still agree with Lord Hardwicke, that "it is of the greatest consequence to the law of England and to the subject that these powers of the judge and jury be kept distinct, that the judge determine the law, and the jury the

(*m*) Judgm , *Giblin* v *McMullen* L R 2 P C 336

(*n*) *Dublin & Wicklow Ry* v *Slattery* 3 App Cas 1155, see *Cutsforth* v *Johnson*, [1913] W C & Ins Rep 131, *Grand Trunk Ry Co of Canada* v *M Alpine*, [1914] A C 599

(*o*) *Prud Ass Co* v *Edmunds* 2 App Cas 487, at p 507, *per* Ld Blackburn

(*p*) R S C , 1883, Order XXXIX r 6, see *Bray* v *Ford*, [1896] A C 44, *Barber* v *Deutsche Bank*, [1919] A C 304

(*q*) A new trial cannot be had in a case of felony, *R* v *Bertrand*, L R 1 P C 520, disapproving *R* v *Scaife*, 17 Q B 238, *R* v *Murphy*, L R 2 P C 35

(*r*) *Allen* v *Allen*, [1894] P 248, at p 255

(*s*) See *Metr Ry Co* v *Wright*, 11 App Cas 152

(*t*) R S C 1883, Order LVIII r 4, *Allcock* v *Hall*, [1891] 1 Q B 444 (approved in *Paquin* v *Beauclerk*, [1906] A C 148, at p 161), *Toulmin* v *Miller*, 17 Q B D 603 (but see the same case in 12 App Cas 746), *Skeate* v *Slaters, Ltd*, [1914] 2 K B 429, *Winterbotham, Gurney & Co* v *Sibthorp*, [1918] 1 K B 625, *Everett* v *Griffiths*, [1921] 1 A C 631, at pp 656, 669

fact and if ever they come to be confounded it will prove the confusion and destruction of the law of England" (*u*)

IN PRÆSENTIA MAJORIS CESSAT POTENTIA MINORIS (*Jenk Cent* 214)—*In presence of the greater the power of the inferior ceases* (*x*)

This maxim has been usually (*y*) cited with special reference to the transcendent nature of the powers vested formerly in the Court of King's Bench, and now, together with those formerly vested in the Courts of Common Pleas and Exchequer, in the King's Bench Division of the High Court (*z*)

It is the function of the King's Bench Division to keep all inferior jurisdictions within the bounds of their authority and to correct irregularities in their proceedings It commands magistrates and others to do what their duty requires in every case where there is no other specific remedy It protects the liberty of the subject by speedy and summary interposition It takes cognizance both of criminal and civil causes, the former in what is called the Crown side, or Crown Office the latter in what, as regards the old Court of King's Bench, was called the plea side of the Court (*a*)

To this supremacy of the Court of King's Bench may be attributed the fact that on its coming into any county the power and authority of other criminal tribunals therein situate were *pro tempore* suspended (*b*), *in præsentia majoris cessat potestas minoris* (*c*) And so no commissioners of oyer and terminer or gaol delivery could sit in the county of Middlesex during term time, because the King's Bench sat in that county, but in the City of London such commissioners could sit at any time, because the King's Bench never sat there (*d*) It was held (*e*), however, that the authority of a Court of Quarter Sessions, whether for a county or a borough, was not in law either determined or

(*u*) *R* v *Poole*, Cas t H 23, at 28
(*x*) See the maxim, *Omne majus continet in se minus*, *post*, Chap IV
(*y*) See the *Case of the Marshalsea*, 10 Rep 68 b, at 73 b, *Ld Sanchar s Case* 9 Rep 118 b, 2 Inst 166
(*z*) Judicature Act, 1873, s 34
(*a*) *R* v *Gillyard*, 12 Q B 527, at p 530
(*b*) 4 Inst 73, see 25 Geo 3, c 18, s 1
(*c*) *Ld Sanchar s Case*, 9 Rep 118 b
(*d*) Ibid
(*e*) *Smith* v *R*, 13 Q B 738, at p 744

suspended by the coming of the judges into the county under their commission of assize, oyer and terminer, and general gaol delivery, though "it would be highly inconvenient and improper, generally speaking, for the magistrates of a county to hold their sessions concurrently with the assizes, even in a different part of the county" But *Smith* v *R* (*f*) was decided upon the ground that the judges of assize were not a superior Court, such as the King's Bench the Judicature Act, 1873, s 29, subsequently made them such a court, and it is doubtful whether *Smith* v *R* is still law As regards the district of the Central Criminal Court it is expressly provided (*g*) that quarter sessions are not affected by the sitting of that Court

§ II THE MODE OF ADMINISTERING JUSTICE

Having in the last section considered some maxims relating peculiarly to the judicial office, the reader is here presented with a few which have been selected in order to show the mode in which justice is administered in our Courts, and which relate rather to the rules of practice than to the legal principles observed there

AUDI ALTERAM PARTEM —*No man shall be condemned unheard*

Statement of Rule

It has long been a received rule (*h*), that no one is to be condemned, punished, or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard (*i*) In the words of the moralist and poet—

> *Quicunque aliquid statuerit, parte inaudita alterâ,*
> *Æquum licet statuerit, haud æquus fuerit* (*k*)

Examples

A writ of sequestration, therefore, cannot properly issue from

(*f*) 13 Q B 738

(*g*) By the Central Criminal Court Act, 1834 (4 & 5 Will 4, c 36), s 21

(*h*) It is "an indispensable requirement of justice that the party who has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him" (*per* Erle, C J , in *Re Brook*, 16 C B N S 416)

(*i*) *Per* Parke, B , in *Re Hammersmith Rent charge*, 4 Ex 87, at p 97, *per* Ld Campbell in *R* v *Archbp of Canterbury*, 1 E & E 538, at p 559, *per* Ld Kenyon in *Harper* v *Carr*, 7 T R 270, at p 275, and in *R* v *Benn*, 6 Id 194 at p 198, *per* Bayley, B , in *Capel* v *Child* in 2 Cr & J 558, at p 579 (see *Daniel* v *Morton*, 16 Q B 198), *Bagg's Case* 11 Rep 93 b, *R* v *Chancellor of University of Cambridge*, 1 Str 557, at p 566, *R* v *Gaskin* 8 T R 209, *R* v *Saddlers' Co* , 10 H L Cas 404, at p 459

(*k*) Seneca, Medea, 195 (cited in *Boswell's Case*, 6 Rep 48 b, at 52 a,

the Consistory Court of the Diocese to a vicar who has disobeyed a monition from his bishop, without previous notice to the vicar to show cause why it should not issue, for the sequestration is a proceeding partly *in pœnam*, and no proposition is more clearly established than that "a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless, indeed, the legislature has expressly or impliedly given an authority to act without that necessary preliminary" (*l*)

An award made in violation of the above principle may be set aside (*m*), and the principle is binding upon the committee of a members' club when they expel a member for alleged misconduct (*n*)

No person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it be given to him (*o*) "The laws of God and man," said Fortescue, J, in *Dr Bentley's Case* (*p*), "both gave the party an opportunity to make his defence, if he has any" And immemorial custom cannot avail in contravention of this principle (*q*)

In conformity also with the elementary principle under consideration, when a complaint has been made or an information exhibited before a justice of the peace, the accused person has due notice given him, by summons or otherwise, of the accusation against him, in order that he may have an opportunity of answering it (*r*)

in *Bagg's Case*, 11 Rep 93 b, at 99 a, in *Re Hammersmith Rent charge* 4 Ex 87, at p 97, in *Graham* v *Furber*, 14 C B 134, at p 165, and in *Smith* v *R*, 3 App Cas 614, at p 624)

(*l*) *Bonaker* v *Evans*, 16 Q B 162, at p 171 (followed, but distinguished in *Bartlett* v *Kirwood*, 2 E & B 771) See *Daniel* v *Morton*, 16 Q B 198 *Ex parte Hopwood*, 15 Id 121, *Ex parte Story*, 8 Ex 195, and 12 C B 767, at p 775, *Reynolds* v *Fenton*, 3 C B 187, *Meeus* v *Thellusson*, 8 Ex 638, *Ferguson* v *Mahon*, 11 A & E 179, *R* v *Cheshire Lines Committee*, L R 8 Q B 344

(*m*) *Thorburn* v *Barnes*, L R 2 C P 384, at p 401 (approved in *Oppenheim* v *Mahomed Haneef*, [1922] 1 A C 482) *Re Brook*, 16 C B N S 403

(*n*) *Fisher* v *Keane*, 11 Ch D 353 *Innes* v *Wylie* 1 Car & Kir 257, *Wood* v *Wood*, L R 9 Exch 190, 196, *Russell* v *Russell*, 14 Ch D 471, 478, *Gray* v *Allison* 25 T L R 531 see *D Arcy* v *Adamson*, 29 T L R 367

(*o*) *Re Pollard*, L R 2 P C 106, at p 120

(*p*) *R* v *Chancellor of Cambridge*, 1 Str 557, *per* Maule, J in *Abley* v *Dale*, 10 C B 62, at p 71, *per* Ld Campbell in *Ex parte Ramshay*, 18 Q B 173, at p 190, *per* Byles, J, in *Cooper* v *Wandsworth B of W*, 14 C B N S 180, at p 194

(*q*) *Williams* v *Ld Bagot*, 3 B & C 772

(*r*) Paley, Conv, 4th ed 67, 93 See *Bessell* v *Wilson*, 1 E & B 489

A statute establishing a gas-light company enacted that if any person should neglect, for a period of ten days after demand, to pay rent due from him to the company for gas supplied, the rent should be recoverable by a warrant of justice and execution thereunder A warrant issued by a justice under this Act, without previously summoning and hearing the party to be distrained upon, was held to be illegal, though a summons and hearing were not in terms required by the Act, for the warrant is in the nature of an execution, without a summons the party charged has no opportunity of going to the justice, and a man shall not "suffer in person or in purse without an opportunity of being heard" (*s*)

The Metropolis Local Management Act, 1855, s 76, empowered the vestry or district board to alter or demolish a house where the builder had neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation It was held that this enactment did not empower the board to demolish such building without first giving the party guilty of the omission an opportunity of being heard (*t*), for "a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds," and "that rule is of universal application and founded upon the plainest principles of justice" (*u*)

Although cases may be found in the books of decisions under particular statutes which at first sight seem to conflict with the maxim, it will be found on consideration that they are not inconsistent with it, for the rule, which is one of elementary justice, only requires that a man shall not be subject to final judgment or to punishment without an opportunity of being heard (*x*)

(*s*) *Painter* v *Liverpool Gaslight Co*, 3 A & E 433, see also *Hammond* v *Bendyshe*, 13 Q B 869, *R* v *Totnes Union*, 7 Id 690, *Bessell* v *Wilson*, 1 E & B 489, *Gibbs* v *Stead*, 8 B & C 528

(*t*) *Cooper* v *Wandsworth Board of Works*, 14 C B N S 180 (cited by Byles, J, in *Re Brook*, 16 Id 403, at p 419), see *Hopkins* v *Smethwick L B*, 24 Q B D 712

(*u*) *Per* Willes, J, in *Cooper* v *Wandsworth B of W*, *supra*, at p 170

(*x*) *Per* Alderson, B, in *Re Hammersmith Rent charge*, 4 Ex 87, at p 95, see also *Re Camberwell Rent charge*, 4 Q B 151

NEMO DEBET ESSE JUDEX IN PROPRIA SUA CAUSA (12 *Rep* 114) —*No man can be judge in his own cause*

It is a fundamental rule in the administration of justice, that a person cannot be judge in a cause wherein he is interested (*y*), *nemo sibi esse judex vel suis jus dicere debet* (*z*), and, therefore, in the reign of James I, it was solemnly adjudged that the king cannot take any cause, whether civil or criminal, out of any of his Courts, and give judgment upon it himself, but it must be determined and adjudged in some Court of justice according to the law and custom of England, and "the judges informed the king that no king, after the Conquest, assumed to himself to give any judgment in any case whatsoever which concerned the administration of justice within this realm, but these were solely determined in the Courts of justice" (*a*), and *rex non debet esse sub homine sed sub Deo et lege* (*b*) Rule

It is, then, a rule observed in practice, and of the application of which instances not unfrequently occur, that, where a judge is interested in the result of a cause, he cannot, either personally or by deputy, sit in judgment upon it (*c*) If, for instance, a plea allege a prescriptive right in the lord of the manor to seize cattle damage feasant, and to detain the distress until fine paid for the damages at the lord's will, this prescription will be void, and the plea bad, because it is against reason, if wrong be done any man, that he thereof should be his own judge (*d*), and it is a maxim of law, that *aliquis non debet esse judex in propria causa, quia non potest esse judex et pars* (*e*), *nemo potest esse simul actor et judex* (*f*), no man can be at once judge and suitor

A leading case in illustration of this maxim is *Dimes* v *Grand Junction Canal Co* *Dimes* v *Grand Junction Canal Co*

(*y*) *Per* Cur, in *Great Charte* v *Kennington*, 2 Stra 1173 see also Roll Abr Judges, Pl 11 *Egerton* v *Brownlou*, 4 H L Cas 1, at pp 96, 240

(*z*) C 3, 5 1

(*a*) *Prohibitions del Roy*, 12 Rep 63 (cited *Bridgman* v *Holt* Show P Ca 111, at p 126), 4 Inst 71 In *Gorham* v *Bp of Exeter*, 15 Q B 52, an argument based on the above maxim was vainly urged See also *Ex parte Medu* in 1 E & B 609 *R* v *Hoseason*, 14 East, 605

(*b*) Fleta, fo 2 c 5

(*c*) *Brooks* v *Rivers*, Hardw 503 *Earl of Derby's Case* 12 Rep 114 *per* Holt, C J in *Anon*, 1 Salk 396, *Worsley* v *S Devon Ry Co*, 16 Q B 539

(*d*) Litt § 212

(*e*) Co Litt 141 a

(*f*) See *R* v *G W Ry Co*, 13 Q B 327, *R* v *Dean of Rochester*, 17 Q B 1 (followed in *R* v *Rand*, L R 1 Q B 230, at p 233), *Re Ollerton*, 15 C B 796, *Re Chandler*, 1 C B N S 323

Grand Junction Canal Co (*g*), where the House of Lords, following the unanimous opinion of the judges, held that the decrees of Lord Cottenham, L C , in favour of the canal company were voidable and must be reversed, on the ground that when he made the decrees he was a shareholder of the company and this fact was unknown to the other parties to the suit "It is of the last importance," said Lord Campbell, "that the maxim that 'no man is to be a judge in his own cause' should be held sacred And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest We have again and again set aside proceedings in inferior tribunals, because an individual, who had an interest in a cause, took a part in the decision And it will have a most salutary effect on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and should be set aside This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence"

The opinion delivered by the judges in this case (*h*) shows, however, that the decision of a judge made in a cause in which he has an interest is, in a case of necessity, unimpeachable, *ex gr* , if an action were brought against all the judges of a Court in a matter over which that Court had exclusive jurisdiction (*i*), or where a judge commits for contempt of Court (*k*) Nor does the principle under consideration apply to avoid the award of a referee to whom, though necessarily interested in the result, parties have contracted to submit their differences (*l*), though ordinarily it is "contrary to reason that an arbitrator or umpire should be sole and uncontrolled judge in his own cause" (*m*)

(*g*) 3 H L Cas 759 (as to which see *L N W Ry Co* v *Lindsay*, 3 Macq Sc App Cas 99, at p 114), *Re Dimes* 14 Q B 554 *Ellis* v *Hopper*, 3 H & N 766, *Williams* v *G W Ry Co*, Id 869 *Lancaster & Carlisle Ry Co* v *Heaton*, 8 E & B 952

(*h*) *Dimes* v *Grand Junc Can Co* 3 H L Cas 759, at p 787 (citing Year Book, 8 Hen 6 19, and 2 Roll Abr 93)

(*i*) *Per* Ld Cranworth C , in *Ranger* v *G W Ry Co* , 5 H L Cas 72, at p 88 See *Ex parte Menhennet* L R 5 C P 16

(*k*) *Per* Field, J in *R* v *Bp of St Albans*, 9 Q B D 454, at p 457

(*l*) *Ranger* v *G W Ry Co* , 5 H L Cas 72

(*m*) *Per* Parke, B , in *Re Coombs*, 4 Ex 839, at p 841

Conformable to the general rule was a decision in the following case Upon an appeal to the Quarter Sessions of the borough of Cambridge, by a water company against an assessment to the poor rate, the deputy recorder of the borough presiding, the rate was reduced, at the time of hearing the appeal the deputy recorder was a shareholder in the company, and although he had in fact sold his shares he had not completed the transfer he was held incompetent to try the appeal (*n*)

In like manner, proceedings had before commissioners under a statute which forbade persons to act in that capacity when interested, have been adjudged void (*o*)

Any direct pecuniary interest, however small, in the subject-matter of inquiry will disqualify a judge (*p*), and any interest, though not pecuniary, will have the same effect, if it be sufficiently substantial to create a reasonable suspicion of bias (*q*) Thus, a justice of the peace may be disqualified if he himself be a litigant in a matter before the Court (*r*), or a party in a similar matter (*s*), but he is not precluded from trying offences under the Cruelty to Animals Prevention Act, merely because he is a subscriber to the society formed for the purpose of enforcing the Act (*t*) It has been held that a justice is not disqualified from acting as a member of the licensing committee by reason of his being either a member of a temperance association organised to oppose the granting of licenses (*u*), or a subscriber to such (*x*) an association, or a shareholder in a brewery company which sells beer in the district (*y*) Nor is a justice disqualified from adjudicating upon a summons against a ratepayer in arrear merely because he is a member of a town council, whose officer took out the summons (*z*)

(*n*) *R* v *Recorder of Cambridge*, 8 E & B 637

(*o*) *R* v *Aberdare Canal Co*, 14 Q B 854

(*p*) *Per* Blackburn, J, in *R* v *Rand* L R 1 Q B 230 *R* v *Hammond*, 9 L T 423, *R* v *Gaisford*, [1892] 1 Q B 381 See *R* v *M S & L Ry Co* L R 2 Q B 336, at p 339, *Fobbing Commrs* v *R*, 11 App Cas 449

(*q*) *Allinson* v *Gen Council of Medical Education* [1894] 1 Q B 750, 758 *R* v *Huggins* [1895] 1 Q B 563 but see *R* v *Burton* [1897] 2 Q B 468

(*r*) *R* v *Meyers* 1 Q B D 173

(*s*) *R* v *Great Yarmouth JJ* 8 Q B D 525

(*t*) *R* v *Mayor of Deal* 45 L T 439

(*u*) *R* v *Dublin JJ* [1904] 2 Ir 75, but see *R* v *Frazer* 57 J P 500, where the converse was held and see also observations of Gibson, J, in *R* v *Tyrone JJ*, 38 I L T R 26

(*x*) *Goodall* v *Bisland*, S C 1152 Ct of Sess

(*y*) *R* v *Tempest*, 86 L T 585

(*z*) *R* v *Handsley* 8 Q B D 383, where *R* v *Gibbon*, 6 Id 168, was disapproved *Sed alster* if the justice is connected with the prosecution, *R* v

It may be generally stated that a justice, who is interested in a matter pending before the Court of Quarter Sessions, may not take any part in the proceedings, unless indeed all parties know that he is interested and consent, either tacitly or expressly, to his presence and interference (*a*) In such a case it has been held that the presence of one interested justice renders the Court improperly constituted, and vitiates the proceedings, it is immaterial that there was a majority in favour of the decision, without reckoning the vote of the interested justice (*b*) And, on the same principle, where a grand jury at assizes threw out a bill preferred against a parish for non-repair of a road, the Court of Queen's Bench granted a criminal information against the parish, on the ground that two of the grand jurors were large landowners therein, and had taken part in the proceedings on the bill (*c*), for "it is very important that no magistrate, who is interested in the case before the Court, should interfere, while it is being heard, in any way that may create a suspicion that the decision is influenced by his presence or interference" (*d*)

The mere presence on the bench, however, of an interested justice during part of the hearing of a case, will not be deemed sufficient ground for setting aside an order of sessions made on such hearing, if it be shown that he took no part in the hearing, came into Court for a different purpose, and in no way influenced the decision (*e*), but unless this be shown, the mere fact of his presence on the bench will make the order liable to be quashed (*f*)

Milledge, 4 Q B D 332, *R* v *Lee* 9 Q B D 394, see *R* v *Huntingdon JJ*, 4 Q B D 522, *R* v *Farrant*, 20 Q B D 58, and see *R* v *Sunderland JJ*, [1901] 2 K B 357, where justices, as members of a corporation interested, were held disqualified, because in the circumstances there was a real likelihood of bias

(*a*) *R* v *Cheltenham Commrs* 1 Q B 467, *Wakefield Board of Health* v *W Riding Ry Co*, 6 B & S 794, *R* v *W Riding JJ*, Id 802 Nothing is better settled than this that a party aware of the objection of interest cannot take the chance of a decision in his favour, and afterwards raise the objection (*per* Cockburn, C J, in *Wakefield Board of Health* v *W Riding Ry Co*, 6 B & S 794 at p 802, see also *R* v *Great Yarmouth JJ*, 8 Q B D 525, at p 529)

(*b*) *R* v *Hertfordshire JJ*, 6 Q B 753 See *R* v *Middlesex JJ*, 1 Q B D 173 *R* v *Lond C C*, [1892] 1 Q B 190, *R* v *Lancashire JJ*, 75 L J K B 198

(*c*) *R* v *Upton St Leonards*, 10 Q B 827 See *Esdaile* v *Lund*, 12 M & W 734

(*d*) *Per* Wightman, J, in *R* v *Suffolk JJ*, 18 Q B 416, at p 421 See *R* v *Surrey JJ*, 21 L J M C 195 (*e*) *R* v *London JJ*, 18 Q B 421 (*c*)

(*f*) *R* v *Suffolk JJ*, 18 Q B 416, *R* v *Lond C C*, *supra*

Hobart, C J , is reported to have said (*g*) that "even an Act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself, for *jura naturæ sunt immutabilia* and they are *leges legum* " But although it is contrary to the general rule to make a person judge in his own cause, " the legislature can, and no doubt in a proper case would, depart from that general rule," and an intention to do so being clearly expressed, the Courts give effect to their enactment (*h*) And if a particular relation be created by statute between A and B , and a duty be imposed upon A to investigate and decide upon charges preferred against B , the maxim *nemo sibi esse judex vel suis jus dicere debet* would not apply (*i*)

Lastly, there is no ground whatever for saying that the governor of a colony cannot give his official consent to a legislative measure in which he may be individually interested It might as well be asserted that the sovereign of these realms could not give assent to a bill in Parliament in which the sovereign was personally concerned (*k*)

ACTUS CURIÆ NEMINEM GRAVABIT (*Jenk Cent* 118)—*An act of the Court shall prejudice no man*

This maxim " is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law " (*l*) In virtue of it, where a case stands over for argument on account of the multiplicity of business in the Court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively to meet the justice of the case (*m*), and, therefore, if one party to an action die during a

(*g*) *D* v *Savadge*, Hob 85, at p 87, cited arg in *Gorham* v *Exeter (Bishop of)* 5 Exch 630, at p 671

(*h*) *Per* Blackburn, J , in *Mersey Docks Trustees* v *Gibbs*, L R 1 H L 93, at p 110 See *Ex p Workington Overseers*, [1894] 1 Q B 416 *R* v *Bolingbroke*, [1893] 2 Q B 347, *R* v *Henley*, [1892] 1 Q B 504

The Jurisdiction in Rating Act, 1877 (40 & 41 Vict c 11), s 1, enacts that no judge of the superior Courts shall be disqualified from acting in any proceeding upon the ground that he is a ratepayer, or interested in a rating question

(*i*) *Wildes* v *Russell*, L R 1 C P 722, at p 747, *R* v *Bp of St Albans*, 9 Q B D 454

(*k*) *Phillips* v *Eyre*, L R 4 Q B 225, at p 244

(*l*) *Per* Cresswell, J , in *Freeman* v *Tranah*, 12 C B 406, at p 415

(*m*) *Per* Garrow, B , in *Lawrence* v *Hodgson*, 1 Y & J 368, at p 372

curia advisari vult, judgment may be entered *nunc pro tunc*, for the delay is the act of the Court, for which neither party should suffer (*n*)

In a case involving issues both of law and fact, the issues of fact were tried in August, 1843, a verdict was found for the plaintiff, and a rule for a new trial was discharged in Trinity Term, 1844, in the same term the demurrers were set down in the special paper, but did not come on for argument until May, 1845, when judgment was given upon them for the plaintiff The plaintiff, having died in March, 1845, the Court made absolute a rule to enter judgment as of Trinity Term, 1844 (*o*) It may be here mentioned that the power of the Court to enter judgment *nunc pro tunc* does not depend upon statute (*p*) It is a power at common law, and, in accordance with the ancient practice of the Court, is adopted in order to prevent prejudice to a suitor from delay occasioned by the act of the Court (*q*)

Where, however, the delay is not attributable to the act of the Court, the above maxim does not apply (*r*)

The preceding examples will probably be sufficient to illustrate the general doctrine, which is equally founded on common sense and on authority, that the act of a Court of law shall prejudice no man, and in conformity with this doctrine, it has been observed, that, as long as there remains a necessity, in any stage of the proceedings in an action, for an appeal to the authority of the Court, or any occasion to call upon it to exercise its jurisdiction, the Court has, even if there has been some express arrangement between the parties, an undoubted right, and is, moreover, bound to interfere, if it perceives that its own process or jurisdiction is about to be used for purposes which are not consistent with justice (*s*)

(*n*) *Cumber* v *Wane*, 1 Stra 426, *Moor* v *Roberts*, 3 C B N S 844, *per* Tindal, C J, in *Harrison* v *Heathorn* 6 Scott, N R 735 at p 797, *Toulmin* v *Anderson*, 1 Taunt 385, Jenk Cent 180 See *Lanman* v *Audley*, 2 M & W 535, *Turner* v *L & S W Ry Co*, L R 17 Eq 561 *Ecroyd* v *Coulthard*, [1897] 2 Ch 554, R S C 1883, O XLI, r 3, O XVII, r 1

(*o*) *Miles* v *Bough*, 3 D & L 105 (recognising *Laurence* v *Hodgson*, 1 Y & J 368 and *Brydges* v *Smith* 8 Bing 29), *Miles* v *Williams* 9 Q B 47

(*p*) As to the effect of the repealed statutes 17 Car 2, c 8, 15 & 16 Vict c 76, s 139, see Archbold's Practice, 14th ed 1029

(*q*) *Evans* v *Rees*, 12 A & E 167, *Miles* v *Bough*, *supra*, and cases there cited, *Vaughan* v *Wilson* 4 Bing N C 116, *Green* v *Cobden*, 4 Scott, 486

(*r*) *Freeman* v *Tranah*, 12 C B 406 (recognised in *Heathcote* v *Wing*, 11 Ex 358), *Fishmongers Co* v *Robertson* 3 C B 970

(*s*) *Wade* v *Simeon* 13 M & W 647 *Thomson* v *Harding*, 3 C B N S 254, *Sherborn* v *Huntingtower*, 13 Id 742, *Burns* v *Chapman*, 5 Id 481, at p 492

Cases, however, have occurred, in which injury was caused by the act of a legal tribunal, as by the *laches* or mistake of its officer, and where, notwithstanding the maxim as to *actus curiæ*, the injured party was without redress (*t*)

Lastly, it is the duty of a judge to try the causes set down for trial before him, and yet, if he refused to hold his Court, although there might be a complaint in Parliament respecting his conduct, no action would lie against him (*u*) So, in the case of a petition to the Crown to establish a peerage, if, in consequence of the absence of peers, a committee for privileges could not be held, the claimant, although necessarily put to great expense, and perhaps exposed to the loss of his peerage by death of witnesses, would be wholly without redress (*x*) In the above and other similar cases a wrong might be inflicted by a judicial tribunal, for which the law could supply no remedy

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ACTUS LEGIS NEMINI EST DAMNOSUS (2 *Inst* 287)—*An act in law shall prejudice no man* (*y*)

A distinction has often been drawn, in accordance with this maxim, between the act of the law and the act of a party Thus, where an advowson is owned by two patrons with the right to present in turn, the one loses his turn if he submit to a presentation usurped by the other, or by a stranger but his turn is merely postponed to the next vacancy, if the Crown, having emptied the living, refill it by virtue of the prerogative, for this, being the act of the law, *nemini facit injuriam* (*z*) Again, in the case of a lease with a condition for re-entry, the condition being entire was not apportionable, at common law (*a*), upon the reversion becoming severed by the act of the lessor, yet it

(*t*) *See Grace* v *Clinch* 4 Q B 606 *Leech* v *Lamb*, 11 Ex 437, *Re Llanbeblig etc* 15 L J M C 92 In *Winn* v *Nicholson*, 7 C B 819, at p 824 however Coltman, J remarked that no doubt, the Court will correct the mistake of its own officer See *Wilks* v *Perks*, 5 M & Gr 376 *Nazer* v *Wade* 1 B & S 728, *Morgan* v *Morris*, 3 Macq 323, R S C 1883, O XXVIII r 11

(*u*) *Ante* pp 61 *et seq*

(*x*) Arg in *Ferguson* v *Kinnoull* 9 Cl & F 251, at p 276

(*y*) *Finch s Case*, 6 Rep 63 a, at 68 a

(*z*) *Keen* v *Denny*, [1894] 3 Ch 169, *Calland* v *Trouard*, 2 Black H 324, *Grocers Co* v *Archbp of Canterbury* 2 Black W 770, Co Litt 378 a

(*a*) See the Conveyancing Act 1881 (44 & 45 Vict c 41), s 12, Law of Property Amendment Act, 1859 (22 & 23 Vict c 35), s 3

was apportionable, if the severance arose by act of law (*b*) Similarly, an involuntary assignment by operation or compulsion of law is no breach of a covenant or condition in a lease against assignment (*c*)

If a person abuse an authority given by the law, he becomes a trespasser *ab initio*, as if he had never had that authority, which is not the case where an authority given by a party is abused (*d*), and this distinction has been ascribed to the principle that the law wrongs no man, *actus legis nemini facit injuriam* (*e*)

EXECUTIO JURIS NON HABET INJURIAM (2 *Inst* 482)—*Legal process, if regular, does not afford a cause of action*

It was a rule of the Roman law, as it is of our own, that if an action be brought in a Court which has jurisdiction upon insufficient grounds or against the wrong party, no injury is thereby done for which an action can be maintained—*Is qui jure publico utitur non videtur injuriæ faciendæ causa hoc facere, juris enim executio non habet injuriam* (*f*), and *nullus videtur dolo facere qui suo jure utitur* (*g*), he is not to be

(*b*) Co Litt 215 a, *Dumpor's Case*, 4 Rep 119 b, at 120 b

(*c*) *Doe* d *Mitchinson* v *Carter*, 8 T R 57 and 301 (execution), *Doe* d *Cheere* v *Smith*, 5 Taunt 795 (bankruptcy), *Baily* v *De Crespigny*, L R 4 Q B 180 (exercise of statutory powers)

(*d*) *Six Carpenters Case* 8 Rep 146 a For certain statutory modifications of the rule, see notes to the case in 1 Sm L C

(*e*) Bac Abr Trespass (B) For other examples of the maxim see *Milbourn* v *Ewart*, 5 T R 381 at p 385, *Nadin* v *Battie*, 5 East, 147, 1 Prest Abs of Tit 346

(*f*) D 47, 10, 13, s 1, see *Waterman* v *Freeman*, Hob 266 *Quartz Hill, etc Co* v *Eyre*, 11 Q B D 674 at p 690

(*g*) D 50, 17, 55

In connection with this rule may be noticed the following cases —If an individual prefer a complaint to a magistrate and procure a warrant to be granted upon which the accused is taken into custody, the complainant is not liable in trespass for the imprisonment, even though the magistrate had no jurisdiction (*Brown* v *Chapman*, 6 C B 365, at p 376) One who mistakenly prefers a charge against another before a justice will not be liable in trespass for a remand judicially ordered by the justice (*Lock* v *Ashton*, 12 Q B 871 See also *Freegard* v *Barnes*, 7 Ex 827) Nor is an execution creditor liable to an owner of goods which had been wrongfully taken in execution for damage sustained by their sale under an interpleader order (*Walker* v *Olding* 1 H & C 621) The above and similar cases seem referable to the rule, *nullus videtur dolo facere qui jure suo utitur*

On the other hand, a defendant who was taken in execution under a *ca sa* issued on a judgment for less than £20, without the order of the judge who tried the cause, could maintain an action of trespass against the plaintiff and his attorney (*Brooks* v *Hodgkinson*, 4 H & N 712) See *Gilding* v *Eyre*, 10 C B N S 592, *Huffer* v *Allen*, L R 2 Ex 15

esteemed a wrongdoer who merely avails himself of his legal rights This is the primary meaning of the maxim On the other hand, if an individual, under colour of the law, does an illegal act, or if he abuses the process of the Court to make it an instrument of oppression or extortion, this is a fraud upon the law, by the commission of which liability will be incurred (*h*) In this, which is obviously a different sense, the leading maxim has also been applied

In a leading case (*i*), illustrative of this latter proposition, the facts were as follows —A *ca sa* was sued out against the Countess of Rutland, but the officers entrusted with the execution of the sheriff's warrant fearing a rescue, the plaintiff was advised to enter a feigned action in London, according to the custom, against the countess, to arrest her thereupon, and then to take her body in execution on the *ca sa* In pursuance of this advice, the Countess was arrested and taken to the Compter "and at the door thereof the sheriff came, and carried the countess to his house, where she remained seven or eight days, till she paid the debt" It was held, however, that the arrest was not made by force of the writ of execution, and was, therefore, illegal, "and the entering of such feigned action was utterly condemned by the whole Court, for, by colour of law and justice, they, by such feigned means, do against law and justice and so make law and justice the author and cause of wrong and injustice"

Again, in *Hooper* v *Lane* (*k*) it was held in accordance with the spirit of the maxim under our notice, that if the sheriff, having in his hands two writs of *ca sa*, the one valid and the other invalid, arrest on the latter alone, he cannot justify the arrest under the valid writ Nor can the sheriff, whilst a person is unlawfully in his custody by virtue of an arrest on an invalid writ, arrest that person on a good writ "to allow the sheriff to make such an arrest while the party is unlawfully confined by him, would be to permit him to profit by his own wrong (*l*) and therefore cannot be tolerated" (*m*)

(*h*) See *per* Pollock, C B, in *Smith* v *Monteith* 13 M & W 427 at p 439 cf *per* Ld Watson in *King* v *Henderson*, [1898] A C 720, at pp 731 732 The Court has a general superintending power to prevent its process from being used for the purpose of oppression and injustice (*per* Jervis, C J in *Webb* v *Adkins*, 14 C B 401 at p 407) See *Alleyne* v *R*, 5 E & B 399, *M Gregor* v *Barrett*, 6 C B 262

(*i*) *Countess of Rutland's Case* 6 Rep 52 b

(*k*) 6 H L Cas 443 (*l*) *Post*, Chap V

(*m*) *Per* Ld Cranworth, in *Hooper* v *Lane*, 6 H L Cas, 443, at p 551

We shall hereafter (*n*) have occasion to consider the general doctrine respecting the right to recover money paid under compulsion We may, however, here observe that, where compulsion consists in an illegal restraint of liberty, a contract entered into by reason thereof is voidable If a man is under duress of imprisonment, or if, the imprisonment being lawful, he is subjected to illegal force and privation, and in order to obtain his liberty, or to avoid such illegal hardship, he enters into a contract, he may allege this duress in avoidance of the contract, but an imprisonment is not sufficient duress to avoid a contract obtained through the medium of its coercion, if the party was in proper custody under the regular process of a Court of competent jurisdiction, and this distinction results from the rule of law, *executio juris non habet injuriam* (*o*)

Further, although, as elsewhere stated, an action will not lie to recover damages for the inconvenience occasioned to a party who had been sued by another without reasonable or sufficient cause (*p*), yet, if the proceedings in the action were against A , and a writ of execution is issued by mistake against the goods of B , trespass will clearly lie, at suit of the latter, against the execution creditor (*q*), or against his attorney, who issued execution (*r*), and where an attorney deliberately directs the execution of a warrant, he, by so doing, takes upon himself the chance of all consequences, and will be liable in trespass if it prove bad (*s*) In cases similar to the above, however, the maxim is to *executio juris* is applicable, if at all, only in the secondary sense above noticed, because the proceedings actually taken are *not* sanctioned by the law, and therefore the party taking them, although acting under the colour of legal process, is not protected

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(*n*) See the maxim *volenti non fit injuria*, *post*, Chap V

(*o*) 2 Inst 482, *Stepney* v *Lloyd*, Cro Eliz 646 *Anon* , 1 Lev 68, *Waterer* v *Freeman*, Hob 266, *R* v *Southerton*, 6 East, 126, at p 140, *Anon* , Al 92, *Le Grand Case in le Court Gards*, 2 Rolle, 294, at p 301

(*p*) *Per* Rolfe, B , in *Davies* v *Jenkins*, 11 M & W 745, at p 746, and cases cited under the maxim, *ubi jus, ibi remedium*, *post*, Chap V

(*q*) *Jarmain* v *Hooper*, 7 Scott, N R 663, *Walley* v *M Connell*, 13 Q B 903, see *Riseley* v *Ryle*, 11 M & W 16, *Collett* v *Foster*, 2 H & N 356, *Churchill* v *Siggers*, 3 E & B 929, *Roret* v *Lewis*, 5 D & L 371, *Dimmack* v *Bowley*, 2 C B N S 542

(*r*) *Davies* v *Jenkins*, 11 M & W 745, *Rowles* v *Senior*, 8 Q B 677 and cases there cited

(*s*) *Green* v *Elgie*, 5 Q B 99

IN FICTIONE JURIS SEMPER ÆQUITAS EXISTIT (11 *Rep* 51)—*Equity is the life of a legal fiction* (*t*)

The meaning of *fiction* in English law is not easily defined *Fictio*, in the Roman system, was a technical form of pleading, a false averment by one party which the other was not allowed to traverse, *eg gr*, that a *peregrinus* was a Roman citizen (*u*) It is, therefore, defined by commentators as *nihil aliud quam legis adversus veritatem in re possibili et justa causa dispositio* (*x*) The strict meaning of fiction in English jurisprudence is closely allied to *præsumptio juris et de jure*, or irrebuttable presumption of law There is, however, this difference, that a presumption of law *de jure* assumes a fact which may or may not be true, but which is probably true, while in fiction the falsehood of the assumption is understood and avowed (*y*) *Super falso et certo fingitur, super incerto et vero jure sumitur* Thus the *presumption* that a child under seven is *doli incapax* is probably true, but the *fiction* was almost certainly false that the plaintiff in former times suing in the Court of Exchequer was an accountant to the Crown (*z*), and avowedly so that a contract made on the high seas had been made at the Royal Exchange in London (*a*) The object of fiction will be apparent if it be considered that every decision of a Court of justice involves a syllogism, of which the major premiss is a general proposition of law, the minor is supported by the facts of the particular case, and the conclusion is the decision of the Court In the infancy of jurisprudence propositions of law were rigid, unbending rules, which lawyers were loth to qualify or weaken by exceptions In order to arrive at that conclusion to the syllogism which justice obviously demanded, the *major* premiss was not touched, but by a fiction of law something was assumed in the *minor* which was avowedly not true An examination of the older cases seems to show that fiction originally operated by an averment in the record, which although known to be false, was for the purpose of doing substantial justice assumed to be true It must, however, be

(*t*) 3 Bl Com 43 Co Litt 150 a *Mary Portington's Case*, 10 Rep 35 b, at 40 a, *Liford's Case*, 11 Rep 46 b, at 50 a

(*u*) Mayne, Ancient Law, Ch 2

(*x*) Gothofred ad Dig lib 22, tit 3, s 3, see *Sheffield* v *Radcliffe*, 2 Rolle 501, *Sheild's Case*, Palm 351 at p 354, Finch, C L Bk 1, c 5

(*y*) Best on Presumptions of Law, p 24

(*z*) 3 Bl Com 46

(*a*) 3 Bl Com 107, 4 Inst, 134

remarked that fiction is frequently employed in a less accurate sense to include the extension by Courts of equity of rules of law (*b*) The modification of pleading in modern times has tended to diminish the operation of fiction strictly so called, although the effect of its former prevalence is probably ineradicable The tendency to set out with truth and detail the actual facts of a case is incompatible with the use of fictitious averments, which are no longer necessary, when the rules of law are themselves modified and developed so as to meet the ends of justice The analogy between fiction and presumption *juris et de jure* has been already noticed It may here be added, that while the latter may never be rebutted, and are absolute propositions of the law, of fiction, it has been said, "although it shall never be contradicted so as to defeat the ends for which it was invented, for every other purpose it may be contradicted" (*c*) It is not to be used at all, except "*ad conciliandam æquitatem cum ratione et subtilitate juris*" (*d*) Since equity is the life of legal fiction, where substantial justice does not require its interference, still more where it would suffer from its operation, fiction has no place (*e*) Fictions, therefore, are only to be made for necessity, and to avoid mischief (*f*), and must never be allowed to work prejudice or injury to an innocent party (*g*) *Fictio legis neminem lædit, nemini operatur damnum vel injuriam* (*h*)

Examples

The following examples must suffice to illustrate the rule which we have been discussing If a man disseise me, and during the disseisin cut down the trees growing upon the land, and afterwards I re-enter, I shall have an action of trespass

(*b*) The doctrine that 'money to be laid out in land is to be treated as land," long established in Courts of equity, is in truth a mere fiction' (*per* Kelly, C B, in *Re De Lancey*, L R 4 Ex 345, at p 358) The doctrine that a deed executing a power refers back to the instrument creating the power, so that the appointee takes under him who created the power, and not under him who executes it, has been called a fiction, and so it was considered in *Bartlett* v *Ramsden*, 1 Keb 570 See also *per* Ld Hardwicke in *Duke of Marlborough* v *Ld Godolphin*, 2 Ves Sen 61, at p 78, where the above proposition is explained *Clere's Case*, 6 Rep 17 b

(*c*) *Mostyn* v *Fabrigas*, Cowp 161, *per* Ld Mansfield, at p 177, *per* Bram well, B, in *A G* v *Kent*, 1 H & C 12, at p 28

(*d*) Scot ad Pand 22, 3, Voct n 19

(*e*) *Johnson* v *Smith*, 2 Burr 950, *per* Ld Mansfield, at p 962, and see *Portington's Case*, 10 Rep 35 b, at 40 a, and *Leyfield s Case*, 10 Rep 88 a, at 89 b

(*f*) *Butler and Baker's Case*, 3 Rep 25 a, at 30 a

(*g*) Ibid 29 b, *Lyford's Case*, 11 Rep 46 b, at 51 a, *Menvil s Case*, 13 Rep 19 b, at 21 a

(*h*) *Sheffield* v *Ratcliffe*, 2 Rolle 501, at p 502, *Sheffield's Case*, Palm 351, at p 354, also *Butler and Baker's Case*, 3 Rep 25 a, at 36 a

against him, for after my regress the law, as against the disseisor and his servants, supposes the freehold always to have continued in me, but if my disseisor makes a feoffment in fee, gift in tail, or lease for life or years, and afterwards I re-enter, I shall not have trespass against those who came in by title, for this fiction of the law, that the freehold always continued in me, is moulded to meet the ends of justice, and shall not, therefore, have relation to make him who comes in by title a wrongdoer, but in this case I shall recover all the mesne profits against my disseisor (*i*) It has also been held (*k*), that, though the customary heir of a copyhold cannot maintain trespass without entry, there is after entry a relation back to the time of accruing of the legal right to enter, so as to support an action for trespasses committed before such entry, this relation being 'created by law for the purpose of preventing wrong from being dispunishable, upon the same principle on which the law has given it in other cases"

Again, although for some purposes the whole assizes are to be considered as one legal day, 'the Court is bound, if required for the purpose of doing substantial justice, to take notice that such legal day consists of several natural days, or even of a fraction of a day' Evidence was therefore admitted to show that an assignment of his goods by a felon *bona fide* made for a good consideration after the commission day of the assizes was in truth made before the day on which he was tried and convicted, and, on proof of such fact, the property was held to pass by the assignment (*l*)

Where it appeared that the writ was issued on the 2nd of July, and on the same day, but before the issuing of the writ, the cause of action arose, it was argued, on demurrer, that the issuing of the writ of summons being a judicial act, must be considered as having taken place at the earliest moment of the day, and therefore before the cause of action accrued It was held, however, that the Court could take cognizance of the fact, that the writ did not issue until after the act had been committed for which the penalty was sought to be recovered (*m*)

(*i*) *Liford's Case*, 11 Rep 51 *Moore* v *Hussey*, Hobart, 93 at p 98 (cited by Coleridge, J , in *Garland* v *Carlisle*, 4 Cl & F 693, at p 710)

(*k*) *Barnett* v *Guildford*, 11 Ex 19, 33

(*l*) *Whitaker* v *Wisbey*, 12 C B 44 at pp 58, 59 See *R* v *Edwards*, and *Wright* v *Mills*, cited *ante*, p 50 and the maxim *de minimis non curat lex*, *post* There was formerly an analogous fiction relating to judgments (*Lyttleton* v *Cross*, 3 B & C 317 at p 325) but now see R S C 1883, O XLI , r 3

(*m*) *Clarke* v *Bradlaugh*, 8 Q B D 63, at p 66

Still less will a legal fiction be raised so as to operate to the detriment of any person, as in destruction of a lawful vested estate, for *fictio legis inique operatur aliqui damnum vel injuriam* (*n*) The law does not love that rights should be destroyed, but, on the contrary, for the supporting of them invents notions and fictions (*o*) And the maxim *in fictione juris subsistit æquitas* is often applied by our Courts for the attainment of substantial justice, and to prevent the failure of right "Fictions of law," as observed by Lord Mansfield, "hold only in respect of the ends and purposes for which they were invented When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth" (*p*)

CURSUS CURIÆ EST LEX CURIÆ (3 *Bulst* 53)—*The practice of the Court is the law of the Court* (*q*)

'Every Court is the guardian of its own records and master of its own practice" (*r*), and where a practice has existed it is convenient, except in cases of extreme urgency and necessity (*s*), to adhere to it, because it is the practice, even though no reason can be assigned for it (*t*), for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience (*u*) Hence, if any necessary proceeding in an

(*n*) *Butler & Baker's Case*, 3 Rep 25 a at 36 a *per* Cur, in *Waring* v *Dewberry*, 1 Stra 97

(*o*) *Per* Gould, J, in *Cage* v *Acton*, 1 Raym Ld 515, at pp 516, 517

(*p*) *Morris* v *Pugh*, 3 Burr 1241, at p 1243

(*q*) It was a common expression of the late Chief Justice Tindal, that the course of the Court is the practice of the Court (*per* Cresswell, J, in *Freeman* v *Tranah*, 12 C B 406, at p 414)

The power of each Court over its own process is unlimited it is a power incident to all Courts, inferior as well as superior, were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice (*per* Alderson B, in *Cocker* v *Tempest*, 7 M & W 502, cited *per* Willes, J, *Stammers* v *Hughes*, 18 C B 527, at p 535)

(*r*) *Per* Tindal, C J, in *Scales* v *Cheese*, 12 M & W 685 at p 687, *Gregory* v *Brunswick* 2 H L Cas 415, *Mellish* v *Richardson*, 1 Cl & F 224, *per* Alderson, B, in *Ex parte Story*, 8 Ex 195, at p 199 *Jackson* v *Galloway* 1 C B 280, *R* v *Denbighshire JJ*, 15 L J Q B 335, *per* Ld Wynford in *Ferrier* v *Howden*, 4 Cl & F 32 But see *Fleming* v *Dunlop*, 7 Cl & F 43

(*s*) See, for instance, *Finney* v *Beesley*, 17 Q B 86

(*t*) *Per* Ld Ellenborough in *Bovill* v *Wood*, 2 M & S 23, *per* Ld Campbell in *Edwards* v *Martyn*, 17 Q B 693

(*u*) *Per* Ld Eldon in *Ex parte Scott*, Buck 275 See *per* Ld Abinger in *Jacobs* v *Layborn*, 11 M & W 685, at p 690

action be informal, or be not done within the time limited for it, or in the manner prescribed by the practice of the Court, it may sometimes be set aside for irregularity, for *via trita via tuta* (*x*), and the Courts of law will not sanction a speculative novelty without the warrant of any principle, precedent, or authority (*y*)

It has been remarked, moreover, that there is a material distinction between things required to be done by the common or statute law of the land, and things required to be done by the rules and practice of the Court Anything required to be done by the law of the land must be noticed by a Court of appellate jurisdiction, but such a Court does not of necessity regard the practice of an inferior one (*z*) In matters of procedure and practice, as in matters of discretion, the practice of the House of Lords has been not to interfere with the decisions of Courts below, unless perfectly satisfied that they are based upon erroneous principles (*a*)

Lastly, even where the course of practice in criminal law has been unfavourable to the accused, and contrary to principles of justice and humanity, it has been held that such practice constitutes the law and cannot be altered without the authority of Parliament (*b*)

Consensus tollit Errorem (2 *Inst* 123)—*The acquiescence of a party who might take advantage of an error obviates its effect*

In accordance with this rule, if the venue in an action was laid in the wrong place, and this was done *per assensum partium*, with the consent of both parties, and so entered of record, it stood (*c*), and where, by consent of both plaintiff and defendant, the venue was laid in London, it was held, that no objection could afterwards be taken to the venue, notwithstanding it

(*x*) *Wood* v *Hurd* 3 Bing N C 45, *Isle of Ely Case*, 10 Rep 142 a

(*y*) See Judgm in *Ex parte Tollerton Overseers*, 3 Q B 792, at p 799

(*z*) *Per* Holroyd, J, in *Sandon* v *Proctor* 7 B & C 800 cited arg in *Bradley* v *Warburg*, 11 M & W 452, at p 455

(*a*) *Per* Ld Selborne in *Cowan* v *Buccleugh* 2 App Cas 344, at p 347

(*b*) *Per* Maule, J, in the *Insane Criminals Case*, 8 Scott, N R 595, at pp 599 600

(*c*) *Fineux* v *Hovenden* Cro Eliz 664, see Co Litt 126 a, and Mr Hargrave's note (1), *Crow* v *Edwards*, Hob 5 Local venues are now abolished for nearly all actions in the High Court see R S C Order XXXVI, r 10, *Buckley* v *Hull Docks Co*, [1893] 2 Q B 93, *Forbes* v *Samuel*, [1913] 3 K B 706, and s 2 of the Public Authorities Protection Act, 1893 (56 & 57 Vict c 61)

ought, under a particular Act, to have been laid in Surrey, for *consensus tollit errorem* (*d*) Consent cannot, however (unless by the express words of a statute), give jurisdiction (*e*), for mere nullity cannot be waived

Doctrine of waiver

On the maxim under consideration depends also the important doctrine of waiver, that is, the passing by of a thing (*f*), a doctrine which is of wide application both in the science of pleading and in those practical proceedings which are to be observed in the progress of a cause from the first issuing of the writ to the ultimate signing of judgment and execution

Pleading

With reference to pleading, however, the rule, that an error will be cured by the waiver of the opposite party, must be taken with considerable limitation, a mere mistake in form is now of little moment, but in the time of Lord Holt such an error might have defeated a substantial case, and was condoned if the other party pleaded over to it (*g*) The effect of a demurrer was to admit the truth of all matters which were sufficiently stated in the pleading demurred to, a result which might be obviated by obtaining leave to plead and demur to the same matter The equivalent of which can now be attained without leave by raising the point of law upon the pleadings (*h*) By pleading over, however, a party was not formerly considered to waive his right subsequently to take any substantial objection in law to the pleading of the other side It is conceived that, under the system introduced by the Rules of 1883 (*i*), this must still be the case For the judgment of the Court must ultimately be based upon and consistent with the record, and cannot give to a party that to which, upon his own showing, he is not in law entitled It must not, however, be forgotten that the Courts now use the widest discretion in directing such amendments as may be necessary in order to determine the real question in controversy (*k*)

Practice

When applied to the proceedings in an action, waiver may be defined to be the doing something after an irregularity com-

(*d*) *Furnival* v *Stringer*, 1 Bing N C 68

(*e*) See *Andrewes* v *Elliott*, 6 E & B 338 (recognised in *Tyerman* v *Smith*, Id 719, at p 724), *Lawrence* v *Wilcock*, 11 A & E 941, *Vansittart* v *Taylor*, 4 E & B 910, at p 912, *British Wagon Co* v *Gray*, [1896] 1 Q B 35

(*f*) Toml Law Dict tit *Waiver* See *Darnley* v *L C & D Ry Co*, L R 2 H L 43 *Ramsden* v *Dyson*, L R 1 H L 129, cited *post*

(*g*) *Anon*, 2 Salk 519 (*h*) Rules, 1883, O XXV, r 2

(*i*) Except in cases where the defendant relies upon the Statutes of Frauds or of Limitations, which must now as formerly, be pleaded (O XIX, r 15)

(*k*) Jud Act, 1873, s 24, sub s 7, Rules, 1883, O XXVIII, r 12

mitted, and with a knowledge of such irregularity, where the irregularity might have been corrected before the act was done, and it is essential to distinguish a proceeding which is merely irregular from one which is completely defective and void In the latter case the proceeding is a nullity, which cannot be waived by any *laches* or subsequent proceedings of the opposite party

Where, however, an irregularity has been committed, and where the opposite party knows of the irregularity, it is a fixed rule observed by all the Courts in this country, that he should come in the first instance to avail himself of it, and not allow the other party to proceed to incur expense "It is not reasonable afterwards to allow the party to complain of that irregularity, of which, if he had availed himself in the first instance, all that expense would have been rendered unnecessary" (*l*), and, therefore, if a party, after any such irregularity has taken place, consents to a proceeding which, by insisting on the irregularity, he might have prevented, he waives all exceptions to the irregularity (*m*) This is a doctrine long established and well known, and extends so far, that a person may be materially affected in a subsequent criminal prosecution by proceedings to the irregularity of which he has, by his silence, waived objection (*n*)

Implied assent

It may appear in some measure superfluous to add, that the consent which cures error in legal proceedings, may be applied as well as expressed for instance—where, at the trial of a cause, a proposal was made by the judge in the presence of the counsel on both sides, who made no objection, that the jury should assess the damages contingently, with leave to the plaintiff to move to enter a verdict for the amount found by the jury, it was held that both parties were bound by the proposal, and that the plaintiff's counsel was not therefore at liberty to move for a new trial on the ground of misdirection (*o*), for *qui tacet consentire videtur* (*p*), the silence of counsel implied their assent to the

(*l*) *Per* Ld Lyndhurst in *St Victor* v *Devereux*, 14 L J Ch 244, at p 246
(*m*) *Ex parte Alcock*, 1 C P D 68, *Ex parte Yeatman*, 16 Ch D 283, *Beresford* v *Geddes*, L R 2 C P 285, *Moseley* v *Simpson*, L R 16 Eq 226, *Ex parte Moore*, 2 Ch D 802, *Ex parte Morgan*, 2 Ch D 77, *per* Brett, J , at p 95 (*n*) *R* v *Widdop*, L R 2 C C 3
(*o*) *Morrish* v *Murrey*, 13 M & W 52, *Booth* v *Clive*, 10 C B 827, *Hughes* v *G W Ry Co*, 14 C B 637 See also *Harrison* v *Wright*, 13 M & W 816
(*p*) Jenk Cent 32 See judgm in *Gosling* v *Veley*, 7 Q B 406, at p 455, *Houldsworth* v *Evans*, L R 3 H L 263

course adopted by the judge, and "a man who does not speak when he ought shall not be heard when he desires to speak" (*q*)

So, too, a new trial will not be granted on the ground that the judge did not direct the jury, or that he did not leave a question to the jury, if the party's counsel had an opportunity of asking him to do it and abstained from asking for it (*r*) So too irregularity in the form of a writ, as by misjoinder of causes of action which can only be joined with leave, is waived by the defendant's taking a fresh step in the action with knowledge of the irregularity (*s*)

COMMUNIS ERROR FACIT JUS (4 *Inst* 240)—*Common error sometimes passes current as law*

Rule and example

The law so favours the public good, that it will in some cases permit a common error to pass for right (*t*), as an instance of which may be mentioned the case of common recoveries, which were fictitious proceedings introduced by a kind of *pia fraus* to elude the statute *de Donis*, and which were at length allowed by the Courts to be a bar to an estate tail, so that these recoveries, however clandestinely introduced, became by long use and acquiescence a legal mode of conveyance whereby a tenant in tail might dispose of his lands (*u*)

Rule must be qualified

However, the above maxim, although well known, must be applied with very great caution 'It has been sometimes said," observed Lord Ellenborough, "*communis error facit jus*, but I say *communis opinio* is evidence of what the law is—not where it is an opinion merely speculative and theoretical, floating in the

(*q*) See *Martin* v *G N Ry Co*, 16 C B 179, at pp 196, 197 *Perry* v *Davis*, 3 C B N S 769, *Beaudry* v *Mayor of Montreal*, 11 Moo P C 399

(*r*) *Per* Halsbury, L C, in *Nevill* v *Fine Art and Gen Insur Co*, [1897] A C 68, at p 76

(*s*) *Lloyd* v *Great Western Dairies Company*, [1907] 2 K B 727 Cf *Smurthwaite* v *Hannay*, [1894] A C 494, and see R S C Order LXX, r 2, and cases thereon

(*t*) Noy, Max, 9th ed, p 37, 4 Inst 240, *per* Blackburn, J, in *R* v *Sussex JJ*, 2 B & S 664, at p 680, and in *Jones* v *Tapling*, 12 C B N S 826, at pp 846, 847, *Waltham* v *Sparkes*, 1 Raym Ld 41, at p 42 See also the remarks of Ld Brougham in *Phipps* v *Ackers*, 9 Cl & F 583, at p 598 (referring to *Cadell* v *Palmer*, 10 Bing 140), and in *Waterford Peerage Claim*, 6 Cl & F 133, at p 172, also in *Devaynes* v *Noble*, 2 Russ & My 495, at p 506, *Janvrin* v *De la Mare*, 14 Moo P C 334

(*u*) Noy, Max, 9th ed, pp 37, 38, Plowd 33 b

minds of persons, but where it has been made the groundwork and substratum of practice" (*x*) So it was remarked by another distinguished judge (*y*), that he hoped never to hear this rule insisted upon, because it would be to set up a misconception of the law in destruction of the law, and, in another case (*z*), it was observed that "even *communis error*, and a long course of local irregularity, have been found to afford no protection to one *qui spondet peritiam artis*" Some useful remarks on the application of the above maxim were made also by Lord Denman, delivering judgment in the House of Lords, in a well-known case, involving important legal and constitutional doctrines, and in the course of this judgment his lordship observed that a large part of the *legal opinion* which has passed current for law falls within the description of 'law taken for granted", and that, "when in the pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by experience, that the mere statement and re-statement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle" (*a*)

The foregoing remarks may be thus exemplified A general understanding had prevailed, founded on the practice of many years, that if patented inventions were used in a department of the public service, the patentees would be remunerated by the officers of the Crown administering such department, as though the use had been by private individuals In numerous instances, patentees had been paid for the use of their inventions in the public service, and even the legal advisers of the Crown appeared to consider the right as settled There was, further, little doubt that on the faith of the practice inventors had, at great expense of time and money, perfected inventions, in the expectation of deriving part of their reward from the use of their inventions in the public service It was, nevertheless, held that the language

(*x*) *Isherwood* v *Oldknow*, 3 M & S 380 at pp 396, 397 (cited in *Treharne* v *Layton*, L R 10 Q B 459, at p 463), *Garland* v *Carlisle*, 2 Cr & M 36, at p 95, Co Litt 186 a

(*y*) Mr Justice Foster, cited by Ld Kenyon, in *R* v *Friswell*, 3 T R 707, at p 725

(*z*) *Hart* v *Frame*, 6 Cl & F 193, at p 199

(*a*) Ld Denman's judgment in *O Connell* v *R*, edited by Mr Leahy, p 28 See also the allusions to *Hutton* v *Balme* (3 Y & J 101, and 1 Cr & M 262) and *R* v *Millis* (10 Cl & Fin 534) at pp 23, 24 of the same report And see *per* Pollock, C B, in *New River Co* v *Hereford Commissioners* 2 H & N 129, at p 139

of the patent should be interpreted according to its legal effect, irrespective of the practice (*b*)

But where a decision of the Courts, originally wrong, or an erroneous conception of the law, especially of real property, has been made, for a length of time, the basis upon which rights have been regulated and arrangements as to property made, the maxim, *communis error facit jus*, may be applied (*c*) Indeed, this is strictly in accordance with the view of Lord Ellenborough, above cited, and it will be found that, where the Courts of justice have declined to correct misconceptions of long standing, the reluctance has been due to a wholesome fear of interference with rights based upon them (*d*)

DE MINIMIS NON CURAT LEX (*Cro Eliz* 353)—*The law does not concern itself about trifles*

Courts of justice generally do not take trifling and immaterial matters into account (*e*), except under peculiar circumstances, such as the trial of a right, or where personal character is involved (*f*), they will not, for instance, take notice of the fraction of a day, except in cases where there are conflicting rights, for the determination of which it is necessary that they should do so (*g*), as, for instance, in a claim for demurrage of a ship, in

(*b*) *Feather* v *R*, 6 B & S 257, at pp 289, 292 The law was altered in favour of the practice by the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict c 57), s 27, which section was repealed by the Patents and Designs Act, 1907 (7 Edw 7, c 29), s 98 (1), was re enacted by s 29 of that Act, and has been amended by the Patents and Designs Act, 1919 (9 & 10 Geo 5, c 80), s 8

(*c*) *Davidson* v *Sinclair*, 3 App Cas 765, at p 788, *per* Ld Blackburn, and see his remarks in *Dalton* v *Angus*, 6 App Cas 740, at p 812 As to errors of conveyancers, see *per* Ld Blackburn in *Brownlie* v *Campbell*, 5 App Cas 925, at p 948, and in *Campbell* v *Campbell*, Id 787, at p 815, and as to mercantile contracts in daily use, see *per* Ld Esher in *London Founders' Association* v *Clarke*, 20 Q B D 576, at p 581

(*d*) See *post*, *omnis innovatio*, &c, and the *dictum* in the dissenting judgment of Fletcher Moulton, L J, in *Dean* v *Brown*, [1909] 2 K B 573, at p 585, which is not affected by the decision in *Brown* v *Dean*, [1910] A C 373

(*e*) See *per* Sir W Scott in *French Guiana*, 2 Dod 151, at p 163, *Graham* v *Berry*, 3 Moo P C N S 207, at p 223

(*f*) *Joyce* v *Metr Bd of Works*, 44 L T 811

(*g*) *Russell* v *Ledsam*, 14 M & W 574, at p 582, *per* Holt, C J, in *Fitzhugh* v *Dennington* 2 Raym Ld 1094 *R* v *St Mary, Warwick*, 1 E & B 816, *Wright* v *Mills*, 4 H & N 488, at pp 493, 494, *Evans* v *Jones*, 3 H & C 423, *Page* v *Moore*, 15 Q B 684, *Clarke* v *Bradlaugh*, 8 Q B D 63, *Campbell* v *Strangeways*, 3 C P D 105 In case of copy right, see *Boosey* v *Purday*, 4 Exch 145, *Chatterton* v *Cave*, L R 10 C P 572

which case it has been expressly held that a fraction of a day counts for a day (*h*)

New trial when the damages are small

A familiar instance of the application of this maxim occurred likewise in the rule observed by the Courts at Westminster, not to grant new trials at the instance of either party, on the ground of the verdict being against evidence, where the damages were less than £20 (*i*) As remarked by Lord Kenyon (*k*), "where the damages are small, and the question too inconsiderable to be retried, the Court have frequently refused to send the case back to another jury But wherever a mistake of the judge has crept in and swayed the opinion of the jury, I do not recollect a single case in which the Court have ever refused to grant a new trial'

Again, a bequest of such parts of the testator's plate as the legatee shall select entitles the legatee to take the whole, he might select the whole except one article of no value, and the maxim *de minimis* applies (*l*)

Trifling injuries

In further illustration of the maxim, *de minimis non curat lex*, we may observe that there are some injuries of so little consideration in the law that no action will lie for them (*m*), for instance, in respect to tithe, the principle which may be extracted from the cases appears to be, that for small quantities of corn, involuntarily left in the process of raking, tithe would not be payable, in the absence of any particular fraud or intention to deprive the parson of his full right Where however a farmer pursued such a mode of harvesting barley, that a considerable quantity of rakings was left scattered after the barley was bound into sheaves, the Court held that tithe was payable in respect of these rakings, although no actual fraud was imputed

(*h*) *Commercial S S Co* v *Boulton*, L R 10 Q B 346

(*i*) *Branson* v *Didsbury* 12 A & E 631, *Manton* v *Bales*, 1 C B 444, *Macrow* v *Hull*, 1 Burr 11, *Burton* v *Thompson*, 2 Burr 664, *Apps* v *Day*, 14 C B 112, *Hawkins* v *Alder*, 18 C B 640 *per* Maule, J , in *Howard* v *Barnard*, 11 C B 653, but see *Allum* v *Boultbee*, 9 Exch 738, at p 743

(*k*) *Wilson* v *Rastall*, 4 T R 753 See *Vaughan* v *Wyatt*, 6 M & W 492, at pp 496, 497, *per* Parke, B , in *Twigg* v *Potts*, 1 Cr M & R 89, at p 93, *Lee* v *Evans*, 12 C B N S 368, *Mostyn* v *Coles*, 7 H & N 872, at p 876 In *Haine* v *Davey*, 4 A & E 892, a new trial was granted for misdirection, though the amount in question was less than £1 See *Poole* v *Whitcomb*, 12 C B N S 770

(*l*) *Arthur* v *Mackinnon*, 11 Ch D 385

(*m*) See *per* Powys, J , in *Ashby* v *White*, 2 Raym Ld 938, at p 944, answered by Holt, C J , Id 953, *Whitcher* v *Hall*, 5 B & C 269, at p 277 2 Bls Com , 21st ed 262, where the rule respecting land gained by alluvion is referred to the maxim treated of in the text The maxim applies "only with respect to gradual accretions not appreciable except after the lapse of time (*per* Pollock, C B , in *New River Co* v *Herefordshire Tax Commrs* , 1 H & N 129, at p 138, and in *Ford* v *Lacey*, 7 Id 151, at p 155)

to the farmer, and although he was careful to leave as little rakings as possible in that mode of harvesting the crop (*n*)

Trespass to realty

It may be observed, however, that for an injury to real property incorporeal, an action may be supported, however small the damage, a commoner may maintain an action for an injury to the common, though his proportion of the damage amount only to a farthing (*o*)

Where trifling irregularities or even infractions of the strict letter of the law are brought under the notice of the Court, the maxim *de minimis non curat lex* is of frequent practical application (*p*) It has, for instance, been applied to support a rate, in the assessment of which there were some comparatively trifling omissions of established forms (*q*) So, with reference to proceedings for an infringement of the revenue laws (*r*), Sir W Scott observed that "the Court is not bound to a strictness at once harsh and pedantic in the application of statutes The law permits the qualification implied in the ancient maxim, *de minimis non curat lex* Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked "

Indictment for misdemeanor

Lastly, in an indictment against several for a misdemeanor all are principals, because the law does not descend to distinguish different shades of guilt in this class of offences (*s*)

(*n*) *Glanville* v *Stacey*, 6 B & C 543

(*o*) *Pindar* v *Wadsworth*, 2 East, 154 See 22 Vin Abr "Waste' (N), *Harrop* v *Hirst*, L R 4 Ex 43, and other cases cited *post*, Chap V See also *Hammerton* v *Dysart*, [1916] 1 A C 57, at p 73

(*p*) See in connection with criminal liability for a nuisance, *R* v *Charlesworth*, 16 Q B 1012, *R* v *Betts*, Id 1022, *R* v *Russell*, 3 E & B 942

(*q*) *White* v *Beard*, 2 Curt 480, at p 493 But where the amount of a poor rate at so much in the pound on the assessable value of premises involves the fraction of a farthing, a demand by the overseers of the whole farthing is excessive and illegal, *Morton* v *Brammer*, 8 C B N S 791, citing *Baxter* v *Foulam*, 1 Wils, K B 199, at p 798

(*r*) *The Reward*, 2 Dod 265, at pp 269, 270

(*s*) For a statutory application of the maxim to trifling offences punishable on summary conviction, see s 16 (now repealed) of the Summary Jurisdiction Act, 1879 (42 & 43 Vict c 49)

OMNIS INNOVATIO PLUS NOVITATE PERTURBAT QUAM UTILITATE PRODEST (2 *Bulstr* 338)—*Every innovation occasions more harm by its novelty, than benefit by its utility*

It has been an ancient observation in the laws of England, that, whenever a standing rule of law, of which the reason, perhaps, could not be remembered or discerned, has been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule has in the end appeared from the inconveniences that have followed the innovation (*t*), and the sages of the law have therefore always suppressed new and subtle inventions in derogation of the common law (*u*)

It is, then, an established rule to abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep the scale of justice steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter according to his private sentiments, he being sworn to determine, not according to his own private judgment (*v*), but according to the known laws of the land—not delegated to pronounce a new law, but to maintain the old (*y*)—*jus dicere et non jus dare* (*z*)

"The province of the legislature is not to construe but to enact, and their opinion, not expressed in the form of law as a declaratory provision would be, is not binding on Courts whose duty is to expound the statutes they have enacted" (*a*), for the

(*t*) 1 Black Com 60 See Ram's Science of Legal Judgment, 112 *et seq* Lord Bacon tells us in his Essay on Innovations, that, "as the births of living creatures at first are ill shapen so are all innovations which are the births of time

(*u*) Co Litt 282 b, 379 b

(*x*) See *per* Ld Camden in *Entick* v *Carrington*, 19 Howell, St T 1030, at p 1071, *per* Williams, J, in *Garland* v *Carlisle*, 4 Cl & F 693, at p 729, *per* Best, C J, in *Newton* v *Cowie*, 4 Bing 234, at p 241, *per* Alderson, B, in *Larkin* v *Marshall*, 4 Ex 804, at p 806

(*y*) *Per* Ld Kenyon in *Denn* v *Mellor*, 5 T R 558, at 682, 6 Id 604, at p 605, and in *R* v *St Mary, Lambeth*, 8 Id 236, at p 239, *per* Grose, J, in *R* v *St Paul's, Deptford* 13 East 320, at p 321, *per* Ld Hardwicke, C, in *Ellis* v *Smith*, 1 Ves 1 at p 17

(*z*) *Geyer* v *Aguilar*, 7 T R 681, at 696, *Butt* v *Conant*, 1 B & B 548, at p 563, Ram's Science of Legal Judgment, 2 My duty, says Alderson B, in *Miller* v *Salcmons*, 7 Ex 475, at p 543, "is plain It is to expound and not to make the law—to decide on it as I find it, not as I may wish it to be, and see *per* Coltman, J, in *Parsons* v *Gingell*, 4 C B 545, at pp 560, 561

(*a*) Judgm in *Russell* v *Ledsam*, 14 M & W 574, at p 589

maxim of the Roman law, *ejus est interpretari cujus est condere* (*b*), does not under our constitution hold

Our common-law system, as remarked by a learned judge, consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents (*c*), and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise, and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised "It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science" (*d*)

Settled law must not be disturbed

Accordingly where a rule has become settled law, it is to be followed, although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason for it is wanting, or although the principle and the policy of the rule may be questioned (*e*) If, as has been observed, there is a general hardship affecting a general class of cases, it is a consideration for the legislature, not for a Court of justice If there is a particular hardship from the particular circumstances of the case, nothing can be more dangerous or mischievous than upon those particular circumstances to deviate from a general rule of law (*f*), "hard cases," it has repeatedly been said, are apt to "make bad law" (*g*), and *misera est servitus ubi jus est*

(*b*) See Tayl Civ L, 4th ed 96

(*c*) As to the value of precedents, see Palgrave, Orig Auth King's Council, pp 9, 10

(*d*) *Per* Parke, J, in *Mirehouse* v *Rennell*, 1 Cl & F 527, at p 546

(*e*) *Per* Tindal, C J, Id at p 557 See the authorities cited, Ram's Science of Legal Judgment, 33—35, and *Smith* v *Doe* d *Jersey*, 7 Price, 379, at p 509, *Ralston* v *Hamilton*, 4 Macq 397, at p 405, *per* Ld Westbury

(*f*) *Per* Ld Loughborough, in *Brydges* v *Chandos*, 2 Ves 416, at pp 426, 427, *per* Tindal, C J, in *Doe* d *Clarke* v *Ludlam*, 7 Bing 275, at p 280, *per* Pollock, C B, in *R* v *Woodrow*, 15 M & W 404, at p 412, *per* Wilde, C J, in *Kepp* v *Wiggett*, 16 L J C P 234, at p 236

(*g*) See *Hodgens* v *Hodgens*, 4 Cl & F 323, at p 378, *per* Coleridge, J, in *Grey* v *Friar*, 4 H L Cas 565, at p 611 'It is necessary that Courts of justice should act on general rules, without regard to the hardship which in particular cases may result from their application (Judgm in *Bosanquet* v *Shortridge*, 4 Exch 699, at p 718 See also judgm in *Cox* v *Mid Co Ry Co*, 3 Exch 268, at p 278), *Winterbottom* v *Wright*, 10 M & W 109, at p 116

vagum aut incertum (*h*)—obedience to law becomes a hardship when that law is unsettled or doubtful, which maxim applies with peculiar force to questions respecting real property, as, for instance, to family settlements, by which provision is made for unborn generations, "and if, by the means of new lights occurring to new judges, all that which was supposed to be law by the wisdom of our ancestors, is to be swept away at a time when the particular limitations are to take effect, mischievous indeed will be the consequence to the public" (*i*)

It is for considerations such as those just noticed that the Courts are reluctant to upset former decisions which, although anomalous, have been accepted by the public as the basis of their transactions for a length of time, a rule embodied in the maxim, *communis error facit jus* (*k*) It is pointed out by Lord Hatherley in *Bain* v *Fothergill* (*l*) that the House of Lords has frequently acted upon the mistaken practice of conveyancers, and will regard the necessity for following previous decisions as more imperative where the common dealings of mankind are in question (*m*)

With respect to matters which do not affect existing rights to any great degree, but tend principally to influence *future* transactions, it is for similar reasons generally considered more important that the rule of law should be settled, than that it should be theoretically correct (*n*)

The judicial rule—*stare decisis*—does, however, admit of exceptions, where the former determination is most evidently contrary to reason But, even in such cases, subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation For, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*, that is, When rule does not hold

(*h*) 4 Inst 246, *Shepherd* v *Shepherd*, 5 T R 51, n (*a*), 2 Dwarr Stats 786, Bac Aphorisms, vol 7, p 148

(*i*) *Per* Ld Kenyon in *Doe* d *Small* v *Allen*, 8 T R 497, at p 504 See *per* Ashhurst, J , in *Goodtitle* v *Otway*, 7 T R 399 at 420, and see *per* Brett, L J , in *Ahearn* v *Bellman*, 4 Ex D 201, at p 210

(*k*) See *ante*, p 98, and cases there referred to

(*l*) L R 7 H L 158 at p 209

(*m*) Upon a question of law the H of L is bound by its own decisions, see *Lond Street Tramways Co* v *Lond C C*, [1898] A C 375

(*n*) See *per* Ld Cottenham in *Lozon* v *Pryse*, 4 Myl & Cr 600, at pp 617, 618

that it is not the established custom of the realm, as has been erroneously determined (*o*)

We may appropriately conclude these remarks by observing that, whilst on the one hand innovation on settled law is to be avoided, yet "the mere lateness of time at which a principle has become established is not a strong argument against its soundness, if nothing has been previously decided inconsistent with it, and it be in itself consistent with legal analogies" (*p*) Nay, it is even true that "a froward retention of custom is as turbulent a thing as an innovation, and they that reverence too much old times are but a scorn to the new" (*q*)

(*o*) 1 Black Com 60 For an example of a long course of decisions being overruled as contrary to reason, see *Mills* v *Armstrong*, 13 A C 1

(*p*) Judgm in *Gosling* v *Veley*, 7 Q B 406, at p 441, *per* Ld Denman in *Nickells* v *Atherstone*, 10 Q B 944, at p 950

(*q*) Bacon's Essays, Of Innovations '

CHAPTER IV

RULES OF LOGIC

The maxims immediately following are placed together, and entitled "Rules of Logic," because they result from simple processes of reasoning Some of them, indeed, may be considered as axioms, the truth of which is self-evident, and consequently admit of illustration only A few examples have in each case been given, showing how the particular rule has been held to apply, and other instances of a like nature will readily occur to the reader (*a*)

UBI EADEM RATIO IBI IDEM JUS (*Co Litt* 10 *a*)—*Like reason doth make like law* (*b*)

The law consists, "not in particular instances and precedents, but in the reason of the law, and *ubi eadem ratio idem jus*" (*c*), for "reason is the life of the law, nay, the common law itself is nothing else but reason, which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason" (*d*) The following instance serves to show how the maxim may be practically applied At a time when almost all written engagements were by deed, it was established, as a general rule, that it is a good defence to an action to enforce a deed, that after its execution it was altered without the defendant's privity in a material point (*e*) The reason of this rule is that "no man shall be permitted to take the chance of committing a fraud,

Illustration of rule

(*a*) The title of this division of the subject has been adopted from Noy's Maxims, 9th ed p 5

(*b*) Co Litt 10 a

(*c*) *Ashby* v *White*, 2 Raym Ld 938, at p 957, *per* Holt, C J

(*d*) Co Litt 97 b

(*e*) *Pigot's Case*, 11 Rep 26 b, not followed, as regards (see p 27 a) immaterial alterations in *Aldous* v *Cornwell*, L R 3 Q B 573 The cases upon the alteration of instruments are collected in the notes to *Master* v *Miller* (4 T R 320), 1 Sm L C

without running any risk of losing by the event when it is detected" (*f*), and, therefore, in *Master* v *Miller* (*g*) it was decided that the rule was not to be confined to deeds, but must be extended to cases where other instruments have been materially altered, for instance, bills of exchange (*h*), for *ubi eadem ratio ibi idem jus* And accordingly the rule has since been applied also to the material alteration of Bank of England notes (*i*), as well as of written contracts not under seal, such as guarantees (*k*), charter-parties (*l*), bought and sold notes (*m*) and building contracts (*n*), and in a case where the validity of an order to detain a person of unsound mind was in question, it was laid down that any tampering with a document of that kind by materially altering it, would impair its validity and deprive any person professing to act under it of any protection from it (*o*) It may be added that, as there is a presumption against fraud or wrong, interlineations and erasures in a deed are, until the contrary be proved, presumed to have been made before its execution, whereas, since a testator may alter his will after its execution without fraud or wrong, it is necessary to prove affirmatively that alterations in a will were made before its execution (*p*)

Caution necessary in reasoning

There are, however, some things, for which, as Lord Coke observed, no reason can be given (*q*) and with reference to which the words of the civil law hold true—*non omnium quæ a majoribus constituta sunt ratio reddi potest* (*r*), and, therefore, we are compelled to admit that, in the legal science, *qui rationem in omnibus quærunt rationem subvertunt* (*s*) It is, indeed, some-

(*f*) *Per* Ld Kenyon in *Master* v *Miller*, 4 T R 320, at p 329

(*g*) *Supra*

(*h*) As to these, and promissory notes, and cheques, see now the Bills of Exchange Act, 1882 (45 & 46 Vict c 61), ss 61, 73, 89

(*i*) *Suffell* v *Bank of Eng*, 9 Q B D 555, *Leeds Bank* v *Walker*, 11 Id 84

(*k*) *Davidson* v *Cooper*, 11 M & W 778, and 13 Id 343, *Ellesmere Brewery Co* v *Cooper*, [1896] 1 Q B 75

(*l*) *Croockewit* v *Fletcher*, 1 H & N 893

(*m*) *Powell* v *Divett*, 15 East, 29, *Mollett* v *Wackerbarth*, 5 C B 181

(*n*) *Pattinson* v *Luckley*, L R 10 Ex 330

(*o*) *Lowe* v *Fox*, 12 App Cas 206, at p 214 For the case of the alteration of the record, in an action, see *Suker* v *Neale*, 1 Exch 468

(*p*) *Doe* d *Tatum* v *Catomore*, 16 Q B 745, *Doe* d *Shallcross* v *Palmer*, Id 747, *Re Adamson*, L R 3 P & D 253 As to interlineations in wills, see *Re Cadge*, L R 1 P & D 543 As to erasures, &c, in affidavits, see R S C 1883, Order XXXVIII r 12

(*q*) *Hix* v *Gardiner*, 2 Bulst 195, at p 196, cited, arg, *Leuckhart* v *Cooper*, 3 Bing N C 99, at p 104

(*r*) D 1, 3, 20

(*s*) *Cromwell's Case*, 2 Rep 69 a, at 75 a

times dangerous to stretch the invention to find out legal reasons for what is undoubted law (*t*), and this observation applies peculiarly to the mode of construing an Act, in order to ascertain and carry out the intention of the legislature in so doing, the judges will bend and conform their legal reason to the words of the Act, and will rather construe them literally, than strain their meaning beyond the obvious intention of Parliament (*u*) The spirit of the maxim prefixed to these remarks, here, however, manifestly prevails, for, as we read in the Digest (*x*), *non possunt omnes articuli singillatim aut legibus aut senatus-consultis comprehendi sed cum in aliqua causa sententia eorum manifesta est is, qui jurisdictioni præest, ad similia procedere atque ita jus dicere debet Nam, ut ait Pedius, quotiens lege aliquid unum vel alterum introductum est, bona occasio est, cætera, quæ tendunt ad eandem utilitatem, vel interpretatione, vel certe jurisdictione suppleri*

Qualification of general proposition,

Further, although it is laid down that the law is the perfection of reason, and that it always intends to conform thereto, and that what is not reason is not law, yet this must not be understood to mean, that the particular reason of every rule in the law can at the present day be always precisely assigned it is sufficient if there be nothing in it flatly contradictory to reason, and then the law will presume that the rule in question is well founded, *multa in jure communi*, as Lord Coke observed, *contra rationem disputandi, pro communi utilitate introducta sunt* (*y*)—many things have been introduced into the common law, with a view to the public good, which are inconsistent with sound reason *Quod vero contra rationem juris receptum est, non est producendum ad consequentias* (*z*)

Reasonableness of custom

The maxim cited from Lord Coke is peculiarly applicable when the reasonableness of an alleged custom has to be considered in such a case, it does not follow, from there being now no apparent reason for such custom, that there never was (*a*) If, however, it be in tendency contrary to the public good, or

(*t*) *Per* Alderson, B , in *Ellis* v *Griffith*, 16 M & W 106, at p 110

(*u*) *Murrey* v *Eyton*, Raym Sir T 338, at p 355, *per* Ld Brougham in *Leith* v *Irvine*, 1 Myl & K 289 As to the mode of construing Acts of Parliament, see further *post*, Chap VIII

(*x*) D 1, 3, 12, and 13

(*y*) Co Litt 70 b *Multa autem jure civili contra rationem disputandi pro utilitate communi recepta esse innumerabilibus rebus probari potest*, D 9, 2, 51, § 2

(*z*) D 1, 3, 14

(*a*) Arg *Tyson* v *Smith*, 9 A & E 406, at p 416

prejudicial to the many and beneficial only to a particular person, such custom is and must be repugnant to the law of reason, for it cannot have had a reasonable origin (*b*)

Again, a clerk who has held preferment in one bishopric is not, on being presented to a living in another bishopric, bound, as a condition precedent to his examination on the question of fitness, to produce letters testimonial and commendatory from his former bishop, if such a rule existed a door would thus be opened to arbitrary and capricious proceedings, rendering the title of the clerk and the right of the patron dependent on the will of the prior bishop, such a conclusion would be at variance with reason, and therefore repugnant to what is called "the policy of the law" (*c*)

We may conclude these remarks by calling to mind the well-known saying *lex plus laudatur quando ratione probatur* (*d*)—then is the law most worthy of approval, when it is consonant to reason, and with Lord Coke we may hold it to be generally true, "that the law is unknown to him that knoweth not the reason thereof, and that the known certainty of the law is the safety of all" (*e*)

CESSANTE RATIONE LEGIS CESSAT IPSA LEX (*Co Litt* 70 *b*)—*Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself* (*f*)

Examples Privilege from arrest

A member of Parliament is privileged from arrest or civil process during the session (*g*), in order that he may discharge his public duties and the trust reposed in him, but the reason of this privilege ceases at a certain time—probably forty days—after the termination of the parliamentary session, because the public has then no longer an immediate interest in the personal

(*b*) Judgm, Id at pp 421, 422 See, further, as to the reasonableness and validity of a custom, *post*, Chap X

(*c*) *Bp of Exeter* v *Marshall*, L R 3 H L 17, at p 54

(*d*) 1 Inst Epil, cited by Ld Kenyon in *Porter* v *Bradley*, 3 T R 143, at 146, in *Dalmer* v *Barnard*, 7 T R 248, at 252, and in *Doe* v *Ewart*, 7 A & E 636, at p 657

(*e*) 1 Inst Epil "Certainty is the mother of repose, and therefore the common law aims at certainty", *per* Ld Hardwicke in *Walton* v *Tryon*, 1 Dick 244, at p 245

(*f*) See *per* Willes, C J, in *Davis* v *Powell*, Willes, 46, at p 51 (cited arg *Morgan* v *Abergavenny*, 8 C B 768, at p 786)

(*g*) *Re Armstrong*, [1892] 1 Q B 327

freedom of the individuals composing the representative body, and *cessante causa cessat effectus* (*h*)

Trees excepted from demise

Again, where trees are excepted out of a demise, the soil itself is not excepted, but sufficient nutriment out of the land is reserved to sustain the vegetative life of the trees, for, without that, the trees which are excepted cannot subsist, but if, in such a case, the lessor fells the trees, or by the lessee's license grubs them up, then, according to the above rule, the lessee shall have the soil (*i*)

Common *pur cause de vicinage*

The same principle applies where a right exists of common *pur cause de vicinage* a right depending upon a general custom and usage, which appears to have originated, not in any actual contract, but in a tacit acquiescence of all parties for their mutual benefit This right does not, indeed, enable its possessor to put his cattle at once on the neighbouring waste, but only on the waste which is in the manor where his own lands are situated, and it seems that the right of common of vicinage should be considered merely as an excuse for the trespass caused by the straying of the cattle, which excuse the law allows by reason of the ancient usage, and in order to avoid the multiplicity of suits which might arise where there is no separation or inclosure of adjacent commons (*k*) But the parties possessing the respective rights of common may, if they please, inclose against each other, and, when they have done so, the right of common *pur cause de vicinage* is no longer an excuse to an action of trespass if the cattle stray, for *cessante ratione legis cessat lex* (*l*)

Law as to validity of marriage

As regards the consent of parents to the marriage of their minor children, it has been observed (*m*) that "any analogy which existed between marriages by banns and marriages by notice to the registrar has been effaced—the attempt at securing that consent in marriages of the latter class by publicity relinquished—and the procurement of actual consent substituted

(*h*) See arg in *Holiday* v *Pitt* Cas t H 28, at p 32, *Goudy* v *Duncombe* 1 Exch 430

(*i*) *Liford s Case*, 11 Rep 46 b, at 49 b (cited *Hewitt* v *Isham*, 7 Exch 77, at p 79), and *post*, Chap VI s 3

(*k*) *Jones* v *Robin* 10 Q B 581, 620 See also *Clarke* v *Tinker*, Id 604 *Prichard* v *Powell*, Id 589

(*l*) *Tyringham's Case*, 4 Rep 36 a, at 38 b, Co Litt 122 a, Finch, Law 8, *per* Powell, J , in *Broomfield* v *Kirber*, 11 Mod 72, *Gullett* v *Lopes*, 13 East, 348, *Wells* v *Pearcy*, 1 Bing N C 549, at pp 556, 566, *Heath* v *Elliott*, 4 Bing N C 388

(*m*) *Holmes* v *Simmons*, L R 1 P & D 523, at p 528

in the same manner as had always been used in marriages by licence There is no reason, therefore, why those decisions which have hitherto only been applied to marriages by banns, and which have their foundation in the necessity for securing that publicity through which it is the object of banns to reach the parents' consent, should be applied to marriages in which that consent is otherwise attained and secured *Cessante ratione cessat et lex* "

Another illustration is afforded by the rule, which through neglect of the principle under discussion has often been misunderstood, viz , that a person may not make felony the foundation of a civil action This can be true only where the felon himself is defendant or a necessary party, and the claim is founded on the felony "The rule is founded on a principle of public policy, and where the *public policy ceases to operate*, the rule shall cease also and the familiar phrase, 'The action is merged in the felony' is not at all times literally true" (*n*)

DE NON APPARENTIBUS ET NON EXISTENTIBUS EADEM EST RATIO (4 *Rep* 47 *a* 5 *Id* 5 *b*)—*That which does not appear will not be presumed to exist* (*o*)

Maxim, how applied

This maxim applies where a party seeks to rely upon any deeds or writings which are not produced in Court, and the loss of which is not accounted for or supplied in the manner which the law prescribes, for in this case they should be treated, as against such party, as if non-existent (*p*)

Special verdict

On the consideration of a special verdict, the Court will neither assume a fact not stated therein nor draw inferences of facts necessary for the determination of the case from other statements contained therein (*q*)

In reading an affidavit also, the Court will look solely at the facts deposed to, and will not presume the existence of additional facts in order to support the allegations made in it To the above, therefore, and similar cases, occurring not only in civil,

(*n*) *Per* Ld Tenterden in *Stone* v *Marsh*, 6 B & C 551, at p 564 See the subject further discussed, *post*, p 146

(*o*) See *per* Buller, J , in *R* v *Bp of Chester*, 1 T R 396, at 404, *per* Cockburn, C J , in *R* v *Walcot Overseers*, 2 B & S 555, at p 560

(*p*) Bell's Dict of Scots Law 287

(*q*) *Tancred* v *Christy*, 12 M & W 316

but also in criminal proceedings, the maxim *quod non apparet non est* (*r*) is emphatically applicable that which does not appear must be taken in law as if it were not (*s*)

Bond

In an action by two commissioners of taxes (*t*) on a bond against the surety of a tax-collector, appointed under 43 Geo 3, c 99, it appeared that the Act contained a proviso that no such bond should be put in suit against the surety for any deficiency, other than what should remain unsatisfied after sale of the collector's lands under the powers given to the commissioners by the Act, it further appeared that, at the time when the bond was put in suit, the obligor had lands within the jurisdiction of the plaintiffs, but of which they had no notice or knowledge it was held that seizure and sale of lands of the collector, of the existence of which the commissioners had no notice or knowledge, was not a condition precedent to their right to proceed against the surety, this conclusion resulting, as was observed, from the sound principle contained in the above maxim (*u*)

Notice of dishonour

So, where a notice of dishonour of a bill of exchange described the bill generally as "Your draft on A B," the Court held, on motion for a nonsuit, that if there were other bills or drafts to which the notice could refer, it was for the defendant to show such to be the fact and that as he had not done so the above maxim applied, for, inasmuch as it did not appear that there were other bills or notes, the Court could not presume that there were any (*x*)

Increase *per alluvionem*

Again, the increase *per alluvionem* is described to be when the sea, by casting up sand and earth by degrees, increases the land, and shuts itself within its previous limits (*y*) In general, the land thus gained belongs to the Crown, as having been a part of the very *fundus maris*, but if such alluvion be formed so imperceptibly and insensibly, that it cannot by any means be ascertained that the sea ever was there—*idem est non esse et non apparere*, and the land thus formed belongs as a perquisite to the owner of the land adjacent (*z*)

(*r*) 2 Inst 479, Jenk Cent 207

(*s*) *Per* Vaughan, L J, in *Shepherd* v *Gosnold*, Vaugh 159, at p 169

(*t*) *Gwynne* v *Burnell*, 6 Bing N C 453

(*u*) *Per* Vaughan, J, Id, at p 539

(*x*) *Shelton* v *Braithwaite*, 7 M & W 436, *Bromage* v *Vaughan*, 9 Q B 608, *Mellersh* v *Rippen* 7 Exch 578

(*y*) See *Gifford* v *Yarborough*, 5 Bing 163

(*z*) Hale, De Jure Maris, pt 1, c 4, p 14, *R* v *Yarborough*, 3 B & C 91, at pp 96, 106 This right has also been referred to the principle, *de minimis non curat lex*, arg *R* v *Yarborough*, 3 B & C 91, at p 99

Process of Court

Lastly, it has been said (*a*) that "there is a distinction between process of superior and inferior Courts, in the former, *omnia præsumuntur rite esse acta* (*b*), in the latter the rule *de non apparentibus et non existentibus eadem est ratio* applies" This is undoubtedly law the superior Court need not, but the inferior Court must show jurisdiction on the face of an order see *Peacock* v *Bell* (*c*) and *Gossett* v *Howard* (*d*), noted *post*

NON POTEST ADDUCI EXCEPTIO EJUSDEM REI CUJUS PETITUR DISSOLUTIO (*Bac Max*, *reg* 2)—*A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto*

Where the legality of some proceeding is the matter in dispute between two parties, he who maintains its legality, and seeks to take advantage of it, cannot rely upon the proceeding itself, as a bar to the adverse party It is obvious that to do so would involve the logical fallacy of *petitio principii*, and would in many cases preclude all redress to an aggrieved party "It were impertinent and contrary in itself," said Lord Bacon, "for the law to allow of a plea in bar of such matter as is to be defeated by the same suit, for it is included, and otherwise a man could never arrive at the end and effect of his suit" (*e*)

Instances Attainder

A few instances will suffice to show the application of this rule If a man was attainted and executed, and the heir brought error upon the attainder, it would have been bad to plead corruption of blood by the same attainder, otherwise the heir would have been without remedy ever to reverse the attainder (*f*) So, although a person outlawed or attainted could not be permitted to sue for any civil right in a Court of law, yet he might take proceedings, and would be heard, for the purpose of reversing his outlawry or attainder (*g*)

(*a*) Arg *Kinning* v *Buchanan*, 8 C B 271, at p 286

(*b*) A presumption "which appears to be sound", *per* Ld Chelmsford in *Scott* v *Bennett*, L R 5 H L 234, at p 248, see *post*, Chap X

(*c*) 1 Wms Saunders, 73 (*d*) 10 Q B 453

(*e*) Bac Max, reg 2, *Pusey* v *Desbouvrie*, 3 P Wms 315, at p 317

(*f*) Bac M, reg 2

(*g*) *Loukes* v *Holbeach*, 4 Bing 419, at p 423 (commented on in *Byrne* v *Manning*, 2 Dow N S 403), *R* v *Bullock*, 1 Taunt 71, at p 93, *R* v *Lowe*, 8 Exch 697, *Matthews* v *Gibson*, 8 East, 527, *Craig* v *Levy*, 1 Exch 570, Jenk Cent 116, Finch, Law, 46

Attainder was abolished by the Forfeiture Act, 1870, s 1 Outlawry is still

On the same principle, although a party in contempt is not generally entitled to take any proceeding in the cause, he will nevertheless be heard if his object be to get rid of the order or other proceeding which placed him in contempt, and he is also entitled to be heard for the purpose of resisting or setting aside for irregularity any proceedings subsequent to his contempt (*h*) And where a man does not appear on a vicious proceeding, he is not to be held to have waived that very objection which is a legitimate cause of his non-appearance (*i*)

Appeal

Where the judge of an inferior Court had illegally compelled a plaintiff who appeared to be nonsuited, and upon a bill of exceptions being brought, the nonsuit was entered on the record, the defendant was not allowed to contend that the entry on record precluded the plaintiff from showing that he had refused to consent to the nonsuit, for that would have been to set up as a defence the very thing which was the subject of complaint,—a course prohibited by the above maxim (*j*) So, the judgment or opinion of the Court below cannot, with propriety, be cited as an authority on the argument, because such judgment and opinion are then under review (*k*)

Extension of rule

The maxim seems also to apply, when the matter of the plea is not to be avoided in the same but in a different suit and, therefore, if a writ of error was brought to reverse an outlawry in any action, outlawry in another action did not bar the plaintiff in error, for otherwise, if the outlawry was erroneous, it could never be reversed (*l*), the general rule, however, was that an outlaw could not enforce any proceeding for his own benefit (*m*)

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theoretically possible in criminal proceedings, on the civil side it was abolished by the Common Law Procedure Act, 1852, s 24, and, finally, by the Civil Procedure Acts Repeal Act, 1879, s 3

(*h*) *Per* Ld Cottenham in *Chuck* v *Cremer*, 1 Coop t Cott 205, *King* v *Bryant*, 3 Myl & Cr 191 See 1 Daniell, Ch Pr 8th ed p 788

(*i*) *Per* Knight Bruce, V C, in *Woodward* v *Miller*, 15 L J Bk 8

(*j*) *Strother* v *Hutchinson*, 4 Bing N C 83 at pp 90, 91 (distinguished in *Corsar* v *Reed*, 17 Q B 540)

(*k*) See *per* Alexander, C B, in *R* v *Westwood*, 7 Bing 1, at p 83, *per* North, C J, in *Barnardiston* v *Soame*, 6 St Tr 1073, 1094 See also, in further illustration of the maxim *Masters* v *Lewis*, 1 Raym, Ld, 57

(*l*) Jenk Cent 37, Gilbert s Chancery, 54 See Bac Max, reg 2

(*m*) *Per* Parke, B, in *R* v *Lowe*, 8 Exch 697 See *Loukes* v *Holbeach*, 4 Bing 419, *Aldridge* v *Buller*, 2 M & W 412, *Re Pyne*, 5 C B 407, *Davis* v *Trevanion*, 2 D & L 743, *Walker* v *Thelluson*, 1 Dow N S 578

ALLEGANS CONTRARIA NON EST AUDIENDUS (4 *Inst* 279, *Jenk Cent* 16)—*He is not to be heard who alleges things contradictory to each other*

This elementary rule of logic, which is frequently applied in our Courts of justice, will receive occasional illustration in the course of this work We may for the present observe that it expresses, in other language, the trite saying of Lord Kenyon, that a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest (*n*)

In *Cave* v *Mills* (*o*), the maxim under notice was applied The plaintiff was surveyor to trustees of turnpike roads, as such surveyor it was his duty to make all contracts, and to pay the sums due for the repair of the roads, he being authorised to draw on the treasurer to a certain amount His expenditure, however, was not strictly limited to that amount, and in the yearly accounts presented by him to the trustees a balance was generally claimed as due to him, and was carried to the next year's account Accounts were thus rendered by him for three consecutive years showing certain balances due to himself These accounts were allowed by the trustees at their annual meeting, and a statement based on them of the revenue and expenditure of the trust was published as required by the statute, 3 Geo 4, c 126, s 78 The trustees, moreover, believing the accounts to be correct, paid off with monies in hand a portion of their mortgage debt The plaintiff afterwards claimed a larger sum in respect of payments which had in fact been made by him, and which he ought to have brought into the accounts of the above years, but had knowingly omitted It was held that he was estopped from recovering the sums thus omitted, for "a man

(*n*) See *Wood* v *Dwarris*, 11 Exch 493, *Andrews* v *Elliott*, 5 E & B 502, *Tyerman* v *Smith* 6 E & B 719, *Morgan* v *Couchman*, 14 C B 100, *Humble stone* v *Welham* 5 C B 195, *Williams* v *Thomas* 4 Exch 479, *Taylor* v *Best*, 14 C B 487, *R* v *Evans*, 3 E & B 363, *Williams* v *Lewis*, 7 E & B 929, *Glen Steam Nav Co* v *Slipper*, 11 C B N S 493, *Elkin* v *Baker*, Id 526, at p 543, *Green* v *Sichel*, 7 C B N S 747, *Pearson* v *Dawson*, E B & E 448, *Haines* v *East India Co*, 11 Moo P C 39, *Smith* v *Hodson*, 4 T R 211, at p 217, *Brewer* v *Sparrow*, 7 B & C 310, *Lythgoe* v *Vernon*, 5 H & N 180, see *Rice* v *Reed*, [1900] 1 Q B 54, *Republic of Bolivia Exploration Syndicate, Re*, [1914] 1 Ch 139, *Suarez, Re*, [1917] 2 Ch 131, *Suarez, Re*, [1918] 1 Ch 176

A man is not entitled to stand by and allow proceedings to go on against him to judgment, and then to ask the Court to interfere on his behalf on the ground that his name was misspelt, *Churchill* v *Churchill* L R 1 P & D 486

(*o*) 7 H & N 913 See *Van Hasselt* v *Sack*, 13 Moo P C 185

shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which Courts of law have in modern times most usefully adopted '

Estoppel

The doctrine of *estoppel*, at any rate by deed and *in pais*, is in great measure a development of the principle expressed in this maxim Indeed, the learned author of Smith's Leading Cases, who was the first to reduce to any system the many applications of the theory of estoppel, seems to connect estoppel by *record* also with the present maxim He defines estoppel generally (*p*) as a conclusive admission, or something which the law treats as equivalent to an admission

It is impossible within the limits of this work to give a satisfactory account of estoppel The reader is referred to Smith's Leading Cases (*q*), and the maxim *nullus commodum capere potest de injuria sua propria* (*r*), where some account will be found of *estoppel in pais* There are, however, cases in which estoppel operates to preclude a person from contradicting that which has been accepted and acted upon as truth and fact by others, under circumstances which do not constitute wilful and culpable deception Such cases are referable to the present maxim rather than to that just cited An illustration of this is afforded by *Prentice* v *London Building Society* (*s*) In that case to an action by a transferee of shares against the trustees of the society, the trustees pleaded that the matter was a dispute between the society and a person claiming on account of a member, and one that ought to be settled by arbitration It appeared at the trial that the shares in question had been forfeited by the defendants to make good a debt due from an absconding secretary who had transferred them to the plaintiff It was accordingly held that as the trustees denied the right of the plaintiff to be a member of the society, they were estopped from saying that the dispute was one with a member

So where a seller has recognised the right of his buyer to dispose of goods remaining in the actual possession of the seller,

(*p*) 2 Sm L C 12th ed 747
(*q*) *Duchess of Kingston's Case*
(*r*) *Post*, p 197, see also p 208
(*s*) L R 10 C P 679, see also *Smith* v *Baker*, L R 8 C P 350

he cannot defeat the right of a person claiming under the buyer on the ground that no property passed to the latter by reason of the want of a specific appropriation of the goods (*t*) Nor can an individual who has procured an act to be done sue as one of several co-plaintiffs for the doing of that very act (*u*) Where a party accepts costs under a judge's order, which, but for such order, would not at that time be payable, he cannot afterwards object that the order was made without jurisdiction (*x*) And if A agrees with B to pay him so much per ton for manufacturing and selling a substance invented and patented by B , it is not competent to A , having used the invention by B 's permission, to plead in answer to an action for monies due in respect of such use that the patent was void and the licence given superfluous (*y*) And a licensee of a patent cannot in any way question its validity during the continuance of the licence (*z*) A person cannot act under an agreement and at the same time repudiate it (*a*)

Again, "where a person is charged as a member of a partnership, not because he is a member, but because he has represented himself as such, the law proceeds on the principle, that if a person so conducts himself as to lead another to imagine that he fills a particular situation, it would be unjust to enable him to turn round and say that he did not fill that situation If, therefore, he appeared to the party who is seeking to charge him to be a partner, and represented himself as such, he is not allowed afterwards to say that that representation was incorrect, and that he was not a partner" (*b*) So a person cannot in the same transaction buy in the character of principal and charge the seller for commission as his agent (*c*) And a person acting professedly as agent for another, may be estopped from saying that he was not such agent (*d*) Also it seems a true proposition that "where parties have agreed to act upon an assumed state of facts, their rights between themselves depend on the

(*t*) *Woodley* v *Coventry*, 2 H & C 164

(*u*) *Brandon* v *Scott*, 7 E & B 234

(*x*) *Tinkler* v *Hilder*, 4 Exch 187 See *Wilcox* v *Odden*, 15 C B N S 837, *Freeman* v *Read*, 9 C B N S 301

(*y*) *Lawes* v *Purser*, 6 E & B 930 See *Harrup* v *Bayley*, 6 E & B 218

(*z*) *Clark* v *Adie*, 2 App Cas 423

(*a*) *Crossley* v *Dixon*, 10 H L Cas 293, at p 310 See also *Morrison* v *Universal Marine Ins Co* , L R 8 Ex 40 and 197

(*b*) *Per* Rolfe, B , in *Ness* v *Angas*, 3 Exch 813 See the Partnership Act, 1890 (53 & 54 Vict c 39), s 14

(*c*) *Salomons* v *Pender*, 3 H & C 639

(*d*) *Rogers* v *Hadley*, 2 H & C 227

conventional state of facts, and not on the truth" (*e*), and it is not competent to either party afterwards to deny the truth of such statement (*f*)

So, where rent, accruing due after the expiration of a notice to quit, is paid by the tenant and accepted by the landlord, that is an act of the parties which evidences an intention that a tenancy should be considered as subsisting (*g*) So, if there be a distress, the distrainor affirms by a solemn act that a tenancy subsists, and it is not competent to him afterwards to deny it (*h*)

In like manner, the maxim under consideration applies, in many cases, to prevent the assertion of titles inconsistent with each other, and which cannot contemporaneously take effect (*i*) And it is laid down that "a person who has a power of appointment, if he chooses to create an estate or a charge upon his estate by a voluntary act, cannot afterwards use the power for the purpose of defeating that voluntary act", and if a bond be given to the Crown under 33 Hen 8, c 39, binding all lands over which the obligor has at the time of executing the bond a disposing power, the giving such bond is to be deemed a voluntary act on the part of the obligor, so that he cannot, by afterwards exercising the power, defeat the right of the Crown (*j*)

No one shall derogate from his own grant

Closely allied with the principle of the decisions just noticed, is the rule of law that "a man shall not derogate from his own grant," as an illustration of which may be cited the case of *Saunt* v *Pilley* (*k*), where it was held that the surrender of a term by a trustee in bankruptcy could not defeat the right of one who had previously bought the fixtures, but had, without *laches*, allowed them to remain upon the premises And where a man parts with land, knowing that it is intended to erect substantial buildings upon it, he will not be allowed afterwards to use his adjoining land so as to injure those buildings (*l*) Further, if a

(*e*) Blackb Contr Sale, 163 As for instance in the case of a valued policy in Marine Insurance, which, however does not effect estoppel for purposes collateral to the contract (*per* Ld Selborne in *Burnand* v *Rodoconachi*, 7 App Cas 333, at p 335)

(*f*) *M Cance* v *L & N W Ry Co*, 3 H & C 343

(*g*) See *Tayleur* v *Wildin*, L R 3 Ex 303, *Freeman* v *Evans*, 125 L T 722

(*h*) *Per* Maule, J, in *Blyth* v *Dennett*, 13 C B 178, at p 181, *per* Cromp ton, J, *Ward* v *Day*, 4 B & S 337, at p 353, 5 Id 359, and see *per* Ld Brougham in *Clayton* v *A G*, 1 Coop t Cott 124

(*i*) See *Gretton* v *Haward*, 1 Swan 409, at p 427, note

(*j*) *R* v *Ellis*, 4 Exch 652 6 Id 921

(*k*) L R 10 Ex 137

(*l*) *Siddons* v *Short*, 2 C P D 572

stranger begins to build on land, supposing it to be his own, and the real owner perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards assist the real owner asserting his title to the land (*m*)

Election

The principle, moreover, underlies the doctrine known in England as that of *election*, and in Scotland as *approbate* and *reprobate* (*n*), which is thus explained by Lord Cairns "Where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument, without at the same time conforming to all its provisions, and renouncing every right inconsistent with them" (*o*)

Lastly, where a witness in a Court of justice makes contradictory statements relative to the same transaction, the rule applicable in determining the degree of credibility to which he may be entitled obviously is *allegans contraria non est audiendus*

OMNE MAJUS CONTINET IN SE MINUS (5 *Rep* 115 (*a*))—*The greater contains the less* (*p*)

Tender of larger sum than due

On this principle, if a debtor tender more than he owes, it is good, and the creditor ought to accept so much of the sum tendered as is due (*q*) But if he tender a bank-note or coin of a larger amount than the sum due, requiring change, that is not a good tender, for the creditor may be unable to take what is due and return the balance (*r*), though if the creditor knows the amount due, and is offered a larger sum, and, without any

(*m*) *Ramsden* v *Dyson*, L R 1 H L 129, see *Plimmer* v *Wellington (N Z)*, *Mayor of*, 9 App Cas 699, at p 710 *M'Manus* v *Cooke*, 35 Ch D 681, at p 696, *A G to Prince of Wales* v *Collom*, [1918] 2 K B 193 at p 203

(*n*) *Codrington* v *Codrington* L R 7 H L 854, at p 861, see *Ld Chesham*, *Re*, 31 Ch D 466, at p 474

(*o*) As instances of this doctrine, see *Talbot* v *Earl of Radnor*, 3 Myl & K 252, *Messenger* v *Andrews*, 4 Russ 478, *Cooper* v *Cooper*, L R 7 H L 53 (applied *Williams*, *Re*, [1915] 1 Ch 450) As to Approbate and Reprobate, see *Kerr* v *Wauchope*, 1 Bligh, 121

(*p*) Finch, Law, 21, D 50, 17, 113, 110, pr

(*q*) *Wade's Case*, 5 Rep 114 a, *Dean* v *James*, 4 B & Ad 546 A demand of a larger sum than is due may be good as a demand of the lesser sum (*Carr* v *Martinson*, 1 E & E 456)

(*r*) *Betterbee* v *Davis*, 3 Camp 70, *Robinson* v *Cook*, 6 Taunt 336, *Blow* v *Russell*, 1 C & P 365 See *Read* v *Goldring*, 2 M & S 86 See, as another instance of the maxim, *Rylands* v *Kreitman*, 19 C B N S 351

objection on the ground of change, merely makes a collateral objection, the tender is good (*s*) Where, however, a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all, not distinguishing the claims against each, is not a valid tender, and will not support a plea by one of the debtors, that *his* debt was tendered (*t*)

The maxim admits of familiar illustration in the power which a tenant in fee-simple possesses over the estate held in fee, for he may either grant to another the whole of such estate, or charge it in any manner he think fit, or he may create out of it any less estate or interest, and to the estate or interest thus granted he may annex such conditions, not repugnant to the rules of law, as he pleases (*u*) In like manner, a man having a power may do less than such power enables him to do, he may, for instance, lease for fourteen years under a power to lease for twenty-one (*u*), or, if he have a licence or authority to do any number of acts for his own benefit, he may do some of them and need not do all (*z*) In these cases, the rule of the civil law applies *non debet cui plus licet quod minus est non licere* (*y*) or, as it is usually expressed in our books, *cui licet quod majus non debet quod minus est non licere* (*z*)—he who has authority to do the more important act shall not be debarred from doing that of less importance, a doctrine founded on common sense, and of general application, not only with reference to the law of real property, but likewise to that of principal and agent, as we shall hereafter see On this principle, moreover, if there be a custom within any manor that copyhold lands may be granted in fee-simple, by the same custom they are grantable to one and the heirs of his body for life, for years, or in tail (*a*) So, if there be a

(*s*) *Per* Ld Abinger in *Bevans* v *Rees*, 5 M & W 306, at p 308 *Black* v *Smith*, P N P 121, *Saunders* v *Graham*, Gow, 121, *Douglas* v *Patrick* 3 T R 683 See *Hardingham* v *Allen*, 5 C B 793, *Danks*, *Ex parte*, 2 De G M & G 936

(*t*) *Strong* v *Harvey*, 3 Bing 304 at p 313 See also *Douglas* v *Patrick* *supra* Tender of part of an entire debt is bad, *Dixon* v *Clark* 5 C B 365, *Searles* v *Sadgrave*, 5 E & B 639 So is a tender clogged with a condition *Finch* v *Miller*, 5 C B 428, *Bowen* v *Owen*, 11 Q B 130, see *Greenwood* v *Sutcliffe*, [1892] 1 Ch 1

(*u*) 1 Prest Abstr Tit 316, 377

(*w*) *Isherwood* v *Oldknow* 3 M & S 382 See, for an instance of syllogistic reasoning founded on the maxim, *Johnstone* v *Sutton*, 1 T R 510 at p 519

(*x*) *Per* Ld Ellenborough in *Isherwood* v *Oldknow*, 3 M & S 392

(*y*) D 50, 17, 21

(*z*) 4 Rep 23, also *majus dignum trahit ad se minus dignum*, Co Litt 355 b, 2 Inst 307, Noy, Max, 9th ed p 26, Finch, Law, 22

(*a*) *Grosvenor* v *Todd*, 4 Rep 23 a, Wing Max p 206

custom that copyhold lands may be granted for life, by the same custom they may be granted *durante viduitate*, but not *e converso*, because an estate during widowhood is less than an estate for life (*b*)

Merger

The doctrine of merger may also be specified in illustration of the maxim now before us, for "when a less estate and a greater estate, limited subsequent to it, coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or in the law phraseology is said to be merged, that is sunk or drowned in the greater, or to express the same thing in other words, the greater estate is accelerated so as to become at once an estate in possession" (*c*)

Extension of principle

Further, it is laid down as generally true, that, where more is done than ought to be done, that portion for which there was authority shall stand, and the act shall be void *quoad* the excess only (*d*), *quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est* (*e*) as in the instance of a power above referred to, if a man do more than he is authorised to do under the power, it shall be good to the extent of his power Thus, if he have power to lease for ten years, and he lease for twenty, the lease for the twenty years shall in equity be good for ten years of the twenty (*f*)

So, if the grantor of land is entitled to certain shares only of the land granted, and if the grant import to pass more shares than the grantor has, it will nevertheless pass those shares of which he is the owner (*g*) Where also there is a custom that a man shall not devise any greater estate than for life, a devise in fee will be a good devise for life, if the devisee will claim it as such (*h*)

Criminal law

Lastly, in criminal law the principle above exemplified sometimes applies Whenever a person is indicted for an offence which includes in it an offence of minor extent and gravity of the same class, he may be convicted of such minor offence Thus on an indictment for murder he may be convicted of

(*b*) Co Copyholder, s 33, Noy, Max , 9th ed p 25 See another example, *Shewsbury's Case*, 9 Rep 46 b, at 48 b

(*c*) 2 Black Com 326 327

(*d*) Noy, Max , 9th ed p 25

(*e*) *Wade s Case*, 5 Rep 114 a, at 115 a

(*f*) See *Bartlett* v *Rendle*, 3 M & S 99, *Doe* d *Williams* v *Matthews*, 5 B & Ad 298

(*g*) 3 Prest Abstr Tit 35

(*h*) Gr & Rud of Law, p 242

manslaughter (*i*) and on an indictment for "unlawfully and maliciously wounding" he may be found guilty of a common assault (*j*) But it is only by virtue of the Criminal Procedure Act, 1851 (*k*), that where a person has been indicted for a crime, a jury may find him guilty of an attempt to commit the same crime

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QUOD AB INITIO NON VALET IN TRACTU TEMPORIS NON CONVALESCIT (Noy, *Max*, 9*th ed*, *p* 16 *Dig* 50, 17, 29, 210)—*That which was originally void, does not by lapse of time become valid*

Importance of rule in practice and pleading

General application

This rule is one of general importance in practice, in pleading, and in the application of legal principles to the occurrences of life (*l*) Instances in which it applies will be found to occur in various parts of this work, particularly in that which treats of the law of contracts The following cases have here been selected, in order to give a general view of its application in different and distinct branches of the law

Lease

If a bishop makes a lease of lands for four lives, which is contrary to the 13 Eliz c 10, s 3, and one of the lives falls in, and then the bishop dies, yet this lease will not bind his successor, for those things which have a bad beginning cannot be brought to a good end (*m*) So, if a man seised of lands in fee make a lease for twenty-one years, rendering rent to begin presently, and the same day he make a lease to another for the like term, the second lease is void, and even if the first lessee surrender his term to the lessor, or commit any act of forfeiture of his lease, the second lessee shall not have his term, because the lessor at the making of the second lease had nothing in him but the reversion (*n*)

(*i*) *R* v *Mackalley*, 9 Rep 67 b

(*j*) *R* v *Taylor*, L R 1 C C 194 See *R* v *Hodgkiss*, Id 212

(*k*) 14 & 15 Vict c 100, s 9

(*l*) See instances of the application of this rule in the case of marriage with a deceased wife's sister, *Fenton* v *Livingstone*, 3 Macq 497, at p 555, of the surrender of a copyhold, *Doe* d *Tofield* v *Tofield*, 11 East, 246, of a parish certificate, *R* v *Upton Gray*, 10 B & C 807, *R* v *Whitchurch*, 7 B & C 573, of an order of removal, *R* v *Chilverscoton*, 8 T R 178

(*m*) Noy, Max, 9th ed p 16 See *Doe* d *Brammal* v *Collinge*, 7 C B 939, *Doe* d *Pennington* v *Taniere*, 12 Q B 998

(*n*) *Smith* v *Stapleton*, Plowd 426, at p 432, Noy, Max, 9th ed p 16

Again, in the case of a lease for years, there is a distinction between a clause by which, on a breach of covenant, the lease is made absolutely void, and a clause which merely gives the lessor power to re-enter (*o*) Under the former clause, if the lessor make a legal demand of the rent, and the lessee refuse to pay, or if the lessee be guilty of any breach of the condition of re-entry, the lease is *void* and absolutely determined, and cannot be set up again by acceptance of rent due after the breach, or by any other act, but under the latter clause the lease is only *voidable* at the option of the lessor (*p*), and may be affirmed by acceptance of rent accrued afterwards (*q*) or other act (*r*), provided the lessor had notice of the breach of condition at the time, and it is undoubted law that, though an acceptance of rent or other act of waiver may make a voidable lease good, it cannot make valid a deed (*s*) or a lease which was void *ab initio*

Remainder, &c

Where a remainder is limited to A , the son of B , he having no such son, and afterwards a son is born to him, whose name is A , during the continuance of the particular estate, he will not take by this remainder (*t*)

So, where uses are raised by a deed which is itself void, as in the instance of the conveyance of a freehold *in futuro*, the uses mentioned in the deed cannot arise (*u*) When the estate to which a warranty is annexed is defeated, the warranty is also defeated (*v*), and when a spiritual corporation to which a church is appropriate is dissolved, the church is disappropriated (*y*)

So, where a living becomes vacant by resignation or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, the law requires him to give notice thereof to the patron (*z*), otherwise he can take no advantage by way of lapse,

(*o*) The distinction has ceased to be of importance owing to the construction now placed, where possible, upon forfeiture clauses, see *Davenport* v *R* 3 App Cas 115 at p 128 *Quesnel Forks Gold Mining Co , Ltd* v *Ward*, [1919] W N 286, and *post*, p 198

(*p*) *Doe* d *Bryan* v *Bancks*, 4 B & Ald 401, Co Litt 215 a, *Jones* v *Carter*, 15 M & W 719, see *Wheeler* v *Keeble*, [1920] 1 Ch 57

(*q*) *Pennant s Case* 3 Rep 64 a at 64 b

(*r*) *Ward* v *Day*, 5 B & S 359 at p 362

(*s*) See *per* Lord Cottenham in *De Montmorency* v *Devereux*, 7 Cl & F 188 at p 230

(*t*) Noy, Max , 9th ed p 17, 2 Black Com 320 321

(*u*) Arg , *Goodtitle* v *Gibbs*, 5 B & C 709, at p 714

(*v*) Litt s 741, and Butler s note (1), Co Litt 389 a, but this may with more propriety be referred to the maxim, *sublato principali tollitur adjunctum*, *ibid*

(*y*) Noy, Max , 9th ed p 20

(*z*) See *Bp of Exeter* v *Marshall*, L R 3 H L 17

neither in this case shall any lapse accrue to the metropolitan or to the Crown, for the first step fails—*quod non habet principium non habet finem* (*a*), it being universally true that neither the archbishop nor the Crown shall present by lapse, but where the immediate ordinary might have collated by lapse within the six months, and has exceeded his time (*b*)

Qualification of rule

Aider by verdict

An important qualification of the rule expressed by the maxim we have been discussing is effected by the doctrine of aider by verdict When an averment which is necessary for the support of a pleading is improperly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict, that the issue could not have been determined without proof of the averment, the defective averment, which might have been fatal on demurrer, is cured by the verdict (*c*) This principle is applicable in criminal proceedings, but is now of no practical importance in civil proceedings (*d*) Aider by verdict does not, however, extend to a case where a necessary averment is totally omitted (*e*) In such cases the more general rule applies, *debile fundamentum fallit opus* (*f*) A still more marked qualification of the leading maxim is afforded by cases where an act done contrary to the express direction or established practice of the law will not be found to invalidate the subsequent proceedings, and where, consequently, *quod fieri non debet factum valet* (*g*)

Further exceptions

Banwen Iron Co v *Barnett* (*h*) seems to fall within the class of cases to which the maxim just cited applies There a certificate of complete registration of a company had been granted under the 7 & 8 Vict c 110, s 7—repealed in 1862—although the deed of settlement—corresponding approximately to the modern memorandum of association—omitted some of the requisite provisions and it was held that a shareholder could

(*a*) Wing Max p 79, Co Litt 345 a

(*b*) 2 Black Com 452, Co Litt 345 a

(*c*) *Heyman* v *R*, L R 8 Q B 105, *per* Blackburn, J , and see *Jackson* v *Pesked*, 1 M & S 234, 1 Wms Saund 228, 1

(*d*) *R* v *Aspinall*, 2 Q B D 48

(*e*) *Per* Brett, J , Id , p 58

(*f*) Finch, Law, 14, 96, Wing Max 113, 114 See, also the judgment in *Davies* v *Lowndes*, 8 Scott, N R 539, at p 567, where the above maxim is applied

(*g*) Gloss in 1, 5, Cod 1, 14 *Pro infectis* D 1, 14, 3, Wood, Inst 25, *Tey's Case*, 5 Rep 38 a, at f 38 b As will be seen hereafter, this and the leading maxim have frequent application in the case of contracts See *McCallan* v *Mortimer*, 6 M & W 58, 7 M & W 20, 9 M & W 636, at p 640

(*h*) 8 C B 406, at p 433

not, in answer to an action against him for calls, object that the certificate had been granted upon the production of an insufficient deed

The case of *R* v *Lord Newborough* (*i*) also illustrates this exception to the maxim The question was as to the payment of special constables by a county treasurer, neither the appointment of these constables, nor the order for their payment, having been made in accordance with the requirements of the Special Constables Act, 1831 (1 & 2 Will 4, c 41) It was urged *quod fieri non debet factum valet*, and this view was adopted by Lush, J , who decided that, as the order for payment had been acted upon, the account allowed, and the money paid, the proceedings should not be re-opened

Conformably to the principle on which that case was decided, the maxim, *quod fieri non debet factum valet*, will in general be found to apply wherever a form has been omitted which ought to have been observed, but of which the omission is *ex post facto* immaterial (*j*) It frequently happens that a particular act is directed to be done by one clause of a statute, and that the omission of such act is, by a separate clause, declared immaterial to the validity of subsequent proceedings In all such cases it is true, that what ought not to have been done is valid when done Thus, residence in the parish before proclamation was directed by 26 Geo 2, c 33, "for the better preventing of clandestine marriages," as a requisite preliminary to a marriage by banns, but if this direction, although material for carrying out the object of that Act, was not complied with, the marriage was nevertheless valid, for the legislature expressly declared that non-observance of this direction should, after the marriage had been solemnised, be immaterial (*k*) The applicability of this maxim, in regard to the validity of a marriage irregularly solemnised, was also discussed in *Beamish* v *Beamish*, which will hereafter more conveniently be noticed (*l*)

Lastly, it is said, that "void things" may nevertheless be

(*i*) L R 4 Q B 585, see also *per* Blackburn, J , in *Winsor* v *R* , 6 B & S 143, at p 188

(*j*) *Per* Ld Brougham in *Auchterarder* v *Kinnoull*, 6 Cl & F 646 at p 708 "There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an Act of Parliament, and clauses *merely directory* , *per* Ld Mansfield in *R* v *Loxdale*, 1 Burr 445, at p 447 (adopted by Tindal, C J , in *Southampton Dock Co* v *Richards*, 1 Scott, N R 219 at p 239)

(*k*) See *per* Ld Brougham, 6 Cl & F 708 *et seq*

(*l*) 5 Irish C L Rep 136, 6 Id 142, 9 H L Cas 274

"good to some purpose" (*m*), as if A, by indenture, let B an acre of land in which A has nothing, and A purchase it afterwards, this will be a good lease (*n*), and the reason is, that what, in the first instance, was a lease by estoppel only (*o*), becomes subsequently a lease in interest, and the relation of landlord and tenant will then exist as perfectly as if the lessor had been actually seised of the land at the time when the lease was made (*p*)

ARGUMENTUM AB INCONVENIENTI PLURIMUM VALET IN LEGE (*Co Litt* 66 *a*)—*An argument drawn from inconvenience is forcible in law* (*q*)

It has been stated, under a preceding maxim (*r*), that where the law is clearly defined, its strict letter will not be departed from because inconvenience or hardship may result from its strict observance Yet, in cases where the law is not clear, or where the circumstances give rise to doubt, the Courts frequently allow their decision to be determined by such considerations (*s*)

Thus, arguments of inconvenience are sometimes of great value upon the question of intention If there be in any instrument equivocal expressions, and great inconvenience must necessarily follow from one construction, it is strong to show that such construction is not according to the true intention of the grantor, but where there is no equivocal expression in the instrument, and the words used admit only of one meaning, arguments of inconvenience prove only want of foresight in the grantor This reasoning was applied in *Glyn* v *East and West India Dock Co*, where the meaning of the expression in bills of lading, "the

(*m*) Finch, Law, 62

(*n*) Noy, Max, 9th ed, p 17, and authorities cited, Id n (*a*)

(*o*) See *Cuthbertson* v *Irving*, 4 H & N 742, at p 754, 6 Id 135, *Duke* v *Ashby*, 7 Id 600

(*p*) *Blake* v *Foster*, 8 T R 487, *Stokes* v *Russell* 3 T R 678, *per* Alderson, B, in *Green* v *James*, 6 M & W 656, at p 662, *Webb* v *Austin*, 8 Scott, N R 419, *Pargeter* v *Harris*, 7 Q B 708, Co Litt 47 b, 1 Platt on Leases, 53, 54, Bac Abr Leases (*o*)

(*q*) Co Litt 97, 152 b As to the argument *ab inconvenienti*, see *per* Sir W Scott in *Georgina, The*, 1 Dod 397, at p 402, *per* Ld Brougham in *Auchterarder* v *Kinnoull*, 6 Cl & Fin 646, at p 671, 1 Mer 420, *Sheppard* v *Phillimore*, L R 2 P C 450, at p 460

(*r*) *Omnis innovatio*, &c

(*s*) *Per* Heath, J in *Steel* v *Houghton*, 1 Black, H, 51, at p 61 *per* Dallas C J, in *Deane* v *Clayton*, 7 Taunt 489, at p 527, and in *Idle* v *Roy Exch Ass Co*, 8 Id 755, at p 762, *per* Holroyd, J, in *May* v *Brown*, 3 B & C 113, at p 131, judgm in *Doe* d *Thomas* v *Acklam*, 2 B & C 779, at p 798

one being accomplished, the other to stand void," was discussed (*t*) But because a man has been wanting in foresight, the Courts cannot make a new instrument for him they must act upon the instrument as it is made (*u*) And generally, if there be any doubts what is the law, judges solve such doubts by considering what will be the good or bad effects of their decision, but if the law is clear, inconveniences afford no argument of weight the legislature alone can remedy them (*x*) And, hence, the doctrine that *nihil quod est inconveniens est licitum* (*y*), which is frequently advanced by Sir E Coke, must certainly be received with some qualification, and must be understood to mean, that against the introduction or establishing of a particular rule or precedent inconvenience is a forcible argument (*z*)

Public inconvenience

This argument *ab inconvenienti*, moreover, is, under many circumstances, valid to this extent, that the law will sooner suffer a private mischief than a public inconvenience,—a principle which we have already considered It is better to suffer a mischief which is peculiar to one, than an inconvenience which may prejudice many (*a*)

Argument, how applied in interpreting statutes

Lastly, in construing an Act, the same rule applies If the words used by the legislature, in framing any particular clause, have a necessary meaning, it is the duty of the Court to construe the clause accordingly, whatever may be the inconvenience of such a course (*b*) Where a statute is imperative no reasoning *ab inconvenienti* should prevail But, unless it is very clear that violence would be done to the language of the Act by adopting any other construction, any great inconvenience which might result from that suggested, may certainly afford fair ground for supposing that it could not be what was contemplated by the

(*t*) 7 App Cas 591 and see *per* Jessel, M R , in *Bottomley s Case* 16 Ch D 681, at p 686

(*u*) *Per* Sir J Leach in *A G* v *Marlborough*, 3 Mad 498, at p 540, *per* Burrough, J , in *Deane* v *Clayton*, 7 Taun 489, at p 496, *per* Best C J , in *Fletcher* v *Sondes*, 3 Bing 502, at p 590

(*x*) *Per* Ld Northington in *Pike* v *Hoare*, 2 Eden, 182, at p 184 See *Dixon* v *Harrison*, Vaughan, 36 at pp 37, 38

(*y*) Co Litt 66 a cited *per* Pollock C B , in *Egerton* v *Brownlow*, 4 H L Cas 1, at p 145, and *per* Ld Truro, Id 195

(*z*) Ram Science of Legal Judgment, 57

(*a*) Co Litt 97 b, 152 b, *Needler* v *Bp of Winchester*, Hobart, 221, at p 224, *salus populi*, &c , p 1, *ante*

(*b*) *Per* Erle, J , in *Wansey* v *Perkins*, 8 Sco N R 954, at p 969, *per* Parke, J in *Mirehouse* v *Rennell*, 1 Cl & F 527, at p 546, Wilberforce on Stat Law, Chap 8

legislature, and will warrant the Court in looking for some other interpretation (*c*)

Although, according to Lord Bacon (*d*), judges ought above all things to remember the conclusion of the Roman Twelve Tables, *salus populi suprema lex*, and that laws, unless they be in order to that end, are but things captious and not well inspired, he reminds them elsewhere that their function is to interpret, and not to make the law

(*c*) Judgm in *Doe* d *Bristol Hospital* v *Norton*, 11 M & W 913, at p 928, judgm in *Turner* v *Sheffield R Co*, 10 Id 425, at p 434

(*d*) Essay Of Judicature, see *per* Pollock, C B, in *Egerton* v *Brownlow*, 4 H L Cas 1, at p 152

CHAPTER V

FUNDAMENTAL LEGAL PRINCIPLES

MANY of the principles set forth in this chapter are of such general application that they may be considered as exhibiting the very foundations on which the legal science rests To these established maxims the remark of Sir W Blackstone (Com , 21st ed , vol 1 , p 68) is peculiarly applicable —Their authority "rests entirely upon general reception and usage, and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it" It would, indeed, be highly interesting to trace from a remote period, and through successive ages, the gradual development of these principles, to observe their primitive and more obvious meaning, and to show how they have been applied by the "living oracles" of the law to meet the increasing exigencies of society, and those complicated facts which are the result of commerce, civilization, and refinement Such an inquiry would, however, be too extensive to be compatible with the plan of this work, our object, therefore, in the following pages, is limited to exhibiting a series of the elementary rules of law, accompanied by occasional references to the civil law, and a sufficient number of cases to exemplify the meaning and qualifications of the maxims cited

These will be found to comprise the following important principles that where there is a right there is a remedy that the law looks not at the remote, but at the immediate cause of damage that the act of God shall not, by the instrumentality of the law, work an injury that the law does not compel the performance of that which is impossible to be done that ignorance of the law does not afford an excuse, although ignorance of facts does that a party shall not convert that which was done by himself, or with his assent, into a wrong that a man shall not take advantage of his own tortious act that the abuse of an authority given by law shall, in some cases, have a

retrospective operation in regard to the liability of the party abusing it that the intention, not the act, is regarded by the law and that a man shall not be twice vexed in respect of the same cause of action

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Ubi Jus ibi Remedium —*There is no wrong without a remedy* (*a*)

Jus and *remedium* defined

Jus signifies here 'the legal authority to do or to demand something" (*b*), and *remedium* may be defined to be the right of action, or the means given by law, for the recovery or assertion of a right According to this elementary maxim, whenever the common law gives a right or prohibits an injury, it also gives a remedy (*c*) *lex semper dabit remedium* (*d*) If a man has a right, he must, it has been observed, "have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it, and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal" (*e*)

It appears, then, that *remedium*, although sometimes used as synonymous with *actio*, has, in the above maxim, a more extended signification than the word "action" in its modern sense An 'action' is, in fact, one peculiar mode pointed out by the law for enforcing a remedy, or for prosecuting a claim or demand, in a Court of justice—*action n'est auter chose que loyall demande de son droit* (*f*), an action is merely the legitimate mode of enforcing a right, whereas *remedium* must here be understood to signify rather the right of action, or *jus persequendi in judicio*

(*a*) *Lex non debet deficere conquerentibus in justitia exhibenda* the law wills that, in every case where a man is wronged and endamaged, he shall have remedy, Co Litt 197 b

(*b*) Mackeld, Civ Law, 6

(*c*) 3 Blac Comm 123

(*d*) Jacob, Law Dict, title, *Remedy* 'Upon principle, wherever the common law imposes a duty, and no other remedy can be shown to exist, or only one which has become obsolete or inoperative, the Court of Queen s Bench will interfere by mandamus" (judgm in *Veley* v *Burder*, 12 A & E 265, at p 266) See *R* v *Leicester Guardians*, [1899] 2 Q B 682

(*e*) *Per* Holt, C J, in *Ashby* v *White*, 2 Raym Ld 938, at p 953, see *per* Vaughan, C J, in *Dixon* v *Harrison*, Vaugh 37, at p 47, and in *North* v *Coe*, Vaugh 251, at p 253, and *per* Willes, C J, in *Winsmore* v *Greenbank* Will 577, at p 581

(*f*) Co Litt 285 a, Mirror, Bk 2, c 1

quod sibi debetur (*g*), which is in terms the definition of the word *actio* in the Roman law (*h*)

The maxim *ubi jus ibi remedium* has been considered so valuable, that it led to the invention of the form of action called an action on the case, for the Statute of Westminster 2 (*i*), which was only in affirmance of the common law on this subject, and was passed to quicken the diligence of the clerks in the Chancery, who were too much attached to precedents, enacted that, "whensoever, from thenceforth a writ shall be found in the Chancery, and in a like case, falling under the same right and requiring like remedy, no precedent of a writ can be produced, the clerks in Chancery shall agree in forming a new one, and if they cannot agree, it shall be adjourned till the next Parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the Court of our Lord the King be deficient in doing justice to the suitors"

Action on the case

Novelty of complaint

The principle adopted by Courts of law accordingly is, that the novelty of the particular complaint alleged in an action on the case is no objection, provided that an injury cognisable by law be shown to have been inflicted on the plaintiff (*j*), in which case, although there be no precedent, the common law will judge according to the law of nature and the public good (*k*) It is, however, important to observe this distinction, that, where cases are new in principle, it is necessary to have recourse to legislative interposition in order to remedy the grievance, but where the case is only new in the instance, and the sole question is upon the application of a principle recognised in the law to such new case, it will be just as competent to Courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago (*l*)

Ashby v *White*

In accordance with the spirit of the maxim, *ubi jus ibi remedium*, it was held in a case usually cited to illustrate it, that a man who has a right to vote at an election for members of Par-

(*g*) I 4, 6, pr

(*h*) See Phillimore, Introd to Rom L , 61

(*i*) 13 Edw I c 24

(*j*) *Per* Pratt, C J , in *Chapman* v *Pickersgill*, 2 Wils K B 145, at p 146, *Novello* v *Sudlow*, 12 C B 177, at p 190, and see *per* Coleridge, J , in *Gosling* v *Veley* 4 H L Cas 679, at p 768, *Catchpole* v *Ambergate Ry Co* , 1 E & B 111

(*k*) Jenk Cent 117

(*l*) *Per* Ashhurst, J , in *Pasley* v *Freeman*, 3 T R 51, at p 63, *per* Park, J , in *Deane* v *Clayton* 7 Taunt 489, at p 515, see *per* Parke, J , in *Fletcher* v *Sondes*, 3 Bing 501, at p 550

liament, may maintain an action against the returning officer for maliciously refusing to admit his vote, though his right was never determined in Parliament, and though the persons for whom he offered to vote were elected (*m*), and in answer to the argument, that there was no precedent for such an action, and that to establish such a precedent would lead to multiplicity of actions, Lord Holt observed (*n*) that "if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense"

General principle

It is true, therefore, that, in trespass and for torts generally, new actions may be brought as often as new injuries and wrongs are repeated (*o*)

Damnum absque injuria

There is, however, a large class of cases in which a damage is sustained, but a damage not occasioned by anything which the law esteems an injury Such damage is termed *damnum absque injuria*, and for that no action can be maintained the maxim, *ubi jus ibi remedium*, does not apply, for there is no *jus*, no legal right to demand that the act which causes the damage shall not be done, and therefore there is no *remedium* (*p*) It may seem a hardship upon the person suffering the damage that he is without remedy, but by that consideration the Courts ought not to be influenced "Hard cases, it has frequently been observed, are apt to introduce bad law" (*q*)

Malice

Before mentioning instances of *damnum absque injuria*, we must refer to the very important principle of our law, that an act lawful in itself is not actionable because it is done from ill-will or other bad motive *damnum absque injuria* remains *damnum absque injuria*, although the *damnum* is inflicted intentionally (*r*) Our law does not take into account motive as constituting an element of civil wrong Any invasion of the civil rights of another person is in itself a legal wrong, carrying with

(*m*) *Ashby* v *White* 2 Raym Ld 938 as to which see 1 Sm L C 12th ed 266 Proof of malice was necessary to support the action because the officer had, from his position a qualified privilege, see *post* pp 134, 149 and see *Cullen* v *Morris*, 2 Stark 577 at p 587, *Tozer* v *Child*, 7 E & B 377

(*n*) In *Ashby* v *White* 2 Raym Ld 938 at p 955

(*o*) *Hambleton* v *Veere* 2 Wms Saund 171 b (1) (cited by Ld Denman in *Hodsoll* v *Stallebrass*, 11 A & E 301, at p 306)

(*p*) See *Pryce* v *Belcher* 4 C B 866, and 3 Id 58, where the maxim *ubi jus ibi remedium*, was much considered

(*q*) *Per* Rolfe B, in *Winterbottom* v *Wright*, 10 M & W 109, at p 116

(*r*) *Allen* v *Flood*, [1898] A C 1 *Bradford Corporation* v *Pickles*, [1895] A C 587, *Davies* v *Thomas*, [1920] 1 Ch 217, *Ware & De Freville* v *Motor Trade Association*, [1921] 3 K B 40 *Per* Ld Macnaghten in *Quinn* v *Leathem*, [1901] A C 495, at p 509

it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose rights are infringed, whether the motive which prompted it be good, bad or indifferent But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due Malice, in common acceptation, means ill-will against a person, but, in its legal sense, it means a *wrongful* act done *intentionally* without just cause or excuse The root of the principle is that, in any legal question, malice depends, not upon any evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed (*s*)

Probably the only exception to this principle is the action for malicious prosecution, in which an evil motive is an essential ingredient, but, as Lord Herschell points out, this is an exceptional case justified "because it was thought men might otherwise be too much deterred from enforcing the law and that this would be disadvantageous to the public" (*t*) Actions for libel and slander appear at first sight to be another exception But that is not really so The law never regards such acts as legal it merely excuses them in certain circumstances for reasons of public policy It is always wrongful falsely to defame, but the law excuses the act, and renders it privileged from action, if it is done in the honest endeavour to discharge a duty which the law recognises (*u*) Proof of malice, in the sense of improper motive, is required, not to show that the act was wrongful, but to show that the act was not privileged Such proof is not essential to the maintenance of the action, unless the wrongful act was done under circumstances from which the law would, in the absence of evidence to the contrary, infer that it was privileged (*v*)

Instances of *damnum absque injuria*

As instances of persons who cause *damnum absque injuria*, we may mention the man who establishes a rival school, which draws away the scholars from a school previously established (*w*), or builds a bridge over a river, which causes loss of traffic

(*s*) See *per* Ld Watson in *Allen* v *Flood*, [1898] A C 1, at pp 92, 94

(*t*) *Per* Ld Herschell, Id at p 125

(*u*) There must be an actual, not merely an imagined duty (*Hebditch* v *MacIlwaine*, [1894] 2 Q B 54)

(*v*) See *per* Ld Watson, in *Allen* v *Flood* [1898] A C 1, at p 93, *per* Ld Herschell, Id at pp 125, 126 As to the *onus probandi* in actions for libel, see *Jenoure* v *Delmege*, [1891] A C 73

(*w*) Y B 11 Hen 4, f 47, pl 21

to a ferry owner (*x*) or establishes a new ferry providing for new traffic which, but for the establishment of the new ferry, would have gone to an existing ferry carried on under a franchise (*y*) the traders who by concerted action, but without the use of illegal means, acquire the business formerly enjoyed by other traders (*z*) the person who by lawful means induces a servant to determine lawfully his contract of service or not to enter into a contract of service (*a*) But to molest a person in the carrying on of his business, or to interfere with his mode of doing it, by unlawful means such as threats, violence, intimidation, or conspiracy, is actionable if it results in damage (*b*), except in so far as protection is given to these acts by the Trade Disputes Act, 1906 (*c*)

Other instances of *damnum absque injuria* arise where a person by his want of care causes damage to another to whom he owes no duty to take care (*d*), or without negligence or intention accidentally inflicts personal injuries on another (*e*) Such also are the cases of the farmer who omits to cut the thistles naturally growing upon his land, in consequence of which they spread into his neighbour's land (*f*) the landowner who erects upon his land buildings obstructing his neighbour's prospect (*g*), or cutting off from his neighbour's house light (*h*), or air (*i*), to which the neighbour had no legal right the landowner who appropriates water percolating in undefined channels within his land, and thus prevents its flow into his neighbour's land (*j*), even though he does this maliciously (*k*), or who erects upon the

(*x*) *Hopkins* v *G N Ry Co*, 2 Q B D 224, *Dibden* v *Skirrow*, [1908] 1 Ch 41

(*y*) *Hammerton* v *Dysart*, [1916] A C 57

(*z*) *Mogul S S Co* v *McGregor*, [1892] A C 25

(*a*) *Allen* v *Flood*, [1898] A C 1

(*b*) *Quinn* v *Leathem* [1901] A C 495, and see the earlier cases fully discussed in *Allen* v *Flood*, [1898] A C 1, especially the opinion of Hawkins, J

(*c*) 6 Edw 7, c 47

(*d*) *Le Lievre* v *Gould*, [1893] 1 Q B 491, *Lane* v *Cox*, [1897] 1 Q B 415, *Earl* v *Lubbock*, [1905] 1 K B 253, following *Winterbottom* v *Wright*, 10 M & W 109

(*e*) *Stanley* v *Powell*, [1891] 1 Q B 86

(*f*) *Giles* v *Walker*, 24 Q B D 656

(*g*) *Aldred s Case*, 9 Rep 58, see *per* Ld Blackburn in *Dalton* v *Angus*, 6 App Cas 740, at p 824

(*h*) *Tapling* v *Jones*, 11 H L Cas 290, *Russell* v *Watts*, 10 App Cas 590, *Broomfield* v *Williams*, [1897] 1 Ch 602

(*i*) *Webb* v *Bird*, 13 C B N S 841, *Bryant* v *Lefever*, 4 C P D 172, *Chastey* v *Ackland*, [1897] A C 155 [1895] 2 Ch 389

(*j*) *Chasemore* v *Richards*, 7 H L Cas 349

(*k*) *Bradford Corporation* v *Pickles*, [1895] A C 587

border of his land barriers against floods, causing them to flow on to his neighbour's land (*l*) But from these last examples we must distinguish that of the landowner who appropriates water which flows through his land in a defined surface channel, and to the flow of which his neighbour is entitled (*m*) or who, by cutting trenches in his land, causes floods, which have already settled therein, to flow away on to his neighbour's land (*n*) For these acts produce an injury for which an action lies

Procuring breach of contract

It has been laid down as a fundamental principle that "it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for such interference" (*o*), and if such interference is committed knowingly and results in damage, an action lies (*p*) So, it is actionable (if damage results) knowingly to induce a servant to break a contract of service (*q*), and the rule is not confined to contracts of personal service, but applies to all contractual rights, such, for instance, as a contract for the supply of goods (*r*) The Trade Disputes Act, 1906, has, however, largely restricted the scope of this principle, in cases where the acts are done in contemplation or furtherance of a trade dispute (*s*) But it by no means follows that every dispute is a trade dispute merely because workmen choose to take part with one side or the other (*t*)

Removal of lateral support to land

In certain cases the same act may cause sometimes *damnum absque injuria*, sometimes *injuria* Thus, if a man, by digging in his own land, cause his neighbour's house to fall down, it depends upon the circumstances whether he is answerable for the damage His neighbour is entitled to lateral support for his house, if he has enjoyed the support openly, peaceably and continuously for twenty years (*u*), but in the absence of an

(*l*) *R* v *Pagham Commrs* 8 B & C 355, *Nield* v *L & N W Ry Co* L R 10 Ex 4 *Massey* (or *Maxey*) *Drainage Board* v *G N Ry Co*, 56 S J 275

(*m*) *Gr Junction Canal Co* v *Shugar*, L R 6 Ch 483

(*n*) *Whalley* v *L & Y Ry Co* 13 Q B D 131

(*o*) *Per* Ld Macnaghten in *Quinn* v *Leathem*, [1901] A C 495, at p 510

(*p*) *Quinn* v *Leathem ubi supra*, *Lumley* v *Gye*, 2 E & B 216, *Bowen* v *Hall*, 6 Q B D 333 *Temperton* v *Russell* [1893] 1 Q B 715, *Glamorgan Coal Co* v *South Wales Miners Federation*, [1905] A C 239, *Read* v *Friendly Society of Stonemasons*, [1902] 2 K B 732 *Giblan* v *Labourers Union*, [1903] 2 K B 600, *Smithies* v *National Association of Plasterers*, [1909] 1 K B 310

(*q*) *Lumley* v *Gye* 2 E & B 216

(*r*) *Bowen* v *Hall*, 6 Q B D 333, *Temperton* v *Russell*, [1893] 1 Q B 715

(*s*) As to the general immunity of trade unions from liability in tort, see 6 Edw 7, c 47, ss 1, 3, & 4, and *Conway* v *Wade*, [1909] A C 506

(*t*) See *per* Ld Parmoor in *Larkin* v *Long*, [1915] A C 814, at p 846

(*u*) *Dalton* v *Angus*, 6 App Cas 740

express or implied grant, he is not entitled to it for a newly-erected house (*v*), and therefore the question whether there is any liability may turn merely upon the age of the house It must be noticed, however, that, unless he has granted away the right, the neighbour is entitled to have his land in its natural unencumbered state left unaffected by the removal of the lateral support, and not the less so because he has recently built a house upon the land Hence, an actionable injury is done to him if the removal of the support causes a subsidence to the land, not attributable to the weight of the house, and in such case the damage done to the house, though newly erected, is recoverable as being consequential upon the injury (*w*) It may be added that it is the subsidence which grounds the cause of action, not the removal of the support, and therefore a fresh cause of action arises upon a second subsidence, due exclusively (*x*) to the same excavation as was the first (*y*) It is the subsidence, not the pecuniary loss, which gives the cause of action (*z*)

Acts authorised by statute

An act which would be an injury at common law is sometimes merely *damnum absque injuria* owing to the provisions of a statute If a statute directs or authorises acts, it is not wrongful to do them if damage results, it is just that there should be compensation, and that is often provided for by the statute, but no action lies for what is *damnum absque injuria* the only remedy is to seek such compensation as the statute provides and this is the case whether the acts be authorised for a public purpose or for a private profit (*a*) The legislature, however, when it authorises persons to do acts which would be wrongful at common law, usually does not exempt them from the duty to take reasonable care that in doing the acts they do no unnecessary damage (*a*), and therefore, though they are not liable to an action for such damage as necessarily arises notwithstanding that they observe that duty (*b*), yet, for damage done in breach

(*v*) The right to support of buildings must be founded upon prescription or grant, express or implied *per* Willes J , in *Bonomi* v *Backhouse* 1 E B & E 622, at pp 654, 655 cited by Ld Selborne, in *Dalton* v *Angus* 6 App Cas 740, at p 795

(*w*) *Browne* v *Robins*, 4 H & N 186, *Hamer* v *Knowles* 6 H & N 454

(*x*) *Manley* v *Burn* [1916] 1 K B 121

(*y*) *Darley Main Colliery Co* v *Mitchell*, 11 App Cas 127 *West Leigh Colliery Co* v *Tunnicliffe and Hampson*, [1908] A C 27

(*z*) See *per* Collins, J , in *A G* v *Conduit Colliery Co* , [1895] 1 Q B 301 at p 312

(*a*) *Per* Ld Blackburn in *Mersey Dock Trustees* v *Gibbs*, L R 1 H L 93, at p 112

(*b*) *Vaughan* v *Taff Vale Ry Co* , 5 H & N 679 (deciding that no action lay

of that duty they have no statutory protection (*c*) They must strictly pursue their statutory powers, and for acts which are injuries at common law and which are not legalised by their statute, or which are legalised by a statute expressly preserving the common law liability to action (*d*) they are liable to a common law action (*e*) Statutes which legalise acts and provide for compensation for damage done thereby are generally construed as providing compensation only for acts which are lawful by reason of the statutes and which would have been actionable injuries if the statutes had not been passed (*f*) In so far as they do not provide compensation, there is no remedy for damage caused by the acts which they have legalised (*g*), unless such remedy is expressly preserved (*h*)

Injury to right imports damage

Although *damnum absque injuria* is a matter of frequent occurrence, yet *injuria absque damno* may be said to be unknown to our law, for a "damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right" (*i*) Thus if a debtor being in execution on final process (*k*), escaped for ever so short a time, the creditor, who had a right to the debtor's body every hour until the debt was paid, could maintain an action against the sheriff without proof of pecuniary damage (*l*) Similarly, on the ground that an injury has been done, proof of pecuniary damage is unnecessary for the maintenance of an action by a customer against his

for damage caused by sparks from railway engines used under statutory powers, but no longer law in view of the Railway Fires Act 1905 (5 Edw 7, c 11)), *Hammersmith Ry Co* v *Brand*, L R 4 H L 171 (deciding that no action lay for vibration caused by the running of trains under statutory powers), *L B & S C Ry Co* v *Truman*, 11 App Cas 45 (deciding that no action lay for the nuisance caused by a cattle yard established alongside a railway pursuant to statutory powers)

(*c*) *Geddis* v *Bann Reservoir Co* 3 App Cas 430

(*d*) *Powell* v *Fall*, 5 Q B D 597, deciding that the owner of a tramway engine legally used was liable for damage caused by it

(*e*) *Jones* v *Festiniog Ry Co*, L R 3 Q B 733 (deciding that an action lay for damage by sparks from railway engine used without statutory power), *Metrop Asylum District* v *Hill*, 6 App Cas 193, *Shelfer* v *City of Lond E L Co*, [1895] 1 Ch 287

(*f*) *Broadbent* v *Imperial Gas Co*, 7 D M & G 436, 7 H L Cas 600, *per* Ld Blackburn in *Caledonian Ry Co* v *Walker's Trustees*, 7 App Cas 259, at p 293, see *Cowper Essex* v *Acton L B*, 14 App Cas 153

(*g*) *Hammersmith Ry Co* v *Brand*, and *L B & S C Ry Co* v *Truman*, *supra*, *A G* v *Metr Ry Co*, [1894] 1 Q B 384

(*h*) See *Powell* v *Fall*, *supra*

(*i*) *Per* Holt, C J, in *Ashby* v *White*, 2 Raym Ld 938, at p 955

(*k*) See the Debtors Act, 1869 (32 & 33 Vict c 62)

(*l*) *Williams* v *Mostyn*, 4 M & W 145, at p 153, and see *Clifton* v *Hooper*, 6 Q B 468

banker who, having received funds for the purpose, wrongfully dishonours the customer's cheque (*m*), or by a client against his solicitor who compromises a suit contrary to instructions (*n*), or by a tenant against his landlord who levies an excessive distress for arrears of rent (*o*) It must be noticed, however, that, whilst in some cases, of which these last-mentioned are examples, a man has an absolute right to demand that some act shall be done, or not done, there are other cases in which he has not that right, but only the qualified right to demand that no damage shall be done to him by the act, or its omission In these cases there is no injury, if there be no damage, and damage is said to be the gist of the action Thus the recklessness of a driver upon the highway gives no cause of action to a person who does not suffer actual damage therefrom though an innkeeper be bound to guard his guest's goods at the inn (*p*), his want of care is not actionable, unless it leads to loss fraud without damage will not support an action of deceit (*q*) no action lies against a landlord who, though he distrains for more rent than is due, only seizes goods which do not exceed a value which is reasonable in view of the rent actually due (*r*) a judgment creditor who sues the sheriff for neglecting to levy under (*s*), or for making a false return to (*t*), a writ of *fi fa* must prove actual damage a father cannot maintain an action for the seduction of his daughter whilst in his service (*u*), unless there be, or might have been, some actual consequent loss of some service (*x*) which he received or might have received because she resided with him and had occasionally done some house-

but damage may be necessary to constitute injury

(*m*) *Marzetti* v *Williams*, 1 B & Ad 415, where nominal damages were recovered, *Rolin* v *Steward*, 14 C B 595, where the jury gave substantial damages, see *Larios* v *Gurety*, L R 5 P C 346, 357, *Wilson* v *United Counties Bank*, [1920] A C 102, at p 133

(*n*) *Godefroy* v *Jay*, 7 Bing 413, *Fray* v *Voules*, 1 E & E 839 But in the absence of instructions, a solicitor can compromise, see *Butler* v *Knight*, L R 2 Ex 109

(*o*) *Chandler* v *Doulton*, 3 H & C 553

(*p*) See *Calye s Case*, 8 Co Rep 32, 1 Sm L C, 12th ed, p 131

(*q*) *Per* Croke, J, in *Baily* v *Merrell*, 3 Bulstr 94, *per* Buller, J, in *Pasley* v *Freeman*, 3 T R 51, at 56, *per* Ld Blackburn in *Smith* v *Chadwick*, 9 App Cas 187, at p 195, *per* Lord Herschell in *Derry* v *Peek*, 14 Id 337, at p 363

(*r*) *Tancred* v *Leyland*, 16 Q B 669, *Glynn* v *Thomas*, 11 Exch 870, *French* v *Phillips*, 1 H & N 564

(*s*) *Hobson* v *Thelluson*, L R 2 Q B 642

(*t*) *Stimson* v *Farnham*, L R 7 Q B 175

(*u*) See *Terry* v *Hutchinson*, L R 3 Q B 599

(*x*) *Per* Tindal, C J, in *Grinnell* v *Wells*, 7 M & G 1033, at p 1041, *per* Pollock, C J, in *Eager* v *Grimwood*, 1 Exch 61, at p 63

work (*y*), even though she did not live with him (*z*) but was not actually in the service of some other person (*a*)

Malicious prosecution

There are three kinds of damage known to the law damage to a man's fame, damage to his person, and damage to his property (*b*) An ordinary civil action nowadays involves a successful defendant in none of these, for any extra costs incurred by him beyond those awarded are not to be ascribed to the litigation, and therefore the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, does not support a subsequent action for malicious prosecution (*c*) A person's fame, however, is damaged not only when strictly criminal proceedings are commenced against him for an alleged offence (*d*), but also when bankruptcy proceedings are instituted against him, and so is the credit of a trading company when a petition is presented to wind it up, and therefore an action lies if such proceedings be taken maliciously and without reasonable and probable cause (*e*) It must be noticed, however, that the action cannot be maintained, unless the proceedings upon which it is founded have been annulled (*f*)

Damages when nominal

Having stated that, when a right has been invaded, an action for damages generally lies (*g*), although no damage has been actually sustained, we may observe that the principle on which many such cases proceed is that it is material to the preservation of the right itself, that its invasion should not pass with impunity, and in these cases, therefore, *nominal* damages only are sometimes awarded, because their recovery sufficiently vindicates the plaintiff's right as, for instance, in trespass *quare clausum fregit*, which is maintainable for a

(*y*) *Manvell* v *Thompson*, 2 C & P 303 *Carr* v *Clarke*, 2 Chit 260

(*z*) *Holloway* v *Abell*, 7 C & P 528

(*a*) *Hedges* v *Tagg*, L R 7 Exch 283

(*b*) *Per* Holt, C J , in *Savill* v *Roberts*, 1 Raym Ld 374, at p 378, see *per* Phillimore, L J , in *Wiffen* v *Bailey and Romford U D C* , [1915] 1 K B 600, at p 610

(*c*) See the judgments in *Quartz Hill Co* v *Eyre* 11 Q B D 674 Legal damage must be shown in order to sustain an action for malicious prosecution (*Cotterell* v *Jones* 11 C B 713 see *Wyatt* v *Palmer* [1899] 2 Q B 106)

(*d*) See *Rayson* v *S Lon Tram Co* [1893] 2 Q B 304 but compare *Wiffen* v *Bailey and Romford U D C* , [1915] 1 K B 600, at pp 608 612 613

(*e*) *Quartz Hill Co* v *Eyre*, *supra* See *The Walter D Wallet* [1893] P 202

(*f*) *Met Bank* v *Pooley*, 10 App Cas 210

(*g*) This proposition is more fully stated and illustrated in *Blofeld* v *Payne*, 4 B & Ad 410 (as to which see *Spalding* v *Gamage*, 32 R P C 273, at p 283), *Rogers* v *Nowill*, 5 C B 109, *Wells* v *Watling*, 2 Black W 1233, *Pindar* v *Wadsworth*, 2 East, 154

wrongful entry on the land of another, though there be no real damage, because repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff might be injured, or in an action by a commoner for an injury done to his common, in which action evidence need not be given of the exercise of the right of common by the plaintiff (*h*) Where a riparian owner had built an obstruction out from his bank into the stream, the Court ordered its removal although no immediate damage could be described nor any actual loss predicated to the owner of the opposite bank (*i*)

It is not, indeed, by any means true, as a general proposition, that the actual damage indicates, in an action *ex delicto*, the proper measure of damages to be given, for instance, my neighbour may take from under my house coal, which I had no means of getting at, and yet I may recover the value, notwithstanding I have sustained no real damage (*k*), and other cases might readily be instanced showing that such an action may be maintainable without evidence being adduced of pecuniary loss or *damnum* to the plaintiff (*l*) as in cases of libel and slander, where the words are actionable *per se*, the jury are at liberty to give substantial damages, although no actual damage be proved (*m*)

Limitations to maxim, *ubi jus ibi remedium*

The maxim, *ubi jus ibi remedium*, has its limitations, and there are various cases in which either the maxim does not apply, or at least the remedy for the wrong is not a civil action for damages

Injuries to community

Where an act is a grievance to the entire community, the mode of punishing the wrong-doer is usually by indictment or by information at the suit of the Attorney-General, suing on behalf of the public (*n*) But an individual who has suffered a

(*h*) *Per* Taunton, J , in *Marzetti* v *Williams*, 1 B & Ad 415, at p 426, *Wells* v *Watling* 2 Black W , 1233, 1 Wms Saunds 346 a, note (cited by Martin, B , and Kelly, C B in *Harrop* v *Hirst*, L R 4 Ex 43, at pp 45, 47)

(*i*) *Bickett* v *Morris*, L R 1 Sc & Div 47 See *Siddons* v *Short*, 2 C P D 572, as to injunctions being granted where actual injury has not been sustained but is apprehended

(*k*) *Per* Maule, J , in *Clow* v *Brogden*, 2 Scott, N R 903, 315, 316, *Pontifex* v *Bignold*, 3 Scott, N R 390 The *dictum* of Ld Denman in *Taylor* v *Hennuker*, 12 A & E 488, at p 492, was also an authority for this proposition but that case is overruled by *Tancred* v *Leyland*, 16 Q B 669

(*l*) *Embrey* v *Owen*, 6 Exch 353, *Dickinson* v *Grand Junc Can Co* , 7 Exch 282, *Northam* v *Hurley*, 1 E & B 665, recognised in *Whitehead* v *Parks* 2 H & N 870, *Rolin* v *Steward*, 14 C B 595 In reference to the question whether substantial damage must be proved, the wording of a statute *may* be material, see (*e g*) *Rogers* v *Parker*, 18 C B 112, *Medway Navigation Co* v *Romney*, 9 C B N S 575 (*m*) *Tripp* v *Thomas*, 3 B & C 427

(*n*) Co Litt 56 a, *per* Holt, C J , in *Ashby* v *White*, 2 Raym Ld 938, at p 955, *per* Channell, B , in *Harrop* v *Hirst*, L R 4 Ex 43, at p 47

particular damage beyond that suffered by the public may sometimes maintain an action in respect thereof

Highways

Thus, if A dig a trench across the highway, that is the subject of an indictment, and for the obstruction of his passage along the highway B cannot maintain an action (*o*) But if the trench obstruct B 's access to the highway from his own lands (*p*), or if B , while using the highway with ordinary care (*q*), has sustained harm by falling into the trench, that is particular damage for which an action lies (*r*) It would, however, be untrue to say that, where a wrong is done to the community, an individual who suffers particular damage always has a remedy by action For if particular damage be suffered by a highway being out of repair, no action lies against the highway authority who ought to have repaired it, since highway authorities, entrusted with the performance of the duties which originally fell upon the inhabitants of parishes, are not civilly liable for mere nonfeasance (*s*) And it is doubtful whether persons bound to repair a highway *ratione tenuræ* (*t*) are civilly liable for particular damage sustained by their default (*u*) Water companies and public authorities, however, which, under their statutory powers, place apparatus in the highway, are liable, if, by reason of the want of repair of such apparatus itself, damage happens to a person using the highway, though they are not liable for damage caused by the apparatus becoming a danger owing to the want of repair of the highway in which it is placed (*v*)

Public nuisance

It is, indeed, an important rule that the law gives no private remedy for anything but a private wrong, and that, therefore, no action lies for a public or common nuisance, and the reason is that, the damage being common to all the subjects of the Crown, no one individual can ascertain his particular proportion

(*o*) *Winterbottom* v *Lord Derby*, L R 2 Ex 316

(*p*) *Fritz* v *Hobson*, 14 Ch D 542 (following *Rose* v *Groves*, 5 M & G 613, and *Lyon* v *Fishmongers' Co* , 1 App Cas 662)

(*q*) *Butterfield* v *Forrester*, 11 East, 60

(*r*) See also *Benjamin* v *Storr*, L R 9 C P 400

(*s*) *Cowley* v *Newmarket L B* , [1892] A C 345, *Thompson* v *Mayor of Brighton*, [1894] 1 Q B 332, *Papworth* v *Battersea Corp* , [1914] 2 K B 89

(*t*) As to this liability, see *R* v *Barker*, 25 Q B D 213

(*u*) See *Rundle* v *Hearle*, [1898] 2 Q B 83, where the *dicta* in favour of their liability are cited As to *Borough of Bathurst* v *Macpherson*, there cited, see *Sydney Corp* v *Bourke*, [1895] A C 433 The latter case overruled *Hartnall* v *Ryde Commrs* , 4 B & S 361

(*x*) *Chapman* v *Fylde Waterworks Co* , [1894] 2 Q B 599, *Thompson* v *Mayor of Brighton*, *supra*, and cases there cited in the judgment of A L Smith, L J

of it, or if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions (*y*) This rule applies where a statute prohibits the doing of a particular act affecting the public Unless the statute provides to the contrary, no cause of action can arise, upon the prohibited act being done, in favour of a private person who suffers therefrom no peculiar damage beyond that which all the King's subjects suffer by the infringement of the law (*z*) Moreover, if the act be prohibited under a penalty, *prima facie* the Crown alone has the right to sue for the penalty, and if a private person sue for it, the onus lies upon him to show that the statute has conferred upon him the right to do so (*a*)

Damage too remote

It frequently happens that when a wrongful act has been done to a person, he suffers a damage, but, although he may have a cause of action for the wrongful act, yet he cannot found any claim for compensation upon that particular damage, because the connection between such damage and the wrongful act is insufficient the damage is too remote *In jure non remota causa sed proxima spectatur* (*b*)

Damages in action on contract

In actions on contract the damages recoverable are such as may fairly and reasonably be considered as arising naturally, *i e*, according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it (*c*)

Damages in action of tort

Similar principles are applicable in actions of tort Generally speaking, a wrong-doer is responsible only for the natural and ordinary consequences of his wrongful act or such as he should have known were likely to arise (*d*) Thus, it is a breach of duty in a railway company to allow their carriages to be overcrowded, but theft, though facilitated by overcrowding, is not

(*y*) Co Litt 56 a, 1 Chitty, Gen Pr Law, 10

(*z*) See *per* Pollock, C B, in *Chamberlaine* v *Chester & Birkenhead Ry Co* 1 Exch 870, at pp 876 77

(*a*) *Bradlaugh* v *Clarke*, 8 App Cas 354, at p 358

(*b*) Bac Max, reg 1, see *per* Blackburn, J, in *Sneesby* v *L and Y Ry Co* L R 9 Q B 263, at p 267

(*c*) Judgm in *Hadley* v *Baxendale*, 9 Exch 341, at p 354, see *Horne* v *Mid Ry Co*, L R 8 C P 131, *Hydraulic Engineering Co* v *McHaffie* 4 Q B D 670, *Grébert Borgnis* v *Nugent*, 15 Id 85, *Hammond* v *Bussey*, 20 Q B D 79 See *post*, p 159

(*d*) *Sharp* v *Powell*, L R 7 C P 253, see *Wilkinson* v *Dounton*, [1897] 2 Q B 57, which is approved in *Janvier* v *Sweeney*, [1919] 2 K B 316 The decision of the Privy Council in *Victorian Rail Commrs* v *Coultas*, 13 App Cas 222, cannot now be regarded as law see *per* Ld Shaw in *Brown* v *Watson*, [1915] A C 1, at p 13

its natural and ordinary consequence, and the company is not liable to one passenger, if his purse be stolen by another in an overcrowded carriage; the damage is too remote (*e*) But it must not be supposed that one wrong-doer is never answerable for consequences resulting in some measure from the intervention of another If a collision between two omnibuses occur through the negligence of both the drivers, the proprietor of each vehicle is responsible for the damage which results to a passenger of either (*f*) If A wrongfully place a spiked barrier upon a carriage-way, and then B remove it improperly on to the adjacent footpath, A is liable for the damage done by the spikes to C whilst lawfully using the path at night (*g*) If the driver of a horse and cart negligently leaves them unattended in the street, his master is liable for the natural results of the horse and cart being wrongfully set in motion by a person who might have been expected to do that act (*h*) but there is no such liability where the driver of a steam lorry, requiring a complicated series of operations to start it, leaves it unattended in the street (*i*) The question here is whether the wrongful act of the defendant or his servant was the effective cause of the damage done, and this must generally be treated as a question of fact (*k*)

Act of third person causing the damage

In an action for slander, if the words are not actionable *per se* (*l*), special damage must be proved (*m*) It has been thought that if, by reason of the slander, a third person does some act which, even if the slander had been true, would have been illegal, that can never be treated as special damage (*n*) But this doctrine has been frequently criticised (*o*), and the better opinion seems to be that of Lord Wensleydale, that to

(*e*) *Cobb* v *G W Ry Co*, [1893] 1 Q B 459

(*f*) See *The Bernina* 13 App Cas 1, overruling *Thorogood* v *Bryan* 8 C B 115, and *Armstrong* v *L & Y Ry Co*, L R 10 Ex 47

(*g*) *Clark* v *Chambers*, 3 Q B D 327

(*h*) *Engelhart* v *Farrant*, [1897] 1 Q B 240

(*i*) *Ruoff* v *Long* [1916] 1 K B 148

(*k*) *Engelhart* v *Farrant*, *supra*, see *Ruoff* v *Long*, *supra*

(*l*) They are such, at common law if they falsely impute a criminal offence or contagious disease, or disparage the plaintiff in the way of his office, profession or trade see Odgers on Libel, 5th ed, pp 39 *et seq* By the Slander of Women Act, 1891 (54 & 55 Vict c 51), they are such, if they impute unchastity or adultery to a woman or girl

(*m*) Such damage, therefore, is the cause of action, see *per* Bramwell, L J, in *Bree* v *Marescaux*, 7 Q B D 434, at p 437

(*n*) *Vicars* v *Wilcocks*, 8 East 1, 2 Sm L C, 12th ed, p 513

(*o*) See the cases collected in the notes to *Vicars* v *Wilcocks*, 2 Sm L C, 12th ed, pp 515 *et seq*

make a slander actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relation between the parties concerned, it might fairly and reasonably have been anticipated and feared would follow from the slander (*p*) When a wrongful act is committed, damages may in some cases be recovered in tort even though the immediate cause is the voluntary act of a third person, as where the defendant kept a dog which he knew to be savage and the dog was let loose by a third person and bit the plaintiff (*q*) And in case of breach of contract damages immediately caused by the intervening criminal act of a third person are recoverable if they can be shown to be a natural consequence of the breach of contract (*r*)

Public policy

There are some cases in which, although a wrongful act has been done, yet, on grounds of public policy, an action will not lie We have already adverted to the qualified privilege which may excuse a slander, libel, or prosecution instituted without reasonable and probable cause (*s*), and some wrongful acts are absolutely privileged The immunities from action, which are enjoyed by the Crown (*t*), and by judges of courts of record (*u*), have been mentioned elsewhere No action lies against a member of Parliament for slanders uttered in Parliament (*x*), or against an advocate for slanders uttered in the course of a judicial inquiry (*y*), or against a witness in legal proceedings for defamation or perjury (*z*) A subordinate military officer has no remedy by action against his superior officer who defames him in an official report upon his conduct (*a*), or who injures him by an act done in the course of discipline and under powers

(*p*) *Per* Ld Wensleydale in *Lynch* v *Knight* 9 H L Cas 577, at p 600 (cited by Brett, L J , in *Chamberlain* v *Boyd*, 11 Q B D 407, at p 414) see also *Bowen* v *Hall*, 6 Q B D 333, at p 338 The cases in which special damage may be proved upon the repetition of the slander by third persons are summed up in *Speight* v *Gosnay*, 60 L J Q B 231

(*q*) *Baker* v *Snell*, [1908] 2 K B 825

(*r*) *De La Bere* v *Pearson, Ld* , [1908] 1 K B 280

(*s*) *Ante*, p 134

(*t*) *Ante*, p 34 See also *R* v *Commissioners of Treasury*, L R 7 Q B 387

(*u*) *Ante*, p 61

(*x*) *R* v *Abingdon*, 1 Esp 228, *Dillon* v *Balfour*, 20 L R Ir 600, *Bradlaugh* v *Gossett*, 12 Q B D 271 As to the qualified privilege of county councillors, see *Royal Aquarium* v *Parkinson*, [1892] 1 Q B 431

(*y*) *Munster* v *Lamb*, 11 Q B D 588, *Mackay* v *Ford*, 5 H & N 792 See also *Pedley* v *Morris*, 61 L J Q B 21, *Lilley* v *Roney*, Id 727

(*z*) *Seaman* v *Netherclift*, 2 C P D 53, and the cases there cited

(*a*) *Dawkins* v *Paulet*, L R 5 Q B 94

legally incident to the position of the superior officer (*b*) In these cases malice does not take away the privilege, for the law will rather suffer a private mischief than a public inconvenience (*c*)

Trade disputes and trade unions

By the Trade Disputes Act, 1906 (*d*), certain immunities are given (i) in respect of acts done in contemplation or furtherance of a trade dispute (*e*), and (ii) in favour of trade unions and their officers By section 1, an act done in pursuance of a conspiracy is, if done in contemplation or furtherance of a trade dispute, not actionable, unless such act would be actionable if done without conspiracy, section 3 prevents actions being brought, on the ground of inducing a breach of contract or interference with business, for any act done in contemplation or furtherance of a trade dispute, and section 4 confers on trade unions absolute immunity from actions "in respect of any tortious act alleged to have been committed by or on behalf of the trade union "

Where the act is felonious

It has been thought that, in order to prevent the compounding of felonies, there is some rule of law against the maintenance of an action for a wrong, amounting to a felony, before the criminal prosecution of the felon, and upon this ground, in *Wellock* v *Constantine* (*f*), Willes, J , nonsuited a servant, who sued her master for a rape, for which he had not been indicted, and the nonsuit was upheld by a majority in the Court of Exchequer (*g*) Subsequently, however, in *Wells* v *Abraham* (*h*), the Court of Queen's Bench refused to disturb a verdict for the plaintiff in an action of trover for a brooch, although the defendant, who had stolen the brooch, had not been prosecuted for the theft, and in that case, and afterwards in *Ex parte Ball* (*i*), and *Midland Insurance Co* v *Smith* (*k*), the

(*b*) *Johnstone* v *Sutton*, 1 T R 510

(*c*) *Johnstone* v *Sutton*, *supra* at p 513, cited by Mellor, J , in *Dawkins* v *Paulet*, *supra*, at p 116

(*d*) 6 Edw 7, c 47

(*e*) As to the meaning of these words see *Conway* v *Wade*, [1908] 2 K B 844, and [1909] A C 506, and *Larkin* v *Long*, [1915] A C 814, at p 846

(*f*) 2 H & C 146, at p 147

(*g*) Ibid , at p 152, by Pollock, C B , and Bramwell, B (Martin, B , diss) The judgment is unsatisfactory, see *per* Blackburn, J , in *Wells* v *Abraham* L R 7 Q B 554, at p 562 and *per* Bramwell, L J , in *Ball*, *Ex parte*, 10 Ch D 667, at p 671

(*h*) L R 7 Q B 554, where the judges were all of opinion that there ought not to have been a nonsuit

(*i*) 10 Ch D 667, where Bramwell, L J , enumerated the ways in which the rule, if any, might be stated, and pointed out the difficulties against each

(*k*) 6 Q B D 561 Most of the earlier authorities are collected in these three

question whether the supposed rule existed, and, if so, how it could be applied, was much discussed The result of this discussion seems to be that it is doubtful whether there is any rule on the subject (*l*), but that, if there is, it is only to the effect that, where a prosecution can be, and ought to be instituted, the Court itself may, in its discretion, summarily stay the action (*m*) the defendant cannot take advantage of the rule either by demurrer (*n*) or by plea (*o*), or, indeed, insist upon it in any other manner (*p*), for if the maxim, *nemo allegans suam turpitudinem est audiendus* (*q*), applies at all, it must, it seems, always affect the defendant

Although the law on this point can hardly be said to be completely settled, yet it is well established that the rule, if any, only obtains in actions against the felon by his immediate victim, and does not extend to actions in respect of events consequent upon the felony, but brought against (*r*) any person other than the felon, nor does it extend to actions by any person other than the person on or against whom the felony was committed (*s*) It never applied to misdemeanors (*t*), and consequently does not form any impediment to an action for assault, battery, or libel, which might be made the subject of a prosecution for misdemeanor, and Lord Campbell's Act (*u*) expressly provides that an action may be maintained under that Act, although death has been caused under such circumstances as

cases but see also *per* Perrin B, in *Gibson* v *Minet*, 1 Black, H, 569, at p 588 *per* Romilly, M R, in *Chowne* v *Baylis* 31 L J Ch 717 at p 761 *per* Sir W Scott, in *The Hercules* 2 Dod 353, at pp 375—376 and cases cited in 1 Sm L C, 12th ed, pp 322—3

(*l*) See particularly *per* Blackburn, J, in *Wells* v *Abraham*, L R 7 Q B 554, at p 559 *et seq*

(*m*) See *per* Cockburn, C J, and Blackburn, J, in *Wells* v *Abraham*, *supra* *per* Cave, J, in *Roope* v *D Avigdor*, 10 Q B D 412, *Smith* v *Selwyn*, [1914] 3 K B 98

(*n*) *Roope* v *D Avigdor*, *supra*

(*o*) *Lutterell* v *Reynell*, 1 Mod Rep 282

(*p*) See *Smith* v *Selwyn* *supra*

(*q*) *Ball, Ex parte* 10 Ch D 667, at p 672, *Midland Ins Co* v *Smith*, 6 Q B D 561, at p 571

(*r*) *White* v *Spettigue*, 13 M & W 603, *Lee* v *Bayes*, 18 C B 599, *Stone* v *Marsh*, 6 B & C 551 *Marsh* v *Keating*, 1 Bing N C 198 (each of which actions was against an innocent receiver of property obtained by means of a felony), *Tyler* v *Cork C C* [1921] 2 I R 8 (action against ratepayers for value of goods feloniously taken by rioters)

(*s*) *Ex p Ball*, 10 Ch D 667, *Appleby* v *Franklin*, 17 Q B D 93, see also *Osborn* v *Gillett* L R 8 Ex 88, and *Smith* v *Selwyn*, [1914] 3 K B 98 at p 104

(*t*) *The Hercules* 2 Dod 353, *Fissington* v *Hutchinson*, 15 L T 390

(*u*) The Fatal Accidents Act, 1846 (9 & 10 Vict c 93) (amended by the Fatal Accidents Act, 1864 (27 & 28 Vict c 95))

amount in law to felony (*x*) Moreover, "it is clear that the liability to an action cannot of itself furnish any answer to an indictment for fraud" (*y*)

Breaches of statute

Hitherto, we have been considering the maxim, *ubi jus ibi remedium*, mainly in relation to common law rights We must now advert briefly to its application to rights conferred by statute There are, it has been said (*z*), three classes of cases in which a statutory liability may be established One is, where a liability existing at common law is affirmed by a statute which gives a special remedy different from that which exists at common law there, unless the words of the statute expressly or by necessary implication (*a*) take away the common law remedy, either that or the statutory remedy may be pursued at election The second is, where the statute gives the right to sue merely, but provides no particular form of remedy there a person can only proceed by action at common law The third is, where a liability not existing at common law is created by a statute which at the same time gives a particular remedy for enforcing it there the remedy provided by the statute must be followed, for it is a rule of law that an action will not lie for the infringement of a right created by a statute, where another specific remedy for its infringement is provided by that statute (*b*) There may, however, be a further remedy by injunction (*c*)

With regard to cases which do not fall within either the first or the third of these classes, no general rule can be laid down upon the question whether a person who suffers damage from the breach of a statutory duty can maintain an action in respect of such damage the question must be decided in each case upon the language and object of the particular statute (*d*) It has been held, however, that where a statute creates a duty with the object of preventing a particular mischief, a person who suffers a totally different mischief from a breach of that duty cannot

(*x*) S 1

(*y*) *Per* Ld Denman, C J , in *R* v *Kenrick*, 5 Q B 49, at p 65

(*z*) *Per* Willes, J , in *Wolverhampton Waterworks Co* v *Hawkesford*, 6 C B N S 336, at p 356

(*a*) *Great Northern Fishing Co* v *Edgehill*, 11 Q B D 225

(*b*) *Stevens* v *Jeacocke*, 11 Q B 731, at p 741, *Peebles* v *Oswaldtwistle U D C*, [1897] 1 Q B 625, *Barraclough* v *Brown*, [1897] A C 615, *Hutchins* v *London C C*, 85 L J K B 1177, *Whittaker* v *London C C*, [1915] 2 K B 676

(*c*) *Cooper* v *Whittingham*, 15 Ch D 501

(*d*) *Atkinson* v *Newcastle Waterworks Co*, 2 Ex D 441, at p 448 *Saunders* v *Holborn D B of W*, [1895] 1 Q B 64, at p 68, *Groves* v *Ld Wimborne*, [1898] 2 Q B 402, at p 416, *Woods* v *Winskill*, [1913] 2 Ch 303

maintain an action therefor (*e*), and it has been laid down, with regard to statutory duties, that for mere nonfeasance no action lies except in the case of a duty owed to the plaintiff and negligently omitted (*f*)

The principles of the common law are often applied to determine whether an action lies against persons who have statutory duties to perform Thus, it has been held that, if their duties are discretionary, they have a qualified privilege, which does not exist in the case of purely ministerial duties (*g*), and that they are not liable for errors in the exercise of their discretion when committed without malice (*h*) Moreover, a statutory duty may be of such a character that, if such construction be permissible, the statute will be construed as imposing no liability where failure to perform it has not arisen from the want of reasonable care (*i*)

Public authorities

By way of conclusion to this subject, we may refer the reader to the Public Authorities Protection Act, 1893 (*k*), for certain privileges enjoyed by persons when sued for any act done in the intended execution of a statute, or of any public duty or authority, or for any neglect or default in the execution of the same

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QUOD REMEDIO DESTITUITUR IPSA RE VALET SI CULPA ABSIT (*Bac Max , reg* 9)—*That which is without remedy avails of itself, if there be no fault in the party seeking to enforce it*

Rule explained

There are certain extra-judicial remedies as well for real as personal injuries, which are furnished by the law, where the parties are so peculiarly circumstanced as to make it impossible to apply for redress in the usual and ordinary methods "The benignity of the law is such," observed Lord Bacon, that, when, to preserve the principles and grounds of law, it deprives

(*e*) *Gorris* v *Scott*, L R 9 Ex 125, cf *Ward* v *Hobbs*, 4 App Cas 13

(*f*) See *Gibraltar Sanitary Commissioners* v *Orfila*, 15 App Cas 400, at p 411, cited by Lopes, L J in *Robinson* v *Workington*, [1897] 1 Q B 619, at p 623

(*g*) *Pickering* v *James*, L R 8 C P 489

(*h*) *Partridge* v *Gen Co of Med Education*, 25 Q B D 90, *Tozer* v *Child*, 7 E & B 377

(*i*) *Hammond* v *St Pancras Vestry*, L R 9 C P 316, *Bateman* v *Poplar D B of W* , 37 Ch D 272, *Lambert* v *Lowestoft Corp* , [1901] 1 K B 590, at p 594

(*k*) 56 & 57 Vict c 61

a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse, for if it disable him to pursue his action, or to make his claim, sometimes it will give him the thing itself by operation of law without any act of his own, sometimes it will give him a more beneficial remedy" (*l*)

Doctrine of remitter

On this principle depended the doctrine of remitter, which, before the abolition of real actions, applied where one who had the true property, or *jus proprietatis*, in lands, but was out of possession, and had no right to enter without recovering possession by real action, had afterwards the freehold cast upon him by some subsequent and, of course, defective title In such case he was remitted by operation of law to his ancient and more certain title, and the right of entry which he had gained by a bad title was held to be, *ipso facto*, annexed to his own inherent good one, so that his defeasible estate was utterly defeated and annulled by the instantaneous act of law, without his participation or consent (*m*) The reason of this was, because he who possessed the right would otherwise have been deprived of all remedy, for, as he himself was in possession of the freehold, there was no person against whom he could bring an action to establish his prior right, and hence the law adjudged him to be in by remitter, that is, in the like condition as if he had lawfully recovered the land by suit (*n*) There could, however, according to the above doctrine, be no remitter where issue in tail was barred by the fine of his ancestor, and the freehold was afterwards cast upon him, for he could not have recovered such estate by action, and, therefore, could not be remitted to it (*o*) Neither will the law supply a title grounded upon matter of record, as if a man be entitled to a writ of error, and the land descend to him, he shall not be in by remitter (*p*) And if land is expressly given to any person by Act of Parliament, neither he nor his heirs shall be remitted, for he shall have no other title than is given by the Act (*q*)

Doe d *Daniel* v *Woodroffe*

In *Doe* d *Daniel* v *Woodroffe*, which went by writ of error before the Exchequer Chamber and House of Lords (*r*), the law

(*l*) Bac Max, reg 9, cited in *Sir Moyle Finch's Case*, 6 Rep 62 b, at 68 a
(*m*) See Vin Ab, '*Remitter*,' Shep Touch, by Preston, 156, n (82), 286
(*n*) Finch, Law, 19, 3 Bl Com 20, Litt, s 661
(*o*) 3 Bl Com 20 See also Bac Max, vol 4, p 40
(*p*) Bac Max, reg 9 *ad finem*
(*q*) *Case of Alton Woods*, 1 Rep 40 b, at 48 b
(*r*) H L Cas 811, 15 M & W 769, 10 M & W 608, (cited in *Spotswood* v

of remitter was much considered, and several important points were decided, which are here stated shortly H W, being tenant in tail in possession of certain lands, with the reversion to the heirs of her late husband, executed a deed-poll in 1735, which operated as a covenant to stand seised to the use of her only son, G W, in fee G W afterward, and during his mother's lifetime, suffered a recovery of the lands to the use of himself in fee He died in 1779, without issue, having by his will devised the lands in fee to trustees in trust to pay an annuity to his nephew, and subject thereto to his great-nephew, W B, for life, with certain remainders over The trustees entered into and held possession until the death of the annuitant in 1790, when they gave possession to W B, who continued in possession of the entirety until his own death in 1824, and did various acts showing that he claimed under the will Upon these facts it was decided, 1st, that the base fee created by the deed-poll, did not, upon H W 's death, become merged in the reversion in fee in G W, as the estate tail still subsisted as an intermediate estate 2ndly, that G W was not remitted to his title under the estate tail, the recovery suffered by him having estopped him 3rdly, that W B, although taking by the Statute of Uses, was capable of being remitted, as the estate tail had not been discontinued 4thly, that the acts done by W B did not amount to a disclaimer by him of the estate tail, as a party cannot waive an estate to which he would be remitted, where the remitter would enure to the benefit of others as well as himself, 5thly, that the right of entry first accrued on the death of G W, in 1779, when there was first an available right of entry, and, consequently, that the entry by W B in 1790 was not too late, and, 6thly, that the entry and remitter of W B in 1790, did not operate to remit A W (his co-parcener) to the other moiety of the estate, the Court observing, with reference to this last point, that possession of land by one parcener cannot, since the 3 & 4 Will 4, c 27 (*s*), be considered as the possession of a co-parcener, and, consequently, that the entry of one cannot have the effect of vesting the possession in the other (*t*)

The principle embodied in the above maxim likewise applies Retainer

Barrow, 5 Exch 110, by Rolfe B, and in *Cowan* v *Milbourn*, L R 2 Ex 230, at p 235, and arg in *Tarleton* v *Liddell*, 17 Q B 390, at p 406)

(*s*) The Real Property Limitation Act, 1833

(*t*) Judgm in *Doe* d *Daniel* v *Woodroffe*, 15 M & W 769, at pp 792, 798

in the case of *retainer* (*u*), that is, where a creditor is made executor or administrator to his debtor If a person indebted to another makes his creditor his executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to *retain* so much as will pay himself before any other creditor whose debts are of *equal* degree This, be it observed, is a remedy by the mere act of law, and grounded upon this reason, that the executor cannot, without an evident absurdity, commence a suit against himself (*x*) as representative of the deceased to recover that which is due to him in his own private capacity, but having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose (*y*) and, in this case, the law, according to the observation of Lord Bacon above given, rather puts him in a better degree and condition that in a worse, because it enables him to obtain payment before any other creditor of equal degree has had time to commence an action An executor *de son tort* is not, however, allowed to retain (*z*), for that would be contrary to another rule of law, which will be hereafter considered—that a man shall not take advantage of his own wrong

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IN JURE NON REMOTA CAUSA SED PROXIMA SPECTATUR (*Bac Max*, *reg* 1)—*In law the immediate, not the remote, cause of any event is regarded*

How paraphrased by Lord Bacon

"It were infinite for the law to consider the causes of causes, and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that,

(*u*) Bac Max, reg 9, arg *Thomson* v *Grant*, 1 Russ 540 (a) But the principle of retainer is by some writers referred to the maxim, *potior est condicio possidentis* See 1 Wms Exors, 11th ed, p 797 (i), 2 Fonblan Eq 5th ed p 406 (m)

(*x*) A man cannot be at once *actor* and *reus* in a legal proceeding *nemo agit in seipsum*, Jenk Cent 40 See in illustration of this rule, *Simpson* v *Thompson*, 3 App Cas 279, *per* Best, C J, in *Neale* v *Turton*, 4 Bing 149, at p 151 *Faulkner* v *Lowe*, 2 Exch 595 (the authority of which case is questioned by Williams, J, in *Aulton* v *Atkins*, 18 C B 249, at p 253), *Rose* v *Poulton*, 2 B & Ad 822

(*y*) 3 Bl Com 18, see *Re Rhoades*, [1899] 2 Q B 347, *Re Broad*, 105 L T 719

(*z*) Went Off Ex 14th ed, p 333, *Curtis* v *Vernon*, 3 T R 587, *Vernon* v *Curtis*, 4 Black, H, 18, *Oxenham* v *Clapp*, 2 B & Ad 309, at pp 313, 315

without looking to any further degree" (*a*) The above maxim, thus paraphrased by Lord Bacon, although of general application (*b*), is, in practice, often cited with reference to that particular branch of the law which concerns marine (*c*) insurance, and we shall, therefore, in the first place, illustrate it by briefly adverting to some cases connected with that subject

Marine insurance Perils of sea, &c

It is a well-known rule, that in order to entitle the assured to recover upon his policy, the loss must be a direct and not too remote a consequence of the peril insured against, and that if the proximate cause of the loss sustained be not reducible to some one of the perils mentioned in the policy, the underwriter is not liable (*d*) If, for instance, a merchant vessel is taken in tow by a ship of war, and thus exposed to a tempestuous sea, the loss thence arising is probably attributable to the perils of the sea (*e*) And where a ship meets with sea damage, which checks her rate of sailing, so that she is taken by an enemy, from whom she would otherwise have escaped, the loss is to be attributed to the capture, not to the sea damage (*f*) So, the underwriters are liable for a loss arising immediately from a peril of the sea, or from fire, but remotely from the negligence of the master and mariners (*g*), even though it is expressly provided by s 78 (4) of the Marine Insurance Act, 1906, that the assurer and his agents

(*a*) Bac Max, reg 1, cited by Blackburn, J, in *Sneesby* v *L & Y Ry Co*, L R 9 Q B 263, at p 267

(*b*) As to remote damage and the liability of one who is the *causa causans*, see *ante*, p 140 See *per* Ld Mansfield in *Wadham* v *Marlow*, 1 H Bla 439, n

(*c*) In *Marsden* v *City & Co Ass Co*, L R 1 C P 232, the same principle was applied to an insurance on plate glass in a shop front, in *Everett* v *London Ass*, 19 C B N S 126, it was applied to an insurance against fire, the damage having been directly caused by an explosion of gunpowder, in *Fitton* v *Acc Death Ins Co*, 17 Id 122, to an insurance against death by accident For a striking illustration of the principle, see *Winspear* v *Accidental Ins Co*, 6 Q B D 42 Other cases which illustrate the principle are *Stanley* v *W Ins Co*, L R 3 Ex 71, *Mardorf* v *Accident Ins Co*, [1903] 1 K B 584, and *In re Etherington* v *Lancs & Yorks Acc Ins Co*, [1909] 1 K B 591

(*d*) *Taylor* v *Dunbar*, L R 4 P C 206, *Pink* v *Fleming*, 25 Q B D 396 (distinguished in *Schloss Bros* v *Stevens*, [1906] 2 K B 665) The common law rule is thus expressed in the Marine Insurance Act, 1906 (6 Edw 7, c 41), s 55 — "The insurer is liable for any loss proximately caused by a peril insured against, but he is not liable for any loss which is not proximately caused by a peril insured against

(*e*) *Hagedorn* v *Whitmore*, 1 Stark 157 See *Grill* v *Gen Iron Screw Collsiery Co*, L R 3 C P 476

(*f*) Judgm in *Livie* v *Janson*, 12 East, 648, at p 653 citing *Green* v *Elmslie*, Peake, N P 212, *Hahn* v *Corbett*, 2 Bing 205

(*g*) *Walker* v *Maitland*, 5 B & Ald 171, *Busk* v *R E A Co*, 2 B & Ald 73, *per* Bayley, J, in *Bishop* v *Pentland*, 7 B & C 219, at p 223, *Phillips* v *Nairne*, 4 C B 343, at pp 350—351, *Trinder* v *Thames and Mersey Mar Ins Co*, [1898] 1 K B 1141 See also *Hodgson* v *Malcolm*, 2 N R 336

must take all reasonable measures to prevent or minimise loss (*h*), and where a ship insured against perils of the sea was injured by the negligent loading of her cargo by natives on the coast of Africa, and, being pronounced unseaworthy, was run ashore in order to prevent her from sinking and to save the cargo, the Court held, that the rule *causa proxima non remota spectatur* must be applied, and that the immediate cause of loss, viz., the stranding, was a peril of the sea (*i*)

The maxim under consideration was discussed in *Dudgeon* v *Pembroke* (*k*) There a ship insured under a time policy (which does not create an implied warranty of the seaworthiness of the ship at the inception of the risk) was lost under circumstances which showed that the vessel was unseaworthy—but not to the knowledge of the assurer (*l*)—at the time of the loss, and would not have been lost but for her unseaworthiness, but the immediate cause of her destruction was the violent action of the winds and waves operating from without on the hull It was contended by the underwriters that this did not amount to a loss by perils of the sea within the meaning of the policy, but the House of Lords held that it did, on the ground that a long course of decisions had established that *causa proxima et non remota spectatur* is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it

Where a ship, being delayed by perils of the sea from pursuing her voyage, was obliged to put into port to repair, and, in order to defray the expenses of such repairs, the master having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses, the Court held that the underwriter was not answerable for this loss, for the damage was to be considered according to the above rule, as not arising *immediately* from, although in a remote sense it

(*h*) *Per* Atkin, L J , in *Gaunt* v *Brit and For Ins Co* , [1920] 1 K B 903, at p 917, see also *per* Ld Sumner in the same case, [1921] 2 A C 41, at p 65

(*i*) *Redman* v *Wilson*, 14 M & W 476 As to what has been held to be a peril of the sea, see also *Laurie* v *Douglas*, 15 Id 746, and *Corcoran* v *Gurney*, 1 E & B 456

(*k*) 2 App Cas 284 See *Reischer* v *Borwick*, [1894] 2 Q B 548, *Thomas* v *Tyne and Wear Steamship Freight Insurance Assoc* , [1917] 1 K B 938, *Leyland Shipping Co* v *Norwich Union Fire Insurance Soc* , [1918] A C 350

(*l*) See the Marine Insurance Act, 1906, s 39, *sub s* 5

might be said to have been brought about by, a peril of the sea (*m*)

A policy of insurance on bags of coffee on a voyage from Rio to New Orleans and thence to New York, contained the following exception "Warranted free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and *free from all consequences of hostilities*" The ship, whilst on her voyage, ran ashore and was eventually lost south of Cape Hatteras It appeared that at Cape Hatteras until the secession of the Southern States of America, a light had always been maintained, and that the light had for hostile purposes been extinguished by the Confederates whilst in possession of the adjacent country If the light had been maintained the ship might have been saved Whilst she was ashore, part of the coffee was saved by certain officers acting on behalf of the Federal Government, and a further part might in like manner have been got ashore but for the interference of the Confederate troops, in consequence of which the residue of the cargo was wholly lost The question arose—had the goods, or any part of them, been lost by perils of the sea, or by perils from which they were by the policy warranted free? The Court held that the insurers were liable as for a partial loss in respect of the coffee which remained on board incapable of being saved, the proximate cause of the loss being a peril of the sea—but that as to so much of the coffee as was got ashore, and as to so much as would have been saved but for the interference of the troops, this was a loss by a consequence of hostilities, in respect of which the insurers were not liable (*n*)

The preceding cases, conjointly with those below cited, in which the maxim before us has, under different states of facts, been applied (*o*), sufficiently establish the general proposition, that, in order to recover for a loss on a maritime policy, the loss must have been directly occasioned by some peril insured

(*m*) *Powell* v *Gudgeon* 5 M & S 431, at p 436, *Sarquy* v *Hobson*, 4 Bing 131, compare *Gregson* v *Gilbert*, cited Park, Mar Insur, 8th ed 138

(*n*) *Ionides* v *Universal Mar Ins Co*, 14 C B N S 259 (cited by Willes, J, in *Marsden* v *City & County Ass Co*, L R 1 C P 232, at p 240 distinguished in *Brit and For S S Co* v *R*, [1918] 2 K B 879) See also *Sully* v *Duranty*, 3 H & C 270, *Cory* v *Burr*, 8 App Cas 393 *Dent* v *Smith*, L R 4 Q B 414, is important in reference to the subject *supra*

(*o*) *Naylor* v *Palmer*, 8 Exch 739 (affirmed in error, 10 Exch 382), where the loss resulted from the piratical act of emigrant passengers, *M'Swiney* v *Royal Exch Ass Co*, 14 Q B 634, 646, which is observed upon by Cockburn, C J, in *Chope* v *Reynolds*, 5 C B N S 642, at pp 651, 652

against (*p*) It is not enough that the loss has happened indirectly through a peril insured against, the loss must be occasioned by a peril insured against acting immediately on the thing insured A policy in the ordinary form insured a cargo against capture and restraint of princes, the captain, the ship being under convoy, was told that if he entered the port of his destination the vessel would be lost by confiscation, and was ordered by the commander of the convoy to proceed to another port, which he did, and there sold the cargo for a nominal sum The underwriters on the above principle were held not liable (*q*)

Again, it may, in general, be said, that everything which happens to a ship in the course of her voyage, by the immediate act of God, without the intervention of human agency, is a peril of the sea (*r*), for instance, if the ship insured is driven against another by stress of weather, the injury which she thus sustains is admitted to be direct, and the insurers are liable for it, but if the collision causes the ship injured to do some damage to the other vessel, both vessels being in fault, a positive rule of the Court of Admiralty (*s*) requires that the damage done to both ships be added together, and that the combined amount be equally divided between the owners of the two, and, in such a case, if the ship insured has done more damage than she has received, and is consequently obliged to pay the balance, this loss can neither be considered a necessary nor a proximate effect of the perils of the sea It grows out of a provision of the law of nations, and cannot be charged upon the underwriters (*t*)

Maxim —how qualified in insurance cases

The maxim before us, however, is not to be applied in the class of cases above noticed, if it would contravene the manifest intention of the parties and the fundamental rule of insurance law that the assurers are not liable for a loss occasioned by the wrongful act of the assured (*u*) ' It is a maxim," says Lord Campbell (*x*), " of our insurance law and of the insurance law of all commercial nations that the assured cannot seek an indemnity

Assured cannot take advantage of his own wrongful act

(*p*) See also *per* Ld Alvanley in *Hadkinson* v *Robinson*, 3 B & P 388, at p 392, *Phillips* v *Nairne*, 4 C B 343

(*q*) *Hadkinson* v *Robinson*, 3 B & P 388, see also *Halhead* v *Young*, 6 E & B 312 (*r*) Park, Mar Insur 8th ed 136

(*s*) Now observed in all the Divisions

(*t*) *De Vaux* v *Salvador*, 4 A & E 420, at p 431, the decision in which case is agreed to by Mr Phillips in his Work on Insurance, Vol 2, § 1416 See *per* Ld Campbell in *Dowell* v *Gen S Nav Co*, 5 E & B 195, at p 206, *per* Sir W Scott in *The Woodrop Sims*, 2 Dod 83, at p 85, *per* Ld Selborne, in *Stoomvaart &c* v *P & O S Nav Co*, 7 App Cas 795, at p 800

(*u*) *Thompson* v *Hopper*, 6 E & B 937, at pp 948—949 see the Marine Insurance Act, 1906, s 55 (2) (*x*) *Thompson* v *Hopper*, 6 E & B 937

for a loss produced by his own wrongful act The plaintiffs said truly that the perils of the seas must still be considered the proximate cause of the loss, but so it would have been if the ship had been scuttled or sunk by being wilfully run on a rock" The misconduct of the assured need not, in order to exempt the insurers from liability, be the direct and proximate cause, the *causa causans*, of the loss, if his misconduct is the efficient cause of the loss, the assured will be disentitled to recover This rule is now expressed in the Marine Insurance Act, 1906, s 55 (2), which declares that "the insurer is not liable for any loss *attributable* to the wilful misconduct of the assured", it precludes an innocent mortgagee of the ship from recovering from insurers for loss attributable to the wilful misconduct of the owner (*y*)

But this rule does not apply to the merely negligent act of the assured or his servants (*z*) If ballast is thrown overboard by the negligent and improper, through not barratrous, act of the master and crew, whereby the ship becomes unseaworthy and is lost by perils of the sea, which otherwise she would have overcome, the underwriters will be liable (*a*) And where a loss arises through the negligence of the captain in not having a pilot on board at any intermediate stage of the voyage or on entering the port of destination (except where required by the positive provisions of an Act of Parliament), the underwriters will not be discharged from their liability, if such loss be proximately caused by the perils insured against, and the master and crew were originally competent (*b*)

Exceptions in bills of lading

The question whether a loss is caused by one of the excepted perils in a bill of lading is governed by the same principle, with this modification, that if the goods are not carried with reasonable care, and are lost by an excepted peril, such as a peril of the sea, the shipowner is responsible (although the excepted peril is the proximate cause of the loss) if the loss would not have occurred but for his negligence or the negligence of his servants or agents (*c*) This rule, however, does not result from any

(*y*) *Graham J S Shipping Co* v *Merchants' Mar Ins Co* (H L), 59 L J Newspaper, 18

(*z*) *Trinder, Anderson & Co* v *Thames, &c, Ins Co*, [1898] 2 Q B 114 Marine Insurance Act, 1906, s 55 (2) See also p 154, *ante*

(*a*) *Sadler* v *Dixon*, 8 M & W 895, cited in *Wilton* v *R Atlantic Mail S Co* 10 C B N S 453, at p 465

(*b*) Arnould's Marine Ins, 5th ed 646

(*c*) Such as negligence in stowage of cargo See *The Oquendo*, 38 L T 151, *The Catherine Chalmers*, 32 L T 847

departure from the general principle laid down in the maxim *causa proxima non remota spectatur*, but is rested on the ground that, upon the true construction of a bill of lading in the ordinary form, the shipowner is excused from liability for such loss only as is caused by an excepted peril without negligence on his part or on that of his servants or agents—or, to put it in another way, that he cannot take advantage of the exceptions unless all reasonable care to avoid their consequences has been taken by him and his servants or agents (*d*)

Maxim applied in actions for negligence

The maxim under consideration is also applied to actions founded on negligence The plaintiff must generally prove that the defendant's negligence was the proximate and not merely a remote cause of the damage (*e*) It is not, however, applied quite so strictly as in actions on policies of insurance, and it is perhaps more correct to say that the plaintiff must make out that the damage is the natural and probable result of the defendant's negligence (*f*) The distinction is most noticeable in cases where the act of a stranger has intervened between the negligence of the defendant and the event causing the damage In such cases, even though the act of the stranger is the proximate cause, the plaintiff recovers if he makes out that the defendant's negligence was "an effective cause" of the damage (*g*)

When the contributory negligence of the plaintiff is relied on as a defence, it is not enough for the defendant to show that the plaintiff's negligence only remotely caused the damage (*h*) As Lord Selborne said "Great injustice might be done if in applying the doctrine of contributory negligence to a case of this sort, the maxim *causa proxima, non remota, spectatur* were lost sight of" (*i*)

Maxim applies in determining the measure of damages

The maxim as to remoteness has an important application

(*d*) See *Thames and Mersey Ins Co* v *Hamilton*, 12 App Cas 484, *The Xantho*, Id 503, *Hamilton, Fraser & Co* v *Pandorf*, Id 518, and *Stordet* v *Hall*, 4 Bing 607

(*e*) *Hadwell* v *Righton*, [1907] 2 K B 348

(*f*) *Sharp* v *Powell*, L R 7 C P 253, *Harris* v *Mobbs*, 3 Ex D 268, *Bailiffs of Romney* v *Trinity House*, L R 5 Ex 204, L R 7 Ex 247

(*g*) *Clark* v *Chambers*, 3 Q B D 327, *Halestrap* v *Gregory*, [1895] 1 Q B 561, *Engelhart* v *Farrant*, [1897] 1 Q B 240, and compare *McDowell* v *G W Ry Co*, [1903] 2 K B 331, *Burrows* v *March Gas Co*, L R 7 Ex 96, *De La Bere* v *Pearson, Ltd*, [1908] 1 K B 280

(*h*) *Radley* v *L & N W Ry Co*, 1 App Cas 754, and cases there discussed, *Ellerman Lines* v *Grayson*, [1919] 2 K B 514

(*i*) *Spaight* v *Tedcastle*, 6 App Cas 217, at p 219

in connection with the measure of damages (*j*) the question which in practice most frequently presents itself being whether a particular item of damage is properly referable to the cause of action alleged and proved The general rule for our guidance upon this subject where the action is founded on contract or in tort has already been adverted to (*k*) Upon the question of remoteness of damage there is no difference in principle between actions on contract and those in tort (*l*)

The principle upon which special damage is sometimes recoverable for the breach of a contract is that enunciated in the second branch of the well-known rule, with regard to the measure of damages, laid down in *Hadley* v *Baxendale* (*m*) That rule is as follows —"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered either (1) arising naturally, *i e*, according to the usual course of things, from such breach of contract itself, or (2) such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated On the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not

(*j*) With respect to damages in general, it has been said that they are of three kinds 1st, nominal damages, which occur in cases where the judge is bound to tell the jury only to give such, as, for instance, where the seller brings an action for the non acceptance of goods, the price of which has risen since the contract was made, 2ndly, general damages, which are such as the jury may give when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable man, 3rdly, special damages, which are given in respect of any consequences reasonably or probably arising from the breach complained of, *per* Martin, B , in *Prehn* v *Royal Bank of Liverpool*, L R 5 Ex 99, at p 100 See *per* Lord Halsbury in *The Mediana*, [1900] A C 113, at pp 116—118

(*k*) *Supra*, p 143

(*l*) *Per* Brett, M R , in *The Notting Hill*, 9 P D 105, at p 114

(*m*) 9 Exch 341, at p 355

affected by any special circumstances, from such a breach of contract For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them "

With regard to the second branch of the above rule, Fry, L J , observed in *Hammond* v *Bussey* (*n*) that there were four questions to be answered in order to see whether the special damages claimed were recoverable under it (1) What are the damages which actually resulted from the breach of contract? (2) Was the breach of contract made under any special circumstances, and, if so, what were they? (3) What at the time of making the contract was the common knowledge of both parties? and (4) What may the Court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach?

Rule does not apply to transaction founded in fraud

The maxim, *in jure non remota causa sed proxima spectatur*, does not apply to any transaction originally founded in fraud or covin, for the law will look to the corrupt beginning, and consider it as one entire act, according to the principle, *dolus circuita non purgatur* (*o*)—fraud is not purged by circuity (*p*), but this principle must be taken with a qualification in cases where the term *dolus* is used to signify deceit In actions of deceit, in order to make the defendant liable, some connection must be shown between the party deceiving and the party deceived, as that the deception was practised by the defendant upon the plaintiff, or upon a third person with the knowledge or intent that it would or should be acted upon by the plaintiff (*q*)

Nor in criminal cases,

Neither does the above maxim, according to Lord Bacon, ordinarily hold in criminal cases, because in them the inten-

(*n*) 20 Q B D 79, at p 100 See *Agius* v *G W Colliery Co*, [1899] 1 Q B 413

(*o*) ' *Dolus* here means any wrongful act tending to the damage of another ' (*per* Lord Campbell, C J , in *Thompson* v *Hopper*, 6 E & B 937, at p 948) There can be no *dolus* without a breach of the law " (*per* Willes, J , in *Jeffries* v *Alexander*, 8 H L Cas 594, at p 637, and in *Thompson* v *Hopper*, E B & E 1038, at p 1047), see also *per* Bramwell, B , Id at p 1045 *per* Williams J , Id , at p 1054, *Trinder, Anderson & Co* v *Thames &c Ins Co*, [1898] 2 Q B 114, at p 127, *Fitzjohn* v *Mackinder*, 9 C B N S 505, 514

(*p*) Bac Max , reg 1, Noy, Max , 9th ed , p 12, Tomlin's Law Dict , tit ' *Fraud* '

(*q*) See *Peek* v *Gurney*, L R 6 H L 377, *Barry* v *Croskey*, 2 J & H 1, at pp 17, 18, 23, *Andrews* v *Mockford*, [1896] 1 Q B 372

tion is matter of substance, and, therefore, the first motive, as showing the intention, must be principally regarded (*r*) As, if A , of malice prepense, discharge a pistol at B , and miss him, whereupon he throws down his pistol and flies, and B pursues A to kill him, on which he turns and kills B with a dagger in this case, if the law considered the immediate cause of death, A would be justified as having acted in his own defence, but looking back, as the law does, to the remote cause, the offence will amount to murder, because committed in pursuance and execution of the first murderous intent (*s*)

Nevertheless, an indictment will sometimes fail to be sustainable on the ground of remoteness (*t*) For instance, if trustees of a road neglect to repair it in pursuance of their statutory powers, and one passing along the road is accidentally killed by reason of the omission to repair, the trustees are not indictable for manslaughter, for "not only must the neglect, to make the party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect" (*u*) It seems, however, that it is no defence to an indictment for manslaughter that the deceased was guilty of negligence and so contributed to his own death, if the death of the deceased is shown to have been caused in part by the negligence of the prisoner (*v*)

ACTUS DEI NEMINI FACIT INJURIAM (2 *Bla Com* 122)—*The law holds no man responsible for the act of God*

General rule

Duties are either imposed by law or undertaken by contract, and the ordinary rule of law is that when the law creates a duty,

(*r*) Bac Max , vol iv , p 17

(*s*) Bac Max reg 1

(*t*) See *R* v *Bennett*, Bell, C C 1, where fireworks kept by the prisoner in contravention of the statute 9 & 10 Will 3, c 7, s 1 (now replaced by the Explosives Act 1875, and the regulations made thereunder), either accidentally or through negligence of his servants exploded, and, setting fire to a neighbouring house, caused a person's death Held, that the illegal act in keeping the fireworks was too remotely connected with the death to support an indictment for manslaughter See also *R* v *Gardner*, Dears & B C C 40 (with which compare *R* v *Martin*, L R 1 C C 56), and *R* v *Clerk of Assize of Oxford Circuit*, [1897] 1 Q B 370

(*u*) *Per* Lord Campbell, C J , in *R* v *Pocock*, 17 Q B 34, at p 39 See also *R* v *Hughes* Dearsl & B 248

(*v*) *R* v *Swindall*, 2 C & K 230, *R* v *Jones*, 11 Cox, 544, *R* v *Kew*, 12 Cox, 355

and the party is disabled from performing it without any default of his own by the act of God, the law excuses him, but when a party by his own contract imposes a duty upon himself he is bound to make it good, notwithstanding any accident by inevitable necessity (*r*)

Meaning of act of God

The act of God, which is the antithesis of the act of man, generally means an inevitable accident due directly and exclusively to natural causes without human intervention, and an accident so due is considered to be inevitable if it be such that it would be unreasonable, under all the circumstances of the case, to expect a person to foresee and prevent it, or to resist or avert its consequences (*y*) The phrase is often used of the distinctive forces of nature, such as storms and floods, and is applicable to these, though they be not unique, if they be extraordinary and such as could not reasonably be anticipated (*z*) It is also used of such an event as a person's death or his incapacity to act through illness

Repair of sea walls

Where the owner of land fronting the sea is under a prescriptive liability (*a*) to maintain a wall against its incursion, the doctrine that the act of God excuses usually applies to, and limits, the liability so that if he has kept the wall in repair sufficient to resist ordinary storms, but the wall be overthrown without his default by an extraordinary tempest, the burden of repair falls, not exclusively upon him, but upon all the landowners of the level (*b*) As the liability is prescriptive, its extent depends upon the usage proved, and the evidence may establish that a landowner is liable to repair damage done by an extraordinary tempest (*c*) but in the absence of proof of this more extensive liability, the liability is limited to the maintenance of the wall in a state to resist ordinary seas (*d*) The burden of repairing damage done to the wall by extraordinary seas, nevertheless, falls upon the landowner if the wall was not

(*x*) *Paradine* v *Jane*, Al 26 (followed in *Redmond* v *Dainton*, [1920] 2 K B 256) *Nichols* v *Marsland*, 2 Ex D 1, at p 4, see also *Greenock Corp* v *Caledonian Ry*, [1917] A C 556

(*y*) *Nugent* v *Smith*, 1 C P D 423, *Forward* v *Pittard*, 1 T R 27, at p 33 See also 14 Q B D 574

(*z*) *Nitro phosp Co* v *L & St Katharine Docks Co*, 9 Ch D 503, at p 516, see *Brabant* v *King*, [1895] A C 632

(*a*) There is no liability at common law to maintain a sea wall for the benefit of neighbours, *Hudson* v *Tabor*, 2 Q B D 290

(*b*) *Keighley's Case*, 10 Rep 139 a, *R* v *Somerset Commrs*, 8 T R 312, *R* v *Fobbing Commrs*, 11 App Cas 449

(*c*) *R* v *Leigh*, 10 A & E 398

(*d*) *R* v *Fobbing Commrs*, *supra*

in proper repair and the want of repair occasioned the damage (*e*)

Immaterial default

The benefit of the excuse that damage was due to the act of God is, it seems, not lost by reason of a default which does not contribute to the damage The owners of a dock connected by an artificial channel with a tidal river neglected to build their river wall to the requisite height, and an extraordinary tide flooded the dock, and the floods escaped and damaged neighbouring premises It was suggested by the dock-owners that even if they had fulfilled their duty, part of the damage would, nevertheless, have been done, and must have been treated as due entirely to the act of God It was held that the dock-owners were not answerable for that part of the damage, if capable of being severed from the part to which their breach of duty contributed (*f*)

Statutory liabilities

The extent of a liability imposed by statute is always a question of construction Where a statute imposed upon the owner of any vessel damaging a pier liability for the damage, and it appeared that the aim of the statute was not to create a new liability, but to fix the owner with the common law liability notwithstanding that his vessel might be in charge of persons for whose conduct he would not be answerable at common law, it was held that an owner was not liable for damage occasioned by the act of God A violent storm compelled the crew to abandon the vessel and drove the abandoned vessel against the pier (*g*)

Artificial reservoir

The maxim under consideration is illustrated by the case of a person who for his private purposes constructs an artificial lake upon his land By so doing he incurs the duty to prevent an escape of the waters to his neighbour's damage This duty, however, does not extend to an escape due, without default, to the act of God, such, for instance, as an extraordinary rainfall, which could not reasonably have been anticipated, and which bursts the banks of the lake, though made and maintained with all reasonable care (*h*)

Fire

Similarly, if a man make a fire in his house or field, he must see it does no harm or answer the damage if it does, but he is excused if the fire be spread by the act of God, as by a

(*e*) *R* v *Essex Commrs* 1 B & C 477
(*f*) *Nitro phosph Co* v *L & St Katharine Docks Co*, 9 Ch D 503
(*g*) *River Wear Commrs* v *Adamson*, 2 App Cas 743
(*h*) *Nichols* v *Marsland* 2 Ex D 1, but see *Greenock Corp* v *Cal Ry Co*, [1917] A C 556

sudden irresistible storm (*i*) At the common law there was a presumption of negligence against a man upon whose premises a fire originated (*j*) By the Fires Prevention (Metropolis) Act, 1774 (14 Geo 3, c 78), s 86 (*k*), no action lies, except upon a contract between landlord and tenant, against a person upon whose premises a fire accidentally begins for any damage done thereby This provision does not extend to fires kindled intentionally or resulting from negligence (*l*), but it probably rebuts the common law presumption It does not, however, protect a person on whose premises a fire occurs from liability for the value of another's goods which are destroyed by the fire, if they are on the premises as the result of a breach, by the occupier of the premises, of a contract between him and the owner of the goods (*m*)

Waste

The burning of a house by negligence is waste (*n*), but it is not waste, or the waste is excusable, if the house be burnt by lightning or prostrated by tempest without the tenant's default (*o*) Notwithstanding the decision in *Davies* v *Davies* (*p*), it may perhaps be doubted whether a tenant for years of a house who has not contracted to do any repairs is under obligation to rebuild the house if overthrown without his default by an extraordinary tempest

Landlord and tenant

The liability of a tenant for years, however, is generally fixed by an express contract A general covenant by the tenant to keep the premises in repair obliges him to repair damage done by accidental fire or by lightning, tempest or other unavoidable contingency (*q*), and therefore special provisions regarding such contingencies are often introduced into leases

(*i*) *Tubervil* v *Stamp*, 1 Salk 13, see *Black* v *Christchurch Co*, [1894] A C 48

(*j*) *Per* Ld Tenterden in *Becquet* v *MacCarthy*, 2 B & Ad 951, at p 968, see 1 Roll Abr 1, and *per* Ld Denman in *Filliter* v *Phippard*, 11 Q B 347, at p 354

(*k*) It has been held that the section is of general application throughout England (*Richards* v *Easto*, 15 M & W 244, *Filliter* v *Phippard*, 11 Q B 347), but see *Westminster Fire Office* v *Glasgow Soc*, 13 App Cas 699, as to s 83 (*l*) *Filliter* v *Phippard*, *supra*

(*m*) *Shaw* v *Symmons*, [1917] 1 K B 799

(*n*) Co Litt 53 b As to burning by accident, see 14 Geo 3, c 78, s 86, *supra*, *Nugent* v *Cuthbert*, Sugd Law of Pr, 475, 479, *White* v *M Cann*, 1 Ir L R (N S) 205

(*o*) 2 Roll Abr 820, Bac Abr, 'Waste' (E), see *Paradine* v *Jane*, Al 26, at p 27, *Rook* v *Worth*, 1 Ves 460, at p 462, *Simmons* v *Norton*, 7 Bing 640, at pp 647, 648 (*p*) 38 Ch D 499, see *Re Cartwright*, 41 Ch D 532

(*q*) *Chesterfield* v *Bolton*, 2 Com 627, *Bullock* v *Dommitt*, 6 T R 650, *Pym* v *Blackburn*, 3 Ves Jr 34, *Clark* v *Glasgow Co*, 1 Macq 668, see *Yates* v *Dunster*, 11 Exch 15

for the tenant's protection (*r*) In the absence of a special contract, the rule is that the landlord is not bound to repair (*s*), nor is he bound, in the event of a fire against which he is insured, to expend money he may have received from the insurance office in reinstating the premises (*t*)

Rent

The destruction of demised buildings by fire or by the act of God does not absolve the lessee from liability to pay rent, notwithstanding that neither he nor the lessor be bound to restore them (*u*), and the rent continues to be payable, unless there was an express stipulation to the contrary (*v*) In *Izon* v *Gorton* (*w*), where the upper floors of a warehouse were let to a tenant from year to year, it was held that the tenancy and the liability to rent continued, although the premises were destroyed by accidental fire and were wholly untenantable until rebuilt, and that the entry of the landlord for the purpose of rebuilding them was not an eviction To determine his liability in such a case a tenant from year to year should give a proper notice to quit

Eviction by act of God

It has been said, indeed, that a tenant for years may have the rent apportioned if, without his default, he be evicted from part of the demised land by the act of God, as by an irruption of the sea whereby the land becomes a permanent part of the open sea But an invasion of waters over which the tenant will have exclusive rights is not an eviction, nor is the destruction by fire of all that stands upon the lands for the subsequent use of the lands is not thereby entirely lost (*x*)

Absolute contracts

With regard to contracts, the general rule is that a person who contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God (*y*) Thus, where a contractor built a bridge across a river under an agreement which bound him to keep

(*r*) See *Saner* v *Bilton*, 7 Ch D 815 *Manchester Warehouse Co* v *Carr*, 5 C P D 507

(*s*) *Gott* v *Gandy*, 2 E & B 845 *Bayne* v *Walker*, 3 Dow, 233

(*t*) *Leeds* v *Cheetham*, 1 Sim 146 *Lofft* v *Dennis* 1 E & E 474

(*u*) *Paradine* v *Jane*, Al 26, *Monk* v *Cooper*, 2 Str 762, *Belfour* v *Weston*, 1 T R 310, *Hare* v *Groves*, 3 Anst 687, *Baker* v *Holtzaffel*, 4 Taunt 45, *Marshall* v *Schofield*, 52 L J Q B 58

(*v*) See *Bennett* v *Ireland*, E B & E 326

(*w*) 5 Bing N C 501, see *Surplice* v *Farnsworth*, 8 Scott, N R 307 (followed in *Hart* v *Rogers*, [1916] 1 K B 646, at p 651), *Packer* v *Gibbins*, 1 Q B 421, *Upton* v *Townend*, 17 C B 30

(*x*) 1 Roll Abr 236, Bac Abr 'Rent" (M 2)

(*y*) Judm in *Lloyd* v *Guibert*, L R 1 Q B 115, at p 121 (citing *Paradine* v *Jane*, Al 26)

it in repair during a fixed term, and during that term the bridge was destroyed by an extraordinary flood, it was held that he was liable to rebuild it (*z*) It is sometimes said that the act of God excuses the breach of contract, but this is inaccurate, and what is really meant is that it is not within the contract that non-performance, if due to the act of God, should be treated as a breach (*a*) For instance, when it is said that "if a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest, he is discharged of his covenant" (*b*), what is meant is that the covenant was intended to relate only to the lessee's own acts, and not to an event beyond his control and producing effects not in his power to remedy (*a*)

Implied conditions

Contracts, then, are not always to be construed as absolute, and, as a general rule, where the parties must have contemplated the continuing existence of a specific thing as the foundation of their contract, and there is no warranty that the thing will continue to exist, a condition ought to be implied that impossibility arising from the accidental destruction of the thing shall excuse performance (*c*) Thus, where a contractor agreed to fit up a building with machinery, and during the progress of the work the building was accidentally destroyed by fire, it was held that he was excused from proceeding with the contract (*d*) The Sale of Goods Act, 1893, recognises this rule by providing that where there is an agreement to sell specific goods, and subsequently the goods, without any fault of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided (*e*) And where the Crown requisitioned goods which had been sold, but before the property in them had passed to the buyer, it was held that the seller was excused from performance of the contract (*f*)

Upon the same principle, where it ought to be inferred that the happening of some future event was contemplated as the

(*z*) *Brecknock Co* v *Pritchard*, 6 T R 750

(*a*) *Baily* v *De Crespigny*, L R 4 Q B 180, at p 185

(*b*) *Shelley's Case*, 1 Rep 93 b at 98 a

(*c*) Judgm in *Taylor* v *Caldwell*, 3 B & S 826, at pp 833, 834, see *Nickoll and Knight* v *Ashton*, [1901] 2 K B 126, and *Newman, In re*, [1916] 2 Ch 309, at p 320

(*d*) *Appleby* v *Myers*, L R 2 C P 651, see *Turner* v *Goldsmith*, [1891] 1 Q B 544

(*e*) 56 & 57 Vict c 71, s 7, see *Howell* v *Coupland*, 1 Q B D 258 (with which compare *Lebeaupin* v *Crispin*, [1920] 2 K B 714), *Elphick* v *Barnes*, 5 C P D 321, *Chapman* v *Withers*, 20 Q B D 824

(*f*) *Re Shipton and Harrison s Arbn*, [1915] 3 K B 676

sole foundation of a contract, the contract is dissolved if, without the fault of either party, that event does not happen This principle was applied in several cases arising out of the postponement of King Edward's coronation Thus, where a flat was taken in Pall Mall for certain days with the sole object of viewing the coronation procession, it was held that the contract was dissolved when it was announced that the procession would not take place (*g*), but, inasmuch as the agreement had provided for payment in advance, it was held that the lessor was entitled to retain money paid as a deposit and to recover the balance of the agreed amount (*h*)

Contracts for personal services

A contract for personal services is not, as a rule, an absolute contract, but is generally subject to an implied condition that the servant's inability to serve, if due to illness, shall not be a breach (*i*) The servant's illness, therefore, does not usually entitle the master to determine the contract, but the master may have an implied right to determine it in the event of an illness which renders the servant permanently incapable of serving (*j*), or of an illness which frustrates the object of the contract (*k*), or goes to the root of the contract (*l*) While the contract remains in force, the servant's right to his wages generally remains intact (*m*) It is, as a rule, an implied term of a contract for personal services that the death of either party shall put an end to it, and the rule applies to an engagement expressed to be for a fixed term (*n*) or to continue until determined by notice (*o*)

Non completion of contract owing to act of God

Where a contract to do work or render services has been partially performed, but further performance is excused by the act of God, the contract is not thereby rescinded *ab initio* (*p*) As a rule, each party retains rights which by the terms of the

(*g*) *Chandler* v *Webster*, [1904] 1 K B 493, and see *Krell* v *Henry*, [1903] 2 K B 740, *Herne Bay Steamboat Co* v *Hutton*, [1903] 2 K B 683, *Civil Service Co op Soc* v *Gen S Nav Co*, [1903] 2 K B 756

(*h*) *Chandler* v *Webster*, *supra*

(*i*) *Boast* v *Firth*, L R 4 C P 1, *Robinson* v *Davidson*, L R 6 Ex 269

(*j*) See *Cuckson* v *Stones*, 1 E & E 248, at p 257

(*k*) See *per* Bramwell, B, in *Jackson* v *Union Marine Ins Co*, L R 10 C P 125, at p 141

(*l*) *Poussard* v *Spiers*, 1 Q B D 410, see *Bettini* v *Gye*, 1 Q B D 183

(*m*) *Cuckson* v *Stones*, *supra*, K— v *Raschen*, 38 L T 88

(*n*) *Whincup* v *Hughes*, L R 6 C P 78 *Hirst* v *Tolson*, 2 Macq & G 134, would appear to have been wrongly decided, see *per* Bovill, C J, and Willes J, in *Whincup* v *Hughes*, at pp 83, 84, 85

(*o*) *Farrow* v *Wilson*, L R 4 C P 744

(*p*) *Stubbs* v *Holywell Ry Co*, L R 2 Ex 311, *Chandler* v *Webster*, [1904] 1 K B 493

contract he had already acquired (*p*), but neither is subject to liabilities which, having regard to those terms, had not already arisen (*q*) For instance, sums which had accrued due for the work actually done remain payable (*p*), or, if already paid, are not recoverable (*r*), but no claim can be maintained in respect of sums which were to be paid only upon the completion of the work, and in the case of a special contract to do the entire work for one entire sum payable upon its completion, the contractor cannot recover any compensation for the work actually done (*q*)

Conditions of bonds

Conditions, as well as contracts, ought sometimes to be construed as not absolute Thus it is laid down that where the condition of a bond is possible at the time of making it, and before it can be performed the condition becomes impossible by the act of God, the obligation is saved (*s*), and the reason seems to be that as the condition is for the obligor's benefit he is not to be deprived of that benefit by the act of God For the same reason it has also been said that if the condition be in the disjunctive, with liberty to the obligor to do either of two things at his election, and both are possible at the time of making the bond, and afterwards one of them becomes impossible by the act of God, the obligor shall not be bound to perform the other (*t*) But it has been denied that this is true as a universal proposition, and in *Barkworth* v *Young* (*u*), Kindersley, V C , after reviewing the authorities, expressed the opinion that in each case the intention of the parties to the bond must be considered, and that "if the Court is satisfied that the clear intention of the parties was that one of them should do a certain thing, but he is allowed at his option to do it in one of two modes, and one of these modes becomes impossible by the act of God, he is bound to perform it in the other mode "

Condition in a devise or conveyance

In a devise or conveyance of lands, on a condition annexed to the estate conveyed, which is possible at the time of making it, but afterwards becomes impossible by the act of God, there,

(*p*) See note (*p*), p 167

(*q*) *Appleby* v *Myers*, L R 2 C P 651, *Krell* v *Henry* [1903] 2 K B 740

(*r*) *Anglo Egyptian Co* v *Rennie*, L R 10 C P 271, see also *Whincup* v *Hughes*, L R 6 C P 78, *Civil Service Co op Soc* v *Gen S Nav Co* , [1903] 2 K B 756

(*s*) Co Litt 206 a , Roll Abr 449, 451, Com Dig "Condition," D 1, L 12, 2 Bl Com 340, *per* Williams, J , in *Brown* v *London Corp* , 9 C B N S 726, at p 747, see the same case 13 Id 828

(*t*) Com Dig ' *Condition*, D 1, *Laughter's Case*, 5 Rep 22

(*u*) 4 Drewry, 1, at p 25

if the condition is precedent, no estate vests, because the condition cannot be performed, but, if subsequent, the estate becomes absolute in the grantee, for the condition is not broken (*v*) Thus, where a man enfeoffed another, on the condition subsequent of re-entry, if the feoffor should within a year go to Paris about the feoffee's affairs, but feoffor died before the year had elapsed, the estate was held to be absolute in the feoffee (*x*) So, where a man devised his estate to his daughter, on a condition subsequent that she should marry his nephew on or before her attaining twenty-one years, but the nephew died young, and the daughter was never required, and never refused to marry him, but, after his death, and before attaining twenty-one, married, it was held that the condition was unbroken, having become impossible by the act of God (*y*)

Liability of common carrier

By the custom of the realm, common carriers are bound to receive and carry goods for a reasonable reward, to take due care of them in their passage, to deliver them safely and within a reasonable time (*z*), or in default thereof to recompense the owner for loss, damage, or delay happening while the goods are in their custody Where, however, such loss, damage, or delay arises from the act of God, as storms, tempests, and the like, the maxim under consideration applies, and the loss falls upon the owner, and not upon the carrier (*a*) And so, if the thing is lost partly by reason of its own inherent vice and partly in consequence of the act of God, the carrier is not liable (*b*), in this case *res perit suo domino* (*c*)

For damage occasioned by accidental fire resulting neither from the act of God nor of the king's enemies, a common carrier is responsible (*d*) But where an injury is sustained by a

(*v*) Com Dig ' *Condition* D 1, Co Litt 206 a, and Mr Butler's note (1) Id 218 a, 219 a (*x*) Co Litt 206 a

(*y*) *Thomas* v *Howell*, 1 Salk 170 See also *Aislabie* v *Rice*, 8 Taunt 459 and *per* Parke, B, in *Egerton* v *Brownlow*, 4 H L C 1, at p 120 As to *Dawson* v *Oliver Massey*, 2 Ch D 753, see *Re Brown*, 18 Ch D 61, at pp 64, 65, 70—73 (*z*) *Taylor* v *G N Ry Co*, L R 1 C P 385

(*a*) *Amies* v *Stevens*, Str 128, with which compare *Trent Navigation* v *Wood*, 3 Esp 127 See *per* Powell J, in *Coggs* v *Bernard*, 2 Raym Ld 909, at pp 910, 911, *per* Tindal, C J, in *Ross* v *Hill* 2 C B 877, at p 890 and *Walker* v *British Guarantee Society*, 18 Q B 277, at p 287

(*b*) *Nugent* v *Smith*, 1 C P D 423

(*c*) As to this maxim see Bell, Dict and Dig of Scots Law, 857, *Appleby* v *Myers*, L R 2 C P 651, at pp 659, 660, *Bayne* v *Walker*, 3 Dow, 233, *Paine* v *Meller*, 6 Ves 349, *Bryant* v *Bush*, 4 Russ 1, *Logan* v *Le Mesurier*, 6 Moo P C 116

(*d*) Story on Bailments, 5th ed, s 528, *Collins* v *Bristol and Exeter Ry Co*, 1 H & N 517, see also *Liver Alkali Works* v *Johnson*, L R 9 Ex 338, and *Watkins* v *Cottrell*, [1916] 1 K B 10

passenger, from an inevitable accident (*e*), the coach-owner is not liable, provided there were no negligence in the driver (*f*) And the breach of a contract to convey a passenger, if caused by *vis major*, seems to be excusable (*g*), the principle being that a carrier of passengers, unlike a carrier of goods, does not warrant or insure their safety, but contracts merely to take all reasonable care, including in that term the use of skill and foresight (*h*)

Death

The following case may also be noticed as applicable to the present subject, and as showing that death, which is the act of God, shall not be allowed to prejudice an innocent party if such a result can be avoided Lessor and lessee, in the presence of the lessor's attorney, signed an agreement that a lease should be prepared by lessor's attorney, and paid for by the lessee The lease was prepared accordingly, but was never executed, owing to the death of the lessor, who had only a life estate in the land to be demised It was held that the lessor's attorney was entitled to recover from the lessee the charge for drawing the lease, for it was known to all the parties that the proposed lessor had only a life estate, and the non-execution of the lease was owing to no fault of the attorney, who ought not, therefore, to remain unpaid (*i*)

The case of *Reg* v *Justices of Leicestershire* (*k*), where a mandamus was issued to Quarter Sessions to hear an appeal against a bastardy order, offers another apt illustration of the maxim before us It appeared that the appellant, having entered into the proper recognisances, posted, in pursuance of 8 & 9 Vict c 10, s 3, a written notice of his having done so,

(*e*) As to the meaning of this expression, see *Fenwick* v *Schmalz*, L R 3 C P 313, *Readhead* v *Midland Ry Co*, L R 4 Q B 379, *Richardson* v *G E Ry Co*, L R 10 C P 486, at p 493, and 1 C P D 342

(*f*) *Aston* v *Heaven*, 2 Esp 533, *per* Parke, J, in *Crofts* v *Waterhouse*, 3 Bing 319, at p 321 See *Sharp* v *Grey*, 9 Bing 457, *Perren* v *Monmouthshire Ry Co* 11 C B 855

(*g*) *Per* Ld Campbell, C J, in *Denton* v *G N Ry Co*, 25 L J Q B 129, at p 134, *Briddon* v *G N Ry Co*, 28 L J Ex 51, *G W Ry Co of Canada* v *Braid*, 1 Moo P C (N S) 101 (followed in *Montreal, City of*, v *Watt and Scott*, [1922] 2 A C 555), and cases there cited See *Kearon* v *Pearson*, 7 H & N 386

(*h*) *Readhead* v *Midland Ry Co*, L R 4 Q B 379, at p 381 with which compare *Liver Alkali Works* v *Johnson*, L R 9 Ex 338, as to the liability of a carrier of goods, and *Randall* v *Newson* 2 Q B D 102, as to the obligation of a vendor of a chattel bought for a specific purpose

(*i*) *Webb* v *Rhodes*, 9 Bing N C 782

For another illustration of the above maxim, see *Morris* v *Matthews*, 2 Q B 293 See also *per* Best, C J, in *Tooth* v *Bagwell*, 3 Bing 273, at p 375

(*k*) 15 Q B 88

addressed to the mother of the child, three days, however, before this notice was posted, the woman had died, and upon that ground the Sessions refused to hear the appeal, considering that the appellant had not complied with the requirements of the Statute But the Queen's Bench held that as the duty of the appellant to give the notice was cast upon him by the law, not by his own contract, he was excused from performing that duty, since it had become impossible by the act of God (*l*)

Rule—where inapplicable

The above general rule must, however, be applied with due caution (*m*) Thus, where, after the indictment—arraignment—the jury charged—and evidence given on a trial for a capital offence, one of the jurymen became incapable, through illness, of proceeding to verdict, the court of oyer and terminer discharged the jury, charged a fresh jury with the prisoner, and convicted him, although it was argued that *actus Dei nemini nocet*, and that the sudden illness was a Godsend, of which the prisoner ought to have the benefit (*n*)

Lastly, illness of a material witness is a sufficient ground to excuse a plaintiff in not proceeding to try, and so would be the death of one of two co-defendants, no suggestion of it having been made on the record, the trial being thus suspended by the act of God (*o*)

LEX NON COGIT AD IMPOSSIBILIA *(Co Litt 231 b)—The law does not compel a man to do that which he cannot possibly perform*

Meaning of rule, and examples of its application

This maxim, or, as it is also expressed, *impotentia excusat legem* (*p*), is intimately connected with that last considered, and must be understood in this qualified sense, that *impotentia* excuses when there is a necessary or invincible disability to perform the mandatory part of the law, or to forbear the prohibitory (*q*) It is akin to the maxim of the Roman law, *nemo tenetur ad impossibilia*, which, derived from common sense and

(*l*) In further illustration of the maxim as to *actus Dei*, see also *Newton* v *Boodle*, 3 C B 795

(*m*) *Kinsey* v *Hayward*, 1 Raym Ld 432, at p 433

(*n*) *R* v *Edwards*, 4 Taunt 309, at p 312

(*o*) *Pell* v *Linnell*, L R 3 C P 441 As to the modern practice upon the death of a defendant, see R S C, O XVII

(*p*) Co Litt 29 a

(*q*) See *Moore* v *Hussey*, Hobart, 93, at p 96

natural equity, has been adopted and applied by the law of England under various and dissimilar circumstances

The law itself and the administration of it, said Sir W Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity, the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases "In the performance of that duty, it has three points to which its attention must be directed In the first place, it must see that the nature of the necessity pleaded be such as the law itself would respect, for there may be a necessity which it would not A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature Secondly, that the party who was so placed used all practicable endeavours to surmount the difficulties which already formed that necessity, and which, on fair trial, he found insurmountable I do not mean all the endeavours which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion and an ordinary knowledge of business Thirdly, that all this shall appear by distinct and unsuspected testimony, for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation" (*r*)

It is, then, a general rule which admits of ample practical illustration, that *impotentia excusat legem*, where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will in general excuse him (*s*) and though impossibility of performance is in general no excuse for not performing an obligation which a party has expressly undertaken by contract, yet when the obligation is one implied by law, impossibility of performance is a good excuse Thus in a case in which consignees of a cargo were prevented from unloading a ship promptly

(*r*) *The Generous*, 2 Dod 321, at pp 323, 324

(*s*) *Paradine* v *Jane*, Al 27, cited *per* Lawrence, J , in *Hadley* v *Clarke*, 8 T R 259, at 267 See *Evans* v *Hutton*, 5 Scott, N R 670, and cases there cited, at p 681

by reason of a dock strike, the Court, after holding that in the absence of an express agreement to unload in a specified time there was implied obligation to unload within a reasonable time, held that the maxim *lex non cogit ad impossibilia* applied, and Lindley, L J , said "We have to do with *implied* obligations, and I am not aware of any case in which an obligation to pay damages is ever cast by implication upon a person for not doing that which is rendered impossible by causes beyond his control" (*t*)

Mandamus

The maxim under notice may be exemplified by reference to the law of mandamus A writ of mandamus issuing to a railway company, enjoining them to prosecute works in pursuance of statutory requirements, supposes the required act to be possible, and to be obligatory when the writ issues (*u*), and, in general, the writ suggests facts showing the obligation, and the possibility of fulfilling it (*v*), though, where an obligation is shown to be incumbent on the company, the onus of proving that it is impossible lies upon those who contest the demand of fulfilment (*x*), if they succeed in doing so, the doctrine applies that "on mandamus, *nemo tenetur ad impossibilia*" (*y*) Upon the same principle, where an order had been made by the Board of Trade upon a railway company requiring the company to carry a turnpike road across the railway, the Court refused a mandamus to compel the company to carry out the order upon proof that the company had no funds, was practically defunct, and was not in a position to obey the writ if granted (*z*)

Contracts impossible of performance

If, however, as already stated, a person, by his own contract, absolutely engages to do an act, it is deemed to be his own fault and folly that he did not thereby expressly provide against contingencies, and exempt himself from responsibility in certain events in such case, therefore, that is, in the instance of an absolute contract, the performance is not excused by an inevitable accident or other contingency, although not foreseen by

(*t*) *Hick* v *Rodocanachi*, [1899] 2 Q B 626, at p 638

(*u*) *R* v *L & N W Ry Co*, *infra*

(*v*) *R* v *L & N W Ry Co*, 16 Q B 864, at p 884, and see *R* v *Ambergate Ry Co*, 1 E & B 372, at p 381 See *R* v *York & N Mid Ry Co*, 1 E & B 178, 858, *R* v *G W Ry Co*, Id 253, 874, *R* v *S E Ry Co* 4 H L Cas 471, *R* v *Lancs & Y Ry Co*, 1 E & B 228, 873 (a), Tapping on Mandamus, 359

(*x*) *Per* Ld Campbell, C J , in *R* v *York, N & B Ry* Co , 16 Q B 886 at p 904, and in *R* v *G W Ry Co*, 1 E & B 774, at p 780

(*y*) *Per* Ld Campbell in *R* v *Ambergate Ry Co*, 1 E & B 372, at p 380 see *R* v *Coaks*, 3 Id 249

(*z*) *Re Bristol & N Somerset Ry Co*, 3 Q B D 10

nor within the control of the party (*a*) Thus, where a builder admitted that he had contracted to complete within a fixed time, not only specified works, but also extra works if ordered, it was held that his failure to fulfil his contract within the fixed time was not excusable on the ground that it was impossible for him to carry out within that time an order to do the extra works (*b*) And, if the condition of a bond be impossible at the time of making it, the condition alone is void, and the bond stands single and unconditional (*c*)

Impossible condition

When performance of the condition of a bond becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond (*d*) for "in case of a private contract, a man cannot use as a defence an impossibility brought upon himself" (*e*) But the performance of a condition is excused by the default of the obligee, as by his absence when his presence is necessary for the performance (*f*), or by his doing any act which renders it impossible for the obligor to perform his engagement (*g*) And, indeed, it may be laid down generally, as clear law, that, if there is an obligation defeasible on performance of a certain condition, and the performance of the condition becomes impossible by the act of the obligee, the obligor is excused from the performance of it (*h*)

It seems, however, that the performance of a condition precedent, on which a duty attaches, is not excused, where the prevention arises from the act or conduct of a mere stranger If a man covenant that his son shall marry the covenantee's

(*a*) *Per* Lawrence, J , in *Hadley* v *Clarke*, 8 T R 259 at p 267, see also *per* Ld Ellenborough in *Atkinson* v *Ritchie*, 10 East, 530 at pp 533, 534 *Bute* v *Thompson*, 13 M & W 487, *Hills* v *Sughrue* 15 Id 253 at p 262, *Jervis* v *Tomkinson* 1 H & N 195, at p 208, *Spence* v *Chodwick*, 10 Q B 517, at p 528, *Schilizzi* v *Derry*, 4 E & B 873, *Hale* v *Rawson* 4 C B N S 85, *Adams* v *R M S Packet Co* , 5 Id 492, *Turner* v *Goldsmith*, [1891] 1 Q B 544

(*b*) *Jones* v *St John's College*, L R 6 Q B 115 See *Dodd* v *Churton*, [1897] 1 Q B 562

(*c*) Co Litt 206 a, *Sanders* v *Coward*, 15 M & W 48, judgm in *Duvergier* v *Fellows*, 5 Bing 248, at p 265 See also Dodd, Eng Law 100

(*d*) Judgm in *Beswick* v *Swindells*, 3 A & E 868, at p 883

(*e*) *Per* Ld Campbell in *R* v *Cal Ry Co* , 16 Q B 19, at p 28

(*f*) Com Dig "*Condition* L 4, 5, cited, *per* Tindal, C J , in *Bryant* v *Beattie*, 4 Bing N C 254, at p 263

(*g*) Com Dig '*Condition*,' L 6, *per* Parke, B , in *Holme* v *Guppy*, 3 M & W 387, at p 389 *Thornhill* v *Neats* 8 C B N S 831, at p 846, *Russell* v *Da Bandeira*, 13 Id 149, at pp 203, 205 See *Roberts* v *Bury Commrs* , L R 5 C P 310

(*h*) Judgm in *Hayward* v *Bennett*, 3 C B 404, at pp 417, 418 (citing Co Litt 206 a)

daughter, her refusal to marry does not discharge the covenantor from making pecuniary satisfaction (*i*) If A covenant with C to enfeoff B , A is not released from his covenant by B 's refusal to accept livery of seisin (*k*)

Impossible consideration

Further, where the consideration for a promise is such that its performance is utterly and naturally impossible, such consideration is insufficient, for no benefit can, by any implication, be conferred on the promisor (*l*), and the law will not notice an act the completion of which is obviously ridiculous and impracticable In this case, therefore, the maxim of the Roman law applies *impossibilium nulla obligatio est* (*m*) Moreover, a promise is not binding if the consideration for it be of such a nature that it was not in fact or law in the power of the promisee, from whom it moved, to complete such consideration, and to confer on the promisor the full benefit meant to be derived therefrom (*n*) Thus, if a man contract to pay money in consideration that another has contracted to do certain things, and it turn out, before anything is done under the contract, that the latter was incapable of doing what he engaged to do, the contract is at an end the party contracting to pay his money is under no obligation to pay for a less consideration than that for which he has stipulated (*o*) But if a party by his contract lay a charge upon himself, he is bound to perform the stipulated act, or to pay damages for the non-completion (*p*), unless the subject-matter of the contract were at the time manifestly and essentially impracticable, for the *improbability* of the performance does not render the promise void, because the contracting party is presumed to know whether the completion of the duty he undertakes be within his power, and therefore an engagement upon a sufficient consideration for the performance of an act, even by a third person, is binding, although the

(*i*) Perkins, s 756

(*k*) Co Litt 209 a, *per* Ld Kenyon in *Cook* v *Jennings*, 7 T R 381, at p 384, and in *Blight* v *Page*, 3 B & P 296 n See *Lloyd* v *Crispe*, 5 Taunt 249, Bac Abr , "*Conditions*, Q 4, cited in *Thornton* v *Jenyns*, 1 Scott N R 52, at p 66

(*l*) *Chanter* v *Leese*, 4 M & W 295, at p 311, *per* Holt, C J , in *Courtenay* v *Strong*, 2 Raym Ld 1217, at p 1219

(*m*) D 50, 17, 185, 1 Pothier, Oblig , pt 1, c 1 s 4, § 3, 2 Story, Eq Jurisp , 6th ed 763

(*n*) *Harvey* v *Gibbons*, 2 Lev 161, *Nerot* v *Wallace*, 3 T R 17

(*o*) *Per* Ld Abinger in *Chanter* v *Leese* 4 M & W 295, at p 311

(*p*) See *Thornborow* v *Whitacre*, 2 Ld Raym 1164, *Pope* v *Barrige*, 10 Exch 73, *Hale* v *Rawson*, 4 C B N S 85, at p 95, *Jones* v *St John's College*, L R 6 Q B 115 Compare *Dunford* v *Cia, Anon Maritima Union*, 12 Asp 32

performance of such act depends entirely on the will of the latter (*q*) Neither is the promisor excused if the performance of his promise be rendered impossible by the act of a third party (*r*), though, if an exercise of public authority render impossible the further performance of a contract which has been in part performed, the contract is, *ipso facto*, dissolved (*s*), but an insurance company who had undertaken, having the option to do so, to reinstate insured premises which had been damaged by fire, were held not to be excused from their contract by reason of the public authorities subsequently taking down the premises as dangerous, on account of defects not caused by the fire (*t*)

It is a principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, the other party may, if he choose, rescind the contract, and it is sufficient that the contract cannot be performed in the manner stipulated, though it could be performed in some other manner not very different (*u*) And if a party, by his own act, disables himself from fulfilling his contract, he thereby makes himself at once liable for a breach of it, and dispenses with the necessity of any request to perform it by the party with whom the contract has been made (*x*), and this is in accordance with the important rule of law, which we shall presently consider, that "a man shall not take advantage of his own wrong" (*y*)

Impossibility by change of the law

Impossibility may, however, be created by a change of the law That which a party has contracted to do may become illegal or impossible without violating the provisions of some Act of Parliament passed since the making of the contract In such cases performance of the contract is excused (*a*)

(*q*) 1 Pothier, Oblig , pt 1, c 1, s 4, § 2, *M'Neill* v *Reid* 9 Bing 68

(*r*) *Thurnell* v *Balbirnie*, 2 M & W 786, *Brogden* v *Marriott*, 2 Bing N C 473

(*s*) *Melville* v *De Wolf*, 4 E & B 844, at p 850, *Reid* v *Hoskins*, 6 E & B 953, *Esposito* v *Bowden*, Id 963 at p 976, *Esposito* v *Bowden*, 7 E & B 763 at p 783 (followed in *Karberg* v *Blythe &c* , [1915] 2 K B 379, and in *Naylor, &c* v *Kraimische, &c* , [1918] 1 K B 331)

(*t*) *Brown* v *Royal Ins Co* , 1 E & E 853

(*u*) *Panama Telegraph Co* v *Ind Rubber Tel Works*, L R 10 Ch App 515, at p 532

(*x*) *Hochster* v *De la Tour*, 2 E & B 678, *Danube Ry Co* v *Xenos* 13 C B N S 825, *Synge* v *Synge*, [1894] 1 Q B 466, arg *Reid* v *Hoskins*, 6 E & B 953, at pp 960 961, 5 Id 737, 4 Id 982, and *Avery* v *Bowden*, 5 E & B 514, at p 722 See *Jonassohn* v *Young*, 4 B & S 296, at p 300, *Lewis* v *Clifton*, 14 C B 425 (*y*) *Post*, p 197

(*a*) *Baily* v *De Crespigny*, L R 4 Q B 180, *Brown* v *Mayor of London*, 9 C B N S 726, and 13 C B N S 828, and see *Manch , Shef and Lincolns Ry* v *Anderson*, [1898] 2 Ch 394

Covenant may be repealed by statute

Again, we find it laid down that "where H covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant So, if H covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed But, if a man covenants not to do a thing which then was unlawful, and an Act comes and makes it lawful to do it, such Act of Parliament does not repeal the covenant" If, before the expiration of the running days allowed by a charter-party for loading, the performance by the shipper of his contract becomes, by virtue of an Order in Council, illegal, he is discharged (*b*)

So, too, when a Prussian subject was bound by charter-party to discharge a cargo at a French port, and by reason of the outbreak of war between those countries and the nature of the cargo (which was contraband of war) it became illegal for him to perform his contract, he was held discharged (*c*)

Additional examples

The following are additional illustrations of the maxim before us An appellant, who had applied to justices to state a case under 20 & 21 Vict c 43, received the case from them on Good Friday, and transmitted it to the proper Court on the following Wednesday It was held that he had complied sufficiently with the requirement of the Act, directing him to transmit the case within three days after receiving it, for, the offices of the Court having been closed from Friday till Wednesday, it was impossible to transmit the case sooner (*d*) Again, where an appeal against an order of an assessment committee had to be made to the next Sessions, it was held that the next Sessions meant the next practicable Sessions, and not necessarily the next Sessions immediately after the date of the order, as the latter construction would not have afforded the aggrieved party time to consider whether he would appeal or not (*e*)

To several maxims in some measure connected with that

(*b*) *Reid* v *Hoskins*, 6 E & B 953 *Avery* v *Bowden*, Id 953 962 See *Esposito* v *Bowden*, 4 E & B 963 and 7 Id 763, *Tamvaco* v *Lewis*, 1 B & S 185, at p 194, *Pole* v *Cetcovitch*, 9 C B N S 430 Parties may by apt words bind themselves by contract as to any *future* state of the law *per* Maule, J , in *Mayor of Berwick* v *Oswald*, 3 E & B 653, at p 665, *Berwick* v *Oswald* 5 H L Cas 856, *Mayor of Dartmouth* v *Silly*, 7 E & B 97

(*c*) *The Teutonia*, L R 4 P C 171

(*d*) *Mayer* v *Harding*, L R 2 Q B 410 where Mellor, J , says that where a statute requires a thing to be done within any particular time, such time may be circumscribed by the fact of its being impossible to comply with the statute on the last day of the period so fixed

(*e*) *R* v *Surrey JJ* , 6 Q B D 100

above considered, it may, in conclusion, be proper briefly to advert First, it is a rule, that *lex spectat naturæ ordinem* (*f*), the law regards the order and course of nature, and will not force a man to demand that which he cannot recover (*g*) Thus, where the thing sued for by tenants in common is in its nature entire, as in a *quare impedit*, or in detinue for a chattel, they must of necessity join in the action, contrary to the rule which in other cases obtains, and according to which they must sue separately (*h*) Secondly, it is a maxim of our legal authors, as well as a dictate of common sense, that the law will not itself attempt to do an act which would be vain, *lex nil frustra facit*, nor to enforce one which would be frivolous—*lex neminem cogit ad vana seu inutilia*—the law will not force any one to do a thing vain and fruitless (*i*)

Lex spectat naturæ ordinem

Lex nil frustra facit

IGNORANTIA FACTI EXCUSAT—IGNORANTIA JURIS NON EXCUSAT (*Gr and Rud of Law*, 140, 141)—*Ignorance of fact excuses—ignorance of the law does not excuse* (*k*)

Rule derived from Roman law

Ignorance may be either of law or of fact If the heir is ignorant of the death of his ancestor, he is ignorant of a fact but if, being aware of the death, and of his own relationship, he is nevertheless ignorant that certain rights have thereby become vested in himself, he is ignorant of the law (*l*) Such is the example given to illustrate the distinction between *ignorantia juris* and *ignorantia facti* in the civil law, where the general rule is thus laid down *regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere* (*m*)

(*f*) Co Litt 197 b (*g*) Litt s 129, Co Litt 194 b

(*h*) Litt s 314, cited in *Marson* v *Short* 2 Bing N C 118, at p 120 One tenant in common cannot be treated as a wrong doer by another, except for some act which amounts to an ouster of his co tenant, or to a destruction of the common property (*per* Smith, J, in *Jacobs* v *Seward*, L R 4 C P 328)

(*i*) *Laughter's Case* 5 Rep 21, Co Litt 127 b, cited in *Marson* v *Short*, 2 Bing N C 118, at p 121, Wing Max, p 600, *per* Willes, J, in *Bell* v *Midland Ry Co* 10 C B N S 287, at p 306

(*k*) 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 ' ' When the word *jus* is used in the sense of denoting a private right, that maxim has no application ' (*per* Ld Westbury in *Cooper* v *Phibbs*, L R 2 H L 150, at p 170) See also *Allcard* v *Walker*, [1896] 2 Ch 369, at p 381

(*l*) D 22, 6, 1 The doctrines of the Roman law upon the subject are shortly stated in 1 Spence's Chan Juris 632 633

(*m*) D 22, 6, 9 pr, Cod 1, 18, 10 The same rule is laid down in the Basilica, 2, 4, 9 See Irving's Civil Law, 4th ed 74

—ignorance of a material fact may excuse a party from the legal consequences of his conduct, but ignorance of the law, which every man is presumed to know, does not afford excuse —*ignorantia juris, quod quisque scire tenetur, neminem excusat* (*n*)

Presumption of legal knowledge

With respect to this "presumption of legal knowledge," we may observe that, although ignorance of the law does not excuse persons so as to exempt them from the consequences of their acts, as, for example, from punishment for a criminal offence (*o*), or from damages for breach of contract, yet the law takes notice that there may be a doubtful point of law of the true solution of which a person may be ignorant, and it is quite evident that ignorance of the law often in reality exists (*p*) It would, for instance, be absurd to assert that every person is acquainted with the practice of the Courts, although, in such a case, there is a presumption of knowledge to this extent, that *ignorantia juris non excusat*, the rules of practice must be observed, and a deviation from them may entail consequences detrimental to the suitor (*q*) It is, therefore, in the above qualified sense alone that the saying, that "all men are presumed cognisant of the law" (*r*), must be understood

The following case illustrates the above general rule, and likewise shows that our Courts recognise the existence of doubtful points of law, since the adjustment of claims involving them is allowed to be a good consideration for a promise (*s*), and to

(*n*) Hale, P C Cr 42 *Manser s Case*, 2 Rep 3b, *Brett* v *Rygden*, 1 Plowd 340, at p 343, *per* Erle, C J , in *Pooley* v *Brown*, 11 C B N S 566, at p 575 *Kitchin* v *Hawkins*, L R 2 C P 22

(*o*) *Post*, p 188

(*p*) 'The maxim is *ignorantia legis neminem excusat*, but there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequences of his acts (*per* Lush, J in *R* v *Tewkesbury Corporation* L R 3 Q B 629, at p 639), see also *per* Ld Alverstone, C J , and Channell, J , in *Harse* v *Pearl Life Co* [1903] 2 K B 92

In reference to the equitable doctrine of election, Ld Westbury observed (in *Spread* v *Morgan*, 11 H L Cas 588, at p 602) that, although it is true as a general proposition that knowledge of the law must be imputed to every person, ' it would be too much to impute knowledge of this rule of equity ' See also *Noble* v *Noble* L R 1 P & D 691, at p 693

(*q*) See *per* Maule, J , in *Martindale* v *Falkner*, 2 C B 708, at pp 719, 720 (cited by Blackburn, J , in *R* v *Tewkesbury Corporation*, L R 3 Q B 629, at p 635), *per* Willes, J , in *Poole* v *Whitcomb*, 12 C B N S 770, at p 775, *per* Ld Mansfield in *Jones* v *Randall*, 1 Cowp 37, at p 40, *per* Coltman, J , in *Sargent* v *Gannon*, 7 C B 743, at p 752, *Edwards* v *Ward* 4 Id 915 See also *Newton* v *Belcher* 12 Q B 921, *Newton* v *Liddiard*, Id 825

(*r*) Gr & R of the Law, 141

(*s*) *Per* Maule, J , in *Martindale* v *Falkner*, 2 C B 706, at p 720 See *Wade* v *Simeon*, 1 C B 610

sustain an agreement between litigating parties The widow, brother, and sister, of an American who died in Italy, leaving considerable personal estate in the hands of trustees in Scotland, agreed, by advice of their law agent, to compromise their respective claims to the succession, by taking equal shares The widow, after receiving her share, brought an action in Scotland to rescind the agreement, on the ground that she had thereby sustained injury, through ignorance of her legal rights and the erroneous advice of the law agent there was, however, no allegation of fraud against him or against the parties to the agreement It was held that, although the fair inference from the evidence was that she was ignorant of her legal rights, and would not have entered into the agreement had she known them, yet, as the extent of her ignorance and of the injury sustained was doubtful, and there was no proof of improper conduct on the part of the agent, she was bound by his acts, and affected by the knowledge which he was presumed to have of her rights, and was therefore not entitled to disturb the agreement (*t*) "If," remarked Lord Cottenham, in this case (*u*), "it were necessary to show knowledge in the principal, and a distinct understanding of all the rights and interests affected by the complicated arrangements which are constantly taking place in families, very few, if any, could be supported "

It is, then, a true rule, if understood in the sense above assigned to it, that every man must be taken to be cognisant of the law, for otherwise, as Lord Ellenborough observed, "there is no saying to what extent the excuse of ignorance might not be carried it would be urged in almost every case " (*v*), and, from this rule, coupled with that as to ignorance of fact, are derived the two important propositions —1st, that money paid with full knowledge of the facts, but through ignorance of the law, is generally not recoverable, if there be nothing unconscientious in the retaining of it, and 2ndly, that money paid in ignorance of the facts is recoverable, provided there was no *laches* in the party paying it, and there was no ground to claim it in conscience (*x*)

(*t*) *Stewart* v *Stewart*, 6 Cl & F 911 see also *Clifton* v *Cockburn*, 3 My & K 76, at p 99 see Cod 1, 18, 2 *Teede* v *Johnson*, 11 Exch 840

(*u*) At p 970 of *Steuart* v *Stewart*, 6 Cl & F 911

(*v*) *Bilbie* v *Lumley*, 2 East, 469, at p 472, Preface to Co Litt , *Gomery* v *Bond*, 3 M & S 378

(*x*) See notes in 2 Smith, L C , 12th ed p 403 to *Marriott* v *Hampton* 7 T R 269, *Wilkinson* v *Johnston*, 3 B & C 428, *per* Ld Mansfield in

Money paid with knowledge of facts

Brisbane v *Dacres*

In a leading case on the first of these rules, the facts were these The captain of a king's ship brought home in her public treasure upon the public service, and treasure of individuals for his own emolument He received freight for both, and paid one-third of it, according to the usage in the navy, to his admiral, but, upon discovering that the law did not compel captains to pay to admirals one-third of the freight, he brought an action to recover the money from the admiral's executrix It was held that he could not recover the private freight, because the whole of that transaction was illegal, nor the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law, and because it was not against conscience for the executrix to retain it (*y*)

The following case may also here be noticed A, tenant to B, received notice from C, a mortgagee of B's term, that the interest was in arrear, and requiring payment to C of the rent then due A, notwithstanding this notice, paid the rent to B, and was afterwards compelled, by distress, to pay it again to C It was held that the money, having been paid to B with full knowledge of the facts, could not be recovered back (*z*)

Mistake of fact

The second rule, regarding the recovery of money paid in genuine ignorance or forgetfulness of facts (*a*), was thus lucidly stated by Parke, B (*b*) "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 not true, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it, though a demand may be necessary in those cases in which the party receiving the money may have been ignorant of the mistake"

Bize v *Dickason* 1 T R 285, *Platt* v *Bromage*, 24 L J Ex 63 See *Lee* v *Merrett*, 8 Q B 820, observed upon in *Gingell* v *Purkins* 4 Exch 720, at p 723, recognising *Standish* v *Ross*, 3 Exch 527

(*y*) *Brisbane* v *Dacres*, 5 Taunt 143, see *per* Ld Ellenborough in *Bilbie* v *Lumley*, 2 East, 469, at p 470, *Cumming* v *Bedborough*, 15 M & W 438 *Bramston* v *Robins*, 4 Bing 11 *Stevens* v *Lynch*, 12 East, 38, *per* Ld Eldon in *Bromley* v *Holland*, 7 Ves 3 at p 23, *Lowry* v *Bourdieu*, 2 Doug 468, *Gomery* v *Bond*, 3 M & S 378 *Lothian* v *Henderson*, 3 B & P 499, at p 520, *Dew* v *Parsons*, 2 B & Ald 562 See arg *Gibson* v *Bruce* 6 Scott, N R 309, *Smith* v *Bromley* cited 2 Dougl 696, and 6 Scott, N R 318, *Atkinson* v *Denby*, 6 H & N 778, 7 Id 934

(*z*) *Higgs* v *Scott* 7 C B 63 See *Wilton* v *Dunn*, 17 Q B 294

(*a*) D 12, 6, 1

(*b*) In *Kelly* v *Solari*, 9 M & W 50, at p 54, where many earlier cases on the subject are cited

Means of knowledge of facts

The case in which the general rule was thus stated was the first of a series which decided that a person can recover money paid by him under a genuine mistake of fact, although at the time of the payment he had means of knowing the real facts, of which he carelessly omitted to avail himself (*c*) An inference that facts were actually known to a person may in some cases fairly be drawn from evidence which shows that he possessed the means of knowing them, but "there is no conclusive rule of law that because a party has the means of knowledge he has the knowledge itself" (*d*), for "if the possibility or even probability of actual knowledge should be considered as legal proof of knowledge, as a *presumptio juris et de jure*, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice" (*e*)

Waiver of inquiry as to facts

The general rule, which we have stated in the words of Parke, B, limits the right to recover money paid under a mistake of fact to cases in which the money would not have been paid if the real facts had been known to the payer For "if, indeed, the money is intentionally paid, without reference to the truth or falsehood of a fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it" (*f*)

Examples of general rule

If A pay money to B, supposing him to be the agent of C, to whom he owes the money, and B be not the agent, the money may be recovered back (*g*) If A and B are settling an account, and, in summing up the items, make a mistake which leads A to pay B £100 too much, A may recover the money Such cases illustrate the principle that no man should by law be deprived of his money which he parted with under a mistake of fact, and which it is against justice that the receiver should retain (*h*)

Mistake must concern payee

It is not, however, every mistake of fact made by a person when he pays money that supports an action to recover it the

(*c*) *Townsend* v *Crowdy*, 8 C B N S 477, at p 493, and cases there collected

(*d*) *Per* Tindal, C J, in *Bell* v *Gardiner*, 4 M & Gr 11, at p 24, cited by Ld Blackburn in *Brownlie* v *Campbell*, 5 App Cas 925, at p 952

(*e*) *Per* Ld Tenterden in *Harratt* v *Wise* 9 B & C 712, at p 717

(*f*) *Per* Parke, B, in *Kelly* v *Solari*, 9 M & W 54, at p 59, see *per* Willes J, in *Townsend* v *Crowdy*, 8 C B N S 477, at p 490, *per* Williams J, Id 494

(*g*) Cf *Walter* v *James*, L R 6 Ex 124

(*h*) See *per* Kelly, C B, in *Freeman* v *Jeffries*, L R 4 Ex 189, at p 197

mistake must relate to the payee's title to receive the money, and it must be shown that upon the supposed facts he had a right to the money, upon the real facts no right (*i*) A banker, in honouring a cheque, pays the money in discharge of the holder's right against the drawer, that right is not affected by the state of the drawer's account at the bank consequently, the banker's mistake as to the state of that account does not render the holder liable to return the money (*k*) Again, a third person pays a debt in ignorance of facts not affecting the creditor's right against the debtor it is immaterial that the payer, had he known the facts, would have perceived that payment of the debt did not benefit himself (*l*) On the other hand, if an agent having received his principal's money with directions to pay it to A, inadvertently pays it to B, the error affects B's title to the money, and the agent can generally recover it (*m*)

Effect of alteration in payee's position

Again, as a rule, no liability to repay money paid under a mistake of fact arises until the payee has notice of the mistake, and the notice must reach him before an alteration in his position has rendered it unjust that he should be called upon to return the money (*n*) The fact that the payee has spent the money before notice is not of itself a good answer to the payer's demand (*o*), but under special circumstances the demand may be defeated by showing that before notice the payee paid away the money without reasonable prospect of recall, for if, by reason of the relation between the parties, the mistake was a breach of duty owed by payer to payee, and the mistake was the proximate cause of the payee parting with the money, the payer must bear the loss occasioned by his breach of duty (*p*) Moreover, it is a rule respecting bills of exchange which have been paid upon a signature afterwards discovered to be a forgery, that the money, when once paid to an innocent holder, is not recoverable from him if he received no notice of the forgery

Payment of forged bills

(*i*) See *per* Parke, B, in *Kelly* v *Solari*, 9 M & W 54, at p 58, *per* Bramwell, B, in *Aiken* v *Short* 1 H & N 210, at p 215, *per* Williams, J, in *Chambers* v *Miller*, 32 L J C P 30, at p 33

(*k*) *Chambers* v *Miller*, 13 C B N S 125, see also *Pollard* v *Bank of England*, L R 6 Q B 623

(*l*) *Aiken* v *Short*, 1 H & N 210

(*m*) *Colonial Bank* v *Exchange Bank*, 11 App Cas 84

(*n*) *Freeman* v *Jeffries*, L R 4 Ex 189, see *Colonial Bank* v *Exchange Bank*, *supra*

(*o*) *Standish* v *Ross*, 3 Exch 527, at p 534, see also *Newall* v *Tomlinson*, L R 6 C P 405

(*p*) *Skyring* v *Greenwood*, 4 B & C 281, *Deutsche Bank* v *Beirro*, 73 L T 669, see *Durrant* v *Ecclesiastical Commrs*, 6 Q B D 234

on the day of payment a later notice finds him with his remedy against other parties to the bill either lost or impaired (*q*)

Mistakes in procedure

It has been stated (*r*) to be a general rule that, "in matters connected with the administration of justice, where a mistake is discovered before any further step is taken, the Court interferes to cure the mistake, taking care that the opposite party shall not be put to any expense in consequence of the application to amend the error" In some cases, also, where at the time of applying to the Court the applicant is ignorant of circumstances material to the subject matter of his motion, he may be permitted to open the proceedings afresh, for instance, under very peculiar circumstances the Court re-opened a rule for a criminal information, it appearing that the affidavits on which the rule had been discharged were false (*s*) And in furtherance of justice the Court has been known to set aside a judgment by default at the instance of a plaintiff, on the ground of a mistake in the amount claimed, although that amount and the costs of the action had been paid since the judgment (*t*)

Moreover, if money has been paid to an officer of a Court by a mistake, whether of fact or of law, the Court will generally entertain an application for an order for its repayment, if feasible (*u*)

Rule is true also in equity

In Courts of equity, as well as of law, the two-fold maxim under consideration is admitted to hold true for, on the one hand, it is a general rule, in accordance with the maxim of the civil law, *non videntur qui errant consentire* (*x*), that equity will relieve where an act has been done, or contract made, under a mistake, or ignorance of a material fact (*y*), and, on the other hand, it is laid down as a general proposition that, in Courts of equity, ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular

(*q*) *Cocks* v *Masterman*, 9 B & C 902, *Lond & R P Bank* v *Bank of Liverpool*, [1896] 1 Q B 7

(*r*) *Per* Pollock, C B, in *Emery* v *Webster*, 9 Exch 242, at p 246, which well illustrates the proposition in the text

(*s*) *R* v *Eve*, 5 A & E 780, *Bodfield* v *Padmore*, Id 785, n

(*t*) *Cannan* v *Reynolds*, 5 E & B 301 See *Hammond* v *Scofield*, [1891] 1 Q B 453, and *Cross* v *Matthews*, 91 L T 500

(*u*) *Ex parte Simmonds*, 16 Q B D 308, *Re Overa, Ltd*, [1891] 2 Ch 154

(*x*) D 50, 17, 116, § 2

(*y*) 1 Story, Eq Jurisp, 12th ed 138 See *Scott* v *Littledale*, 8 E & B 815, *Simmons* v *Heseltine*, 5 C B N S 554, at p 565

If parties contract under mutual mistake and misapprehension as to their relative and respective rights, the agreement thus made is liable to be set aside in equity as having proceeded upon a common mistake (*per* Ld Westbury in *Cooper* v *Phibbs*, L R 2 H L 149, at p 170)

acts (*z*), and this proposition seems to be fully borne out by the authorities (*a*), if by ignorance of the law is meant ignorance of some well-established rule of law, and not ignorance of such a matter as the true construction of a doubtful grant (*b*) But, while a Court of equity will not, in general, relieve against a mistake in a contract which was a mistake in law and not in fact (*c*), there are cases in which the Court does not hold itself strictly bound by this rule, and considers it has power to relieve against mistakes in law if there be any equitable ground which makes it, under the particular facts of the case, inequitable that the party benefited by the mistake should retain the benefit (*d*), and the line between mistakes in law and mistakes in fact is not so sharply drawn in Courts of equity as in Courts of common law (*e*)

The following are instances where Courts of equity have refused to relieve against a mistake in law A deed of appointment under a settlement was executed absolutely, without reserving a power of revocation which the settlement authorised, this omission was made through a mistake in law, on the supposition that the deed of appointment, being a voluntary deed, was therefore revocable, relief was refused by the Court (*f*) So, where two are jointly bound by a bond, and the obligee releases one, supposing, erroneously, that the other will remain bound, the obligee will not be relieved in equity upon the mere ground of his mistake of the law, for *ignorantia juris non excusat* (*g*)

It is, however, well settled that a Court of equity will relieve against a mistake or ignorance of fact, and in several cases, which are sometimes cited as exceptions to the general rule as to *ignorantia juris*, it will be found that there was a mistake or a misrepresentation of fact sufficient to justify a Court of equity in interfering to give relief (*h*) In a leading case (*i*),

(*z*) 1 Fonbl Eq , 5th ed 119, note

(*a*) 1 Story, Eq Jurisp , 12th ed 138 *Mid G W Ry Co* v *Johnson*, 6 H L Cas 798, illustrates the text

(*b*) *Beauchamp* v *Winn* L R 6 H L 223, at p 234 (followed in *Stanley Bros* v *Nuneaton Corporation*, 107 L T 760, at p 764)

(*c*) *Mid G W Ry Co* v *Johnson*, 6 H L Cas 798

(*d*) *Stone* v *Godfrey*, 5 D M & G 76, at p 90 *Ex parte James* L R 9 Ch 609 (as to which, see *Thelluson, In re*, [1919] 2 K B 735 and *Wigzell, In re* 37 T L R 526), *Rogers* v *Ingham*, 3 Ch D 351, at p 357

(*e*) *Daniel* v *Sinclair*, 6 App Cas 181

(*f*) *Worrall* v *Jacob*, 3 Meriv 256, at p 271

(*g*) *Harman* v *Cam*, 4 Vin Abr 387, pl 3 1 Fonbl Eq 5th ed 119, note

(*h*) The reader is referred to 1 Story, Eq Jurisp , 12th ed Chap V , p 138, where the cases are considered

(*i*) *Pusey* v *Desbouverie*, 3 P Wms 315 See also *M'Carthy* v *Decaix* 2 Russ & M 614

illustrative of this remark, a freeman of the City of London bequeathed £10,000 to his daughter upon condition that she should release her orphanage part, together with all her claim to his personal estate, by virtue of the custom of the city (*j*) or otherwise Upon her father's death, the daughter accepted the legacy, and executed the release, her brother having first informed her that she had it in her election either to have an account of her father's personal estate, or to claim her orphanage part Upon a bill afterwards filed on the daughter's behalf against the brother, who was executor under the will, Lord Talbot expressed an opinion (*k*) that the release should be set aside, and the daughter be restored to her orphanage share, which amounted to £40,000 This opinion seems to have rested, in part, on the ground that the daughter had not been informed of the actual amount to which she would be entitled under the custom, and did not appear to know that she was entitled to have an account taken of her father's personal estate, and that when she should be fully apprised of this, and not till then, she was to make her election, and it is a rule that a party is always entitled to a clear knowledge of the funds between which he is to elect before he is put to his election (*l*) In like manner it was held, in a case which is frequently cited with reference to this subject, that, where a person agrees to give up his claim to property in favour of another, such renunciation will not be supported if, at the time of making it, he was ignorant of his legal rights and of the value of the property renounced, especially if the party with whom he dealt possessed, and kept back from him, better information on the subject (*m*)

Upon an examination, then, of the cases which have been relied upon as exceptions to the general rule (*n*) observed by Courts of equity, some, as in the instances above mentioned, may be supported upon the ground that the circumstances disclosed an ignorance of fact as well as of law, and in others

(*j*) See Pulling, Laws and Customs of London, 180 *et seq*

(*k*) The suit was compromised

(*l*) *Pusey* v *Desbouverie*, 3 P Wms 315, at p 321

(*m*) *M Carthy* v *Decaix*, 2 Russ & M 614, *Smith* v *Pincombe*, 3 Mac & Gor 653, *Fane* v *Fane*, L R 20 Eq 698

(*n*) Bearing upon the subject touched upon in the text, see *per* Sir J Leach in *Cockerell* v *Cholmeley*, 1 Russ & My 418, at pp 424, 425 (affirmed *Cockerell* v *Cholmeley*, 1 Cl & F 60), see *Cockerell* v *Cholmeley*, 3 Russ 565, where the facts are set out at length, *Broadalbane* v *Chandos*, 2 My & Cr 711

there will be found to exist either actual misrepresentation, undue influence, mental imbecility, or that sort of surprise which equity regards as a just foundation for relief It is, indeed, laid down broadly that, if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his property to another, under the name of a compromise, a Court of equity will grant relief, and this proposition may be illustrated by the case of an heir-at-law, who, knowing that he is the eldest son, nevertheless agrees, through ignorance of the law, to divide undevised fee-simple estates of his ancestor with a younger brother, such an agreement being one which would be held invalid by a Court of equity Even in so simple a case, however, there may be important ingredients, independent of the mere ignorance of law, and this very ignorance may well give rise to a presumption of imposition, weakness, or abuse of confidence, which will give a title to relief, at all events, in cases similar to the above, it seems clear that the mistake of law is not, *per se*, the foundation of relief, but is only the medium of proof by which some other ground of relief may be established, and on the whole it may be safely affirmed that a mere naked mistake of law, unattended by special circumstances, will furnish no ground for the interposition of a Court of equity, and that the present disposition of such a Court is rather to narrow than to enlarge the operation of exceptions to the above rule (*o*)

Mistake of fact—when a ground to refuse specific performance

As bearing on the subject under consideration, it may be observed that in cases where a purchaser seeks to avoid specific performance of a contract of purchase, on the ground of a mistake of fact, he can only do so provided he shows that the mistake was mutual to both parties, or that he entered into the bargain under a mistake of fact which, although not contributed to by the other party, would inflict a hardship amounting to injustice if the Court held him to his bargain (*p*), or where the mistake was one to which the other party contributed, in other words if the party seeking relief was misled by any act of the vendor into making the bargain (*q*)

Criminal cases

In criminal cases the maxim as to *ignorantia facti* applies

(*o*) See 1 Story, Eq Jurisp, 12th ed 131 *et seq*, *per* Ld Cottenham, C, in *Stewart* v *Stewart*, 6 Cl & F 911, at pp 964 971 See also Spence, Chanc Juris 633 *et seq*

(*p*) *Tamplin* v *James*, 15 Ch D 215, at p 221

(*q*) *Goddard* v *Jeffreys*, 51 L J Ch 57

when a man, intending to do a lawful act, does that which is unlawful In this case there is not that conjunction between the deed and the will which is necessary to form a criminal act, but, in order that he may stand excused, there must be an ignorance or mistake of fact, and not an error in point of law If a man, intending to kill a burglar under circumstances which would justify him in so doing, by mistake kills one of his own family, this is no criminal act, but if a man thinks he has a right to kill an excommunicated person wherever he meets him, and does so, this is wilful murder For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is, in criminal cases, no sort of defence (*r*) *Ignorantia eorum quæ quis scire tenetur non excusat* (*s*)

Lastly every man is presumed to be cognisant of the statute law of this realm, and to construe it aright, and if an individual infringe it through ignorance, he must, nevertheless, abide by the consequences of his error it is not competent to him, to aver, in a Court of justice, that he has mistaken the law, this being a plea which no Court of justice is at liberty to receive (*t*) Where, however, the passing of a statute could not have been known to an accused at the time of doing an act thereby rendered criminal, the Crown would probably think fit, in case of conviction, to exercise its prerogative of mercy (*u*)

VOLENTI NON FIT INJURIA (*Wing Max* 482)—*Damage suffered by consent is not a cause of action* (*v*)

Consent bars right of action

In actions founded on tort the leave and licence of the plaintiff to do the act complained of usually constitutes a good

(*r*) 4 Blac Com 27, Doct and Stud, Dial ii c 46 A plea of ignorance of the law was rejected in *Lord Vaux's Case*, 1 Bulstr 197 See also *Re Barronet* 1 E & B 1

(*s*) Hale, Pl Cr 42 The law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it (*per* Tindal, C J in *Macnaghten's Case* 10 Cl & F 200, at p 210)

(*t*) *Per* Sir W Scott in *The Charlotta*, 1 Dod 386, at p 392, *per* Ld Hardwicke in *Middleton* v *Croft*, Str 1056, *per* Pollock, C B in *Cooper* v *Simmons*, 7 H & N 707, at p 717, *The Katherina*, 30 L J P M & A 21, *R* v *Esop*, 7 C & P 456

(*u*) *R* v *Bailey*, Russ & Ry 1

(*v*) *Damnum sentire non videtur qui sibi damnum dedit*, D 50, 17 204, see C 2, 4, 34, C 3, 28, 35 See also *Grendon* v *Lincoln, Bishop of*, Plowd 493, at p 501, *Haddon* v *Ayers*, 1 E & E 118, at p 148

defence by reason of the maxim *volenti non fit injuria* (*x*), and, as a rule, a man must bear loss arising from acts to which he assented (*y*) Thus it was settled law that in an action of *crim con* the husband's consent to the wife's adultery went in bar of the action, whereas his improper conduct, not amounting to consent, only went in reduction of damages (*z*), and this doctrine now applies to the husband's claim, by petition in the Divorce Division (*a*), for damages on the ground of adultery with his wife (*b*) Upon the same principle a husband has no right to turn his wife away on account of her adultery at which he connived he cannot complain of that to which he was a willing party (*c*) Nor is it contrary to this principle that an indictment lies for an illegal prize-fight notwithstanding the consent of the combatants, for the party complaining of the breach of the peace is the Crown (*d*) It has, indeed, been said that even in an action for an assault it is no defence to allege that the parties fought by consent, if the fight was unlawful (*e*), but it does not follow that either of the consenting parties to an unlawful fight can recover damages, for, even if their consent being illegal, be a nullity, it may well be that the action would be dismissed by reason of the maxim *ex turpi causa non oritur actio* (*f*)

Actions for personal injuries

The maxim *volenti non fit injuria* has been often cited, and sometimes applied, in favour of defendants sued for damages for personal injuries, for instance it was so applied against a man who was hurt by a spring-gun while he trespassed in a wood after being warned by the owner that in it there were spring-guns set (*g*) in a manner which was not then illegal, and

(*x*) Bullen & Leake, Prec , 3rd ed 740

(*y*) *Gould* v *Oliver*, 4 Bing N C 134, at p 142

(*z*) *Duberley* v *Gunning*, 4 T R 651, at p 657, see the maxim cited in *Forster* v *Forster*, 1 Hag Cons 144, at p 146, in *Rogers* v *Rogers*, 3 Hag Ec 57, in *Anichini* v *Anichini*, 2 Curt 211 at p 213, and in *Phillips* v *Phillips* 1 Rob Ec 144, at p 158

(*a*) Under the Matrimonial Causes Act, 1857 (20 & 21 Vict c 85), s 33

(*b*) *Bernstein* v *Bernstein*, [1893] P 292, at p 304, see also *Keyse* v *Keyse*, 11 P D 100, *Izard* v *Izard*, 14 P D 45

(*c*) *Wilson* v *Glossop*, 20 Q B D 354, at p 358

(*d*) *R* v *Coney*, 8 Q B D 534, at p 553

(*e*) *Boulter* v *Clarke*, Bull, N P 16, see *R* v *Coney*, 8 Q B D 534, at p 538

(*f*) *Post*, Chap IX

(*g*) *Ilott* v *Wilkes*, 3 B & Ald 304, see *Bird* v *Holbrook* 4 Bing 628 *Jordin* v *Crump*, 8 M & W 782 *Barnes* v *Ward* 9 C B 392, *Wootten* v *Dawkins*, 2 C B N S 412 *Harrold* v *Watney* [1898] 2 Q B 320, *Bromley* v *Mercer*, [1922] 2 K B 126

General rule

it seems that, as a rule, the application of the maxim is justifiable if the plaintiff received his injuries under circumstances leading necessarily to the inference that he encountered the risk of them freely and voluntarily and with full knowledge of the nature and extent of the risk in other words, if the real cause of the plaintiff running the risk and receiving the injuries was his own rash act (*h*) Whether the maxim ought to be applied in a particular case is often a question rather of fact than law (*i*)

No breach of duty

This question, we may notice, hardly arises unless the facts disclose some breach by the defendant of a duty owed by him to the plaintiff, for if the injuries arose out of a risk in respect of which the defendant owed no duty to the plaintiff, or in respect of which the defendant fulfilled such duty as he owed, the action fails, whether or not the plaintiff ran the risk voluntarily, since the defendant has done him no wrong (*k*) A defence founded on the maxim is akin to a defence of contributory negligence, with which we deal elsewhere (*l*)

Knowledge

It is to be observed that the leading word of the maxim is not *scienti*, but *volenti* there are degrees of knowledge, and even full knowledge that an act is dangerous does not necessarily render the act, if done, a voluntary act (*m*) For instance, if by my misconduct towards a man he be placed in a situation which only leaves him a choice between perilous courses, I am liable for the consequences of whichever course he takes his knowledge of the risk run by his taking that course is immaterial (*n*) It seems safe, however, to say that where the choice lies between bearing a small temporary inconvenience and escaping from it by an obviously dangerous act, the maxim may be applied if the latter course be knowingly adopted (*o*) On the other hand, a man's ignorance of a risk

(*h*) See *Thomas* v *Quartermaine*, 18 Q B D 685, *Yarmouth* v *France*, 19 Q B D 647, *Smith* v *Baker*, [1891] A C 325, *Abbott* v *Isham*, 18 L G R 719

(*i*) *Per* Lindley, L J , in *Yarmouth* v *France*, 19 Q B D 647, at p 659

(*k*) See *per* Ld Herschell in *Membery* v *G W Ry Co* , 14 App Cas 179, at p 192

(*l*) See maxim, *respondeat superior*, Chap IX

(*m*) See *Thomas* v *Quartermaine*, 18 Q B D 685, at p 696, *per* Bowen, L J , who gives illustrations

(*n*) See *per* M Smith, J , in *Adams* v *L & Y Ry Co* , L R 4 C P 739, at p 742

(*o*) *Adams* v *L & Y Ry Co* , L R 4 C P 739, but see *Gee* v *Metr Ry Co* , L R 8 Q B 161

does not necessarily render his act which exposes him to the risk involuntary

Instances

The following points may be mentioned in connection with the foregoing remarks If a man enter premises as a bare licensee, he runs at his own peril, as a rule, any risk, whether apparent or not, which arises out of the condition of the premises or the business carried on there (*p*) But if a man enter premises for business purposes at the express or implied invitation of the occupier, it is, as a rule, at the occupier's peril that the man is exposed to any unusual risk which so arises, unless the risk be obvious or fully known to him, or one of which he has been clearly warned (*q*) Wrong-doers who endanger the use of a highway are, as a rule, responsible for injuries thereby caused to a person using it with some knowledge of the danger, but doing no act which, having regard to that knowledge, can be considered unreasonable (*r*), and the same general rule obtains in favour of passengers at railway stations (*s*) Upon the true construction of a statute, a duty thereby imposed upon one person to prevent another from being subjected to a particular danger may be so imperative that little short of a wilful intention to injure himself can deprive the latter of his remedy for an injury resulting from the former's breach of his duty (*t*)

Master and servant

The great controversy regarding the application of the maxim has arisen in actions brought by workmen against their employers (*u*) We shall deal with such actions more fully under the maxim *respondeat superior* It is sufficient to point out here that in its application to questions between employer and employed, the maxim "generally imports that the workman, either expressly or by implication, agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury The question which has to be considered most frequently is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the

(*p*) See *Hounsell* v *Smith* 7 C B N S 731, *Gautret* v *Egerton*, L R 2 C P 371, *Ivay* v *Hedges*, 9 Q B D 80, *Batchelor* v *Fortescue*, 11 Id 474

(*q*) See *Indermaur* v *Dames*, L R 1 C P 274, 2 Id 311, *Pritchard* v *Peto*, [1917] 2 K B 173, *Mercer* v *S E & Chat Ry Co*, [1922] 2 K B 549

(*r*) *Clayards* v *Dethick*, 12 Q B 439, *Lax* v *Darlington*, 5 Ex D 28

(*s*) *Osborne* v *L & N W Ry Co*, 21 Q B D 220

(*t*) See *Clarke* v *Holmes*, 7 H & N 937, *Baddeley* v *Granville*, 19 Q B D 423

(*u*) See particularly the cases cited *ante*, p 190, n (*h*)

risk was to be his and not his master's When his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it, unless he knew of its existence and appreciated or had the means of appreciating its danger" (*t*) And the mere fact of his continuing at his work with such knowledge and appreciation does not necessarily imply his acceptance of the risk Whether it has that effect or not depends 'to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case" (*u*)

Contracts

The maxim is sometimes cited in cases where a person consents by the terms of a binding contract to give up rights which he might otherwise assert (*v*) Thus, where persons were employed in a factory under a contract, of which it was a term that the gate should be locked during working hours, and should, during such hours, be open only for the egress of persons provided with passes, it was held that no action for false imprisonment lay where the factory owner failed to open the gate for the egress of a man who, in breach of his contract, desired to leave during such hours (*y*) So, also, a railway company usually owes a duty to a passenger to take reasonable care of him, but he cannot demand such care if he expressly agree in consideration of a free pass to travel at his own risk (*z*) The powers of a railway company to escape by contract from liability for damage done to goods by the company's default are somewhat abridged by the Railway and Canal Traffic Acts (*a*), but a special contract, not vitiated by those Acts, for the carriage of goods at a lower rate at the owner's risk deprives him of the usual right to have the goods carried safely (*b*)

Appeals

Again, where a local Act gave to any person aggrieved by orders of commissioners a right of appeal against the orders, the maxim was applied to defeat an appeal of a person who

(*t*) *Per* Ld Watson in *Smith* v *Baker*, [1891] A C 325, at p 355

(*u*) *Per* Ld Watson in *Smith* v *Baker*, [1891] A C 325, at p 355 See *Williams* v *Birmingham, &c , Co* , [1899] 2 Q B 338, *Monaghan* v *Rhodes*, [1920] 1 K B 487, at p 498

(*v*) Cf the maxim, *modus et conventio vincunt legem* post

(*y*) *Burns* v *Johnson*, [1916] 2 I R 444, [1917] 2 I R 137 See *Herd* v *Weardale, &c , Co* , [1917] A C 67

(*z*) *McCawley* v *Furness Ry Co* , L R 8 Q B 57

(*a*) See, for instance, *Dickson* v *G N Ry Co* , 18 Q B D 176

(*b*) *G W Ry Co* v *McCarthy*, 12 App Cas 218, see further, 1 Sm L C , 12th ed pp 248 *et seq*

had concurred in a resolution pursuant to which the order he appealed from was made (*c*)

Voluntary payments

An important application of the maxim is to the case of a person seeking to recover money which he has paid, but which was not legally due from him The general rule is that a person who has paid money which he was not under legal obligation to pay cannot recover it if he paid it voluntarily and with full knowledge of the facts (*d*) For example, he cannot maintain an action to recover money so paid by him in discharge of a debt which was barred by the Statute of Limitations (*e*), or of a debt which was void by reason of his infancy (*f*) In these instances it may be said that he was under a moral, though not a legal, duty to pay, and the rule promotes natural justice But the rule extends to cases in which there was no moral consideration for the payment Thus, if the occupying tenant of lands, after discharging the property tax assessed thereon, omits to make the authorised deduction out of his next payment of rent, he cannot, in the absence of an express agreement (*g*), recover from his landlord the sum which he might have deducted it is a voluntary payment (*h*) This case is closely allied to several which have been already mentioned under the maxim *ignorantia legis non excusat* (*i*)

Payments under illegal compulsion

A payment of money which is not due is not, however, necessarily voluntary by reason that it is made with full knowledge of the facts It is not voluntary if it be made upon the unjust demand of a person who, abusing the advantages his position gives him, wrongfully refuses a man his legal rights except upon the condition that the demand be complied with A pawnbroker refuses to return goods pledged to him unless he be paid more than he has a right to claim the party entitled to redeem having tendered the lesser sum actually due (*j*), and having been then forced to pay the larger sum wrongfully demanded, can recover the excess he paid for the purpose of

(*c*) *Harrup* v *Bayley*, 6 E & B 218, at p 224

(*d*) *Remfry* v *Butler*, E B & E 887, at p 897 (as to which case, see *Lond Founders' Ass* v *Clarke*, 20 Q B D 576), *Stray* v *Russell*, 1 E & E 888

(*e*) *Per* Ld Mansfield in *Bize* v *Dickason*, 1 T R 285, at p 287, *per* De Grey, C J , in *Farmer* v *Arundel*, 2 Black W 824

(*f*) *Valentini* v *Canali*, 24 Q B D 166

(*g*) *Lamt* v *Brewster*, 4 Q B D 607

(*h*) *Cumming* v *Bedborough*, 15 M & W 438, *Denby* v *Moore*, 1 B & Ald 123, at p 128

(*i*) *Ante*, p 178

(*j*) See *Ashmole* v *Wainwright*, 2 Q B 837, at p 845, *Parker* v *Bristol & E Ry Co* , 6 Exch 702

getting back the goods the maxim *volenti non fit injuria* does not apply (*k*) The like law holds where goods are wrongfully detained under an unfounded claim of lien (*l*) where railway companies refuse to carry goods which they are bound to carry, or to deliver goods after carriage, until they be paid more than they are entitled to charge (*m*) where a landowner, having distrained cattle damage feasant and put them into his private pound, extorts, as the price of their restoration, an exorbitant sum for the damage done (*n*) where a mortgagee exacts more than is due to him by a threat that, unless it be paid, he will sell the mortgaged premises (*o*) and generally wherever money is paid under pressure of an untenable demand made *colore officii* (*p*) In these and the like cases (*q*) the proper course is to pay what is unjustly demanded under a protest showing that there is no intention to give up the right (*r*), and the general rule is that, though, in order to avoid a contract by reason of duress, it must be duress of a man's person, or of his goods (*s*), yet where money is paid simply to obtain possession of goods wrongfully obtained, it may be recovered for the payment is not voluntary (*t*)

Recovery of money from agent

The cases show that where a person acting, or purporting to act, as agent for another compels the payment of money on an illegal ground, he may be sued for the money, though he has already paid it over to his principal, unless it was expressly paid to him for his principal's use he is responsible for his own illegal act (*u*) But it is otherwise where an agent has merely received money for his principal and paid it to him without notice that it was wrongfully obtained (*v*)

(*k*) *Astley* v *Reynolds*, 2 Str 915

(*l*) *British Empire Co* v *Somes*, 8 H L Cas 338, *Tamvaco* v *Simpson*, L R 1 C P 363

(*m*) *Parker* v *G W Ry Co*, 7 M & Gr 253 *Parker* v *Bristol & E Ry Co*, 6 Exch 702, *L & N W Ry Co* v *Evershed*, 3 App Cas 1029

(*n*) *Green* v *Duckett*, 11 Q B D 275

(*o*) *Close* v *Phipps*, 7 M & Gr 586, *Fraser* v *Pendlebury*, 31 L J C P 1

(*p*) *Steele* v *Williams*, 8 Exch 625, *Traherne* v *Gardner*, 5 E & B 913, *Hooper* v *Exeter*, 56 L J Q B 457, see *Slater* v *Burnley*, 59 L T 636

(*q*) See, for an instance of payment of a bill to save credit, *Kendal* v *Wood*, L R 6 Ex 243

(*r*) See *per* Tindal, C J, in *Valpy* v *Manley*, 1 C B 594, at p 603

(*s*) *Skeate* v *Beale*, 11 A & E 983, see *Wakefield* v *Newbon*, 6 Q B 276

(*t*) *Oates* v *Hudson*, 6 Exch 346

(*u*) *Snowdon* v *Davis*, 1 Taunt 359, *Parker* v *Bristol & E Ry Co*, and *Steele* v *Williams*, *supra*

(*v*) *Owen* v *Cronk*, [1895] 1 Q B 265, cf *Ellis* v *Goulton*, [1893] 1 Q B 350

Payment under illegal contract

The question under what circumstances money paid under an illegal contract can be recovered will be discussed hereafter, under the maxim *in pari delicto potior est conditio possidentis* (*x*), but we may point out that the position of the parties to the contract may be such that neither that maxim nor the maxim *volenti non fit injuria* should be applied to defeat the recovery of money paid under it (*y*)

Payments under pressure of legal process

Again, the general rule is that money paid under the pressure of legal process cannot be recovered, and this rule usually prevents the recovery of money paid to satisfy a demand, whether valid or not, after legal proceedings have been commenced to enforce the demand (*z*) it is immaterial that the money was paid under a mistake of fact (*z*), or in ignorance of the real facts (*a*), or with a protest that the money was not due (*b*) This rule, however, does not extend to cases in which money has been extorted under "colourable legal process" A foreigner, ignorant of our language, was arrested, under a writ of *capias*, for a fictitious debt of £16,200 to obtain his release he paid £500, agreeing that it should be "a payment in part of the writ" the writ was afterwards set aside for a trivial irregularity, and thereupon an action was brought to recover the £500 the jury found that the defendant knew that he had no claim against the plaintiff, and upon this finding it was held that the money was recoverable (*c*) In this case the arrest, though made under colour of legal process, was illegal by reason of the defendant's knowledge that his claim was groundless an action might have been brought against him for damages for malicious arrest (*d*), and it seems that money paid as the price of obtaining release from an illegal arrest is generally recoverable, either as money had and received or as special damages for the false imprisonment, not only if the money was not due from the plaintiff (*e*), but even if he was under a liability to pay the money or some part of it (*f*) *a fortiori*, it is recoverable

(*x*) *Post*, Chap IX

(*y*) See *Atkinson* v *Denby*, 6 H & H 778, 7 Id 934, *Re Lenzberg*, 7 Ch D 650, *Jones* v *Merionethshire Soc*, [1892] 1 Ch 173

(*z*) *Moore* v *Fulham Vestry*, [1895] 1 Q B 399

(*a*) *Hamlet* v *Richardson*, 9 Bing 644

(*b*) *Brown* v *McKinnally*, 1 Esp 279

(*c*) *De Cadaval* v *Collins*, 4 A & E 858

(*d*) See the judgment in *Daniels* v *Fielding*, 16 M & W 200

(*e*) *De Mesnil* v *Dakin*, L R 3 Q B 18

(*f*) *Clark* v *Woods* 2 Exch 395, *Norton* v *Monckton*, 43 W R 350, see also *Pitt* v *Coomes* 2 A & E 459 The maxim *nemo commodum capere potest de injuria sua propria* seems applicable

if the arrest was not merely illegal, but malicious, and there was no such liability Where, however, a person who is in lawful custody pays money voluntarily and with full knowledge of the facts as the price of his release, he cannot recover it back (*g*)

This principle was followed in a case where, though money was paid under compulsion of legal process, the payee had not acted *bona fide* The plaintiffs sued the defendant for work and labour done, and by mistake credited the defendant with a sum of £75 as paid on account, and sued for the balance After issue of the writ the defendant paid the balance claimed and took a receipt in full discharge, although he knew there had been a mistake It was held that the plaintiffs were entitled to recover this £75 from the defendant in another action as money allowed in account under a mistake of fact (*h*)

Binding effect of judgments

It is important here to notice the binding effect, as between the parties thereto, of a judgment, valid on the face of it, so long as the judgment stands To avoid a seizure under an execution for £100, issued upon a judgment signed against him for that sum, a man pays the sum in full, while the judgment or the writ of execution stands, he cannot, except in a proceeding to set it aside (*i*), allege that the judgment was signed, or the execution issued, maliciously and without probable cause, for a sum which (by reason, for instance, of what he had previously paid), exceeded what was really due (*j*) The general rule is that no action for malicious prosecution lies until the result of the prosecution has shown that there was no ground for it (*k*)

The authorities already cited, however, sufficiently establish the position that money paid under compulsion of fraudulent legal process, which has been set aside, or of wrongful pressure exercised upon the party paying it, can generally be recovered back, and it only remains to add, that, *a fortiori*, money is recoverable which was paid, and that an instrument may be avoided which was executed under threats of personal violence,

(*g*) *Viner* v *Hawkins*, 9 Exch 266

(*h*) *Ward & Co* v *Wallis*, [1900] 1 Q B 675

(*i*) See *Wyatt* v *Palmer*, [1899] 2 Q B 106, cf *De Medina* v *Grove*, 10 Q B 152, at p 168

(*j*) *Huffer* v *Allen*, L R 2 Ex 15, *De Medina* v *Grove*, 10 Q B 152, at p 172

(*k*) *Metropolitan Bank* v *Pooley*, 10 App Cas 210, at p 216

duress, or illegal restraint of liberty (*l*), and this is in strict accordance with the maxims laid down by Lord Bacon *non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit* (*m*), and *corporalis injuria non recipit æstimationem de futuro* (*n*)

Intentional wrong doer

It is worthy of observation that the maxim *volenti non fit injuria* does not deprive even an intentional wrongdoer of the benefit of a law framed on grounds of public policy Thus, a person who intentionally trespasses on horseback may be sued in trespass, but the horse cannot, while it is being ridden, be distrained damage feasant, the reason being that its seizure would probably provoke a breach of the peace (*o*)

NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA (*Co Litt* 148 *b*)—*No man can take advantage of his own wrong*

Rule stated

It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong (*p*), and this maxim, which is based on elementary principles, is fully recognised in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases, and, in the first place, we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law (*q*) *frustra legis auxilium quærit qui in legem committit* (*r*), where- Examples fore, A shall not have an action of trespass against B, who

(*l*) As to what may constitute duress, see *per* Ld Cranworth in *Boyse* v *Rossborough*, 6 H L Cas 2, at p 45, *Cumming* v *Ince*, 11 Q B 112, *Powell* v *Hoyland*, 6 Exch 67, *Edward* v *Trevellick*, 4 E & B 59

(*m*) Bac Max reg 22 *Nil consensui tam contrarium est quam vis atque metus*, D 50, 17, 116

(*n*) Bac Max, reg 6

(*o*) *Field* v *Adames*, 12 A & E 649, *Storey* v *Robinson*, 6 T R 138, *Bunch* v *Kennington*, 1 Q B 679, cf *Sunbolf* v *Alford*, 3 M & W 248, *Garland* v *Morris*, 3 Exch 695

(*p*) *Per* Ld Abinger in *Findon* v *Parker*, 11 M & W 675, at p 680, *Daly* v *Thompson*, 10 Id 309, *Malins* v *Freeman*, 4 Bing N C 395, at p 399, *per* Best, J, in *Doe* d *Bryan* v *Bancks*, 4 B & Ald 401, at p 409, Co Litt 1, 48 b, Jenk Cent 209, 2 Inst 713, D 50, 17, 134, § 1

It "is contrary to all legal principle that the plaintiff can take advantage of his own wrong" (*per* Willes, J, in *Ames* v *Waterlow*, L R 5 C P 53, at p 55) See also *Dean of Christchurch* v *Buckingham*, 17 C B N S 391

(*q*) 1 Hale, P C 482 (*r*) 2 Hale, P C 386

lawfully enters to abate a nuisance caused by A 's wrongful act (*s*), nor shall an executor *de son tort* obtain that assistance which the law affords to a rightful executor (*t*) So if A , on whose goods a distress has been levied, by his own misconduct prevent the distress from being realised, A cannot complain of a second distress as unlawful (*u*) So B , into whose field cattle have strayed through defect of fences which he was bound to repair, cannot distrain such cattle damage feasant in another field, into which they have got by breaking through a hedge which he had kept in good repair, because his own negligence was *causa sine quâ non* of the mischief (*x*) So if a man be bound to appear on a certain day, and before that day the obligee put him in prison, the bond is void (*y*)

Construction of contracts

It is contrary to justice that a party should avoid his own contract by his own wrong Accordingly, "in a long series of decisions the Courts have construed clauses of forfeiture in leases, declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they shall be voidable only at the option of the lessors The same rule of construction has been applied to other contracts, where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract", and it is applicable even where the legislature has imposed the condition, unless the scope and purpose of the enactment be so opposed to the rule that it ought not to prevail (*z*)

Landlord and tenant

The following instances also serve further to illustrate the same general principle If tenant for years fell timber-trees, they will belong to the lessor, for the tenant cannot, by his own wrongful act, acquire a greater property in them than he would otherwise have had (*a*) Where the lessee is evicted by title paramount from part of the lands demised, he will have to pay a rateable proportion for the remainder (*b*), whereas if he be evicted from part of the lands by his landlord, no apportionment, but

(*s*) Dod Eng Law, pp 220, 221 See *Perry* v *Fitzhowe*, 8 Q B 757

(*t*) See *Carmichael* v *Carmichael*, 2 Phill 101, *Paull* v *Simpson*, 9 Q B 365

(*u*) *Lee* v *Cooke*, 3 H & N 203

(*x*) *Singleton* v *Williamson*, 7 H & N 410

(*y*) Noy, Max , 9th ed , p 45, arg *Williams* v *Gray*, 9 C B 730, at p 737

(*z*) *Davenport* v *R* , 3 App Cas 115, at pp 128, 129 See the authorities there cited

(*a*) Wing Max , p 574

(*b*) *Smith* v *Malings*, Cro Jac 160 See *Mayor of Poole* v *Whitt*, 15 M & W 571, *Selby* v *Browne*, 7 Q B 620, at p 632

a suspension of the whole rent, takes place, except where the king is landlord, and there is no suspension, if the eviction has followed upon the lessee's own wrongful act, as for a forfeiture, but an apportionment only (*c*) And it is a well-known rule that a lessor or grantor cannot dispute, with his lessee or grantee, his own title to the land which he has assumed to demise or convey (*d*) Nor can a grantor derogate from his own grant (*e*)

Default in performance of contract

It is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned If the absence of an insurance by the landlord be a condition of the tenant's liability to insure, the landlord cannot charge the tenant with a default occasioned by his own untrue representation that he himself has insured (*f*) Where a doctor has bought a practice on the terms of his paying to the vendor a share of the earnings to be made therein during the next four years, he cannot rely upon the absence of any such earnings, if that be due to his wilful abandonment of the business, and if it be an implied term of the contract that he should carry it on (*g*)

An insurance company agreed with A that he and B should be their joint agents at Glasgow, and that if they should displace B from the agency they would pay A a certain sum, they subsequently sold their business, and it was held that by so doing they displaced B within the meaning of the agreement (*h*) If a manufacturer has agreed with a person to employ him as sole agent for the sale of his goods for a definite period and at a fixed commission, his wilful abandonment of his business is no excuse for the non-fulfilment of his agreement (*i*) But, to bind the manufacturer to continue his business, he must agree to employ the agent therein either

(*c*) *Walker's Case* 3 Rep 22, Wing Max , p 569 See *Boodle* v *Campbell*, 8 Scott, N R 104

(*d*) Judgm in *Doe* d *Levy* v *Horne*, 3 Q B 757, at p 766 cited *per* Alderson, B , in *Poole Corporation* v *Whitt*, 15 M & W 571, at p 576

(*e*) 2 Shepp Touchst by Preston, p 286 As to the canons of construction applicable to grants by the Crown, see *A G* v *Ewelme Hospital*, 17 Beav 366, and between private individuals *Booth* v *Alcock*, L R 8 Ch App 663, *Taylor* v *Corporation of St Helens*, 6 Ch D 264

(*f*) See Judgm in *Doe* d *Muston* v *Gladwin*, 6 Q B 953, at p 963

(*g*) *M'Intyre* v *Belcher*, 14 C B N S 654

(*h*) *Stirling* v *Maitland*, 5 B & S 840, at p 853, see *Ry and Electric Appliances Co , In re*, 38 Ch D 597, at pp 603, 604

(*i*) *Turner* v *Goldsmith*, [1891] 1 Q B 544

expressly or by necessary implication from the terms actually expressed (*k*)

Tender

Again, where a creditor refuses a tender sufficient in amount, and duly made, he cannot afterwards, for purposes of oppression or extortion, avail himself of such refusal, for, although the debtor still remains liable to pay whenever required so to do, yet the tender operates in bar of any claim for damages and interest for not paying or for detaining the debt, and also of the costs of an action brought to recover the demand (*l*)

Confusion of goods

According to the same principle, if articles of unequal value are mixed together, producing an article of a different value from that of either separately, and, through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole (*m*) "At law," said Lord Redesdale, in *Bond* v *Hopkins* (*n*), "fraud destroys rights—if I mix my corn with another's he takes all (*o*), but if I induce another to mix his corn with mine, I cannot then insist on having the whole, the law in that case does not give me his corn" So, where the plaintiff, pretending title to hay standing on defendant's land, mixed some of his own with it, it was held that the defendant thereby became entitled to the hay (*p*) A malting agent represented to his principals that some barley which he had upon his premises had been bought by him for them, and thereby induced them to make him payments to cover the price of the barley, as a matter of fact, only part of the barley had been bought by him for his principals, but he had mixed it with his own so that the two portions could not be separately distinguished, the agent having become bankrupt, his trustee claimed to hold the whole of the barley against the principals on the ground that the part bought for them could not be identified, but it was held that he was not so entitled, as no man can take advantage of his own wrong (*q*)

(*k*) *Rhodes* v *Forwood*, 1 App Cas 256, *Hamlyn* v *Wood*, [1891] 2 Q B 488

(*l*) See *per* Williams, J, in *Smith* v *Manners*, 5 C B N S 632, at p 636

(*m*) *Per* Ld Eldon in *Lupton* v *White*, 15 Ves 432, at p 442 See *per* Ld Ellenborough, C J, in *Colwill* v *Reeves*, 2 Camp, N P 575, *Warde* v *Eyre*, 2 Bulstr 323

(*n*) 1 Sch & Lef 413, at p 433

(*o*) In *Aldridge* v *Johnson*, 7 E & B 885, at p 899, Ld Campbell observes, Where the owner of such articles as oil or wine mixes them with similar articles belonging to another, that is a wrongful act by the owner for which he is punished by losing his property'

(*p*) Pop 38, pl 2 (*q*) *Harris* v *Truman*, 7 Q B D 340, 9 Id 264

By the mixture of bales of cotton on board ship, and their becoming undistinguishable by reason of the action of the sea, and without the fault of their respective owners, these parties become tenants in common of the cotton in proportion to their respective interests, but such a result follows only in those cases where, after the adoption of all reasonable means to identify or separate the goods, it has been found impracticable to do so (*r*)

Wrong name

Again, where a party was sued by a wrong name, and suffered judgment to go against him, without attempting to rectify the mistake, he could not afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name (*s*), and, if any instrument is executed under an assumed name, the party so executing it is bound thereby in the same manner as if he had executed it in his true name (*t*) "So, if a man, having an opportunity of seeing what he is served with, wilfully abstains from looking at it, that is virtually a personal service" (*u*), and, where one of the litigating parties takes a step after having notice that a rule has been obtained to set aside the proceedings, he does so in his own wrong, and the step so taken will be set aside (*r*)

Trespass to land

A wrongdoer ought not to be permitted to make a profit out of his own wrong (*y*), and, therefore, if a person for his own purposes uses another's land, as by tipping thereon refuse from a colliery, without the landowner's leave, he ought to pay compensation for such user, and the measure of damages is not merely the diminution in value of the land (*z*)

Intention

"No man is allowed to take advantage of his own wrong, far less of his wrong intention which is not expressed" (*a*) Nothing can be better settled than this, that "where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly A

(*r*) *Spence* v *Union Mar Ins Co*, L R 3 C P 427 See *Webster* v *Power*, L R 2 P C 69, and *Sandeman* v *Tyzack, etc, S S Co*, [1913] A C 680, at pp 687, 695, 698

(*s*) *Fisher* v *Magnay*, 6 Scott, N R 588, *Morgans* v *Bridges*, 1 B & Ald 647 See *De Mesnil* v *Dakin*, L R 3 Q B 18, *Kelly* v *Lawrence*, 3 H & C 1

(*t*) See *Trueman* v *Loder*, 11 A & E 589, at pp 594—5

(*u*) *Per* Tindal, C J, in *Emerson* v *Brown*, 8 Scott, N R 219, at p 222

(*x*) *Per* Pollock, C B, in *Tiling* v *Hodgson*, 13 M & W 638

(*y*) *Per* Ld Hatherley in *Jegon* v *Vivian*, L R 6 Ch App 742, at p 761, *per* Chitty, J, in *Whitwham* v *Westminster, &c, Co*, [1896] 1 Ch 894, at p 899

(*z*) *Whitwham* v *Westminster, &c Co*, [1896] 2 Ch 538

(*a*) *Per* Willes, J, in *Rumsey* v *N E Ry Co*, 14 C B N S 641, at p 653

man who has a right of entry cannot say he committed a trespass in entering A man who sells the goods of another as agent for the owner cannot prevent the owner from adopting the sale, and deny that he acted as agent for the owner It runs throughout our law, and we are familiar with numerous instances in the law of real property A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully" (*b*)

A party cannot take advantage of his own fraud

The foregoing examples have been selected, in order to show how the rule, which they serve to illustrate, has been applied to promote justice, in various and dissimilar circumstances The maxim under review applies also with peculiar force to that extensive class of cases in which fraud has been committed by one party to a transaction, and is relied upon as a defence by the other We do not propose to consider how formerly a Court of equity dealt with fraud or interfered to give relief from it, but we may state the principle upon which that Court invariably acted, namely—that the author of wrong, who has put a person in a position in which he has no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong (*c*)

Twyne's case

In a leading case on the subject of fraud (*d*), the facts were that A owed B £400, and also owed C £200, C brought an action of debt against A , and, pending the writ, A , being possessed of chattels of the value of £300, in secret made a general deed of gift of all his chattels, real and personal, to B , in satisfaction of his debt, but nevertheless remained in possession of the chattels, some of which he sold, he also shore the sheep, and marked them with his own mark Afterwards C obtained judgment, and issued a *fi fa* against A , and the question arose whether the gift was fraudulent and of no effect

(*b*) *Per* Jessel, M R , in *Re Hallett's Estate*, 13 Ch D 696, at p 727

(*c*) *Per* Ld Cottenham in *Hawkins* v *Hall*, 4 My & Cr 280

(*d*) *Twyne s Case*, 3 Rep 80 (with which cf *Evans* v *Jones*, 3 H & C 423) See *Graham* v *Furber*, 14 C B 410, at p 418, *Tarleton* v *Laddell*, 17 Q B 390 *Fermor s Case* (3 Rep 77), is also a leading case to show that the Courts will not sustain or sanction a fraudulent transaction In that case it was held, that a fine fraudulently levied by lessee for years should not bar the lessor and see the law on this subject stated by Tindal, C J , in *Davies* v *Lowndes*, 5 Bing N C 161, at p 172 See also *Wood* v *Dixie*, 7 Q B 892

by virtue of 13 Eliz c 5 It was determined, for the following reasons, that the gift was fraudulent within the statute —1, it had the signs and marks of fraud, because it was general, without excepting the wearing-apparel, or other necessaries of the donor, and it is commonly said, that *dolosus versatur in generalibus* (*e*)—a person intending to deceive deals in general terms, a maxim, we may observe, which has been adopted from the civil law, and has been frequently cited in our Courts (*f*), 2, the donor continued in possession and used the goods as his own, and by reason thereof traded with others, and defrauded them (*g*), 3, the gift was made in secret, and *dona clandestina sunt semper suspiciosa* (*h*)—clandestine gifts are always open to suspicion, 4, it was made pending the writ, 5, there was a trust between the parties, for the donor possessed the goods and used them as his own, and fraud is always clad with a trust, and a trust is the cover of fraud, and 6, the deed stated that the gift was made honestly, truly, and *bona fide*, and *clausulæ inconsuetæ semper inducunt suspicionem* unusual clauses excite suspicion

In the foregoing case, it will be observed that the transaction was invalidated on the ground of fraud, according to the principle, that a wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it, *nul prendra advantage de son tort demesne* (*i*)

Estoppel *in pais*

The doctrine of estoppel *in pais*, which has often been applied, is obviously referable to the principle set forth in the maxim before us, and has been defined as follows If a man, by his words or conduct, wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not exist at the time again, if a man, either in express

(*e*) Wing Max 636 *Dodington s Case*, 2 Rep 32 at 34, *Crook* v *Grubham*, 2 Bulstr 226, *Magdalen College Case* 1 Rolle, 151, at p 157, *Englefield s Case*, Moor, 303, at p 321 and see *Mace* v *Cammel*, Lofft, 782

(*f*) *Auchterarder* v *Kinnoull*, 6 Cl & F 646, at pp 698, 699, see *Specot s Case*, 5 Rep 57 a, at 58 a

(*g*) Cited by Ld Mansfield, in *Worseley* v *Demattos*, 1 Burr 467, at p 482 but compare *Martindale* v *Booth*, 3 B & Ad 498 See this subject considered in the Note to *Twyne s Case* 1 Smith, L C 12th ed , 1

(*h*) Noy, Max , 9th ed , p 152, *Latimer* v *Batson*, 4 B & C 652, *per* Ld Ellenborough in *Leonard* v *Baker*, 1 M & S 251, at p 253

(*i*) 2 Inst 713, Branch, Max , 5th ed , p 141

terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts and thirdly, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented (*k*)

It has, in accordance with the principle of estoppel *in pais*, been laid down that if a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, the real owner will not afterwards be allowed to assert his title to the land so as to deprive the stranger of the buildings erected by him (*l*)

The cases illustrative of the doctrine of estoppel *in pais* are numerous, and reference here can only be made to a few of the leading authorities In *Pickard* v *Sears* (*m*), which was an action of trover, the goods in question were seized, while in the actual possession of a third party, under an execution against him, and were sold to the defendant, no claim was made by the plaintiff after the seizure, and he consulted with the execution creditor as to the disposal of the goods, without mentioning his own claim, after he knew of the seizure and of the intention to sell it was held that a jury might properly infer from the plaintiff's conduct that he had authorised the sale or had in fact ceased to be the owner In *Gregg* v *Wells* (*n*), it was held that the owner of goods, who stands by, and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them, cannot recover them from

(*k*) *Carr* v *L & N W Ry Co*, L R 10 C P 307, *M'Kenzie* v *British Linen Co*, 6 App Cas 82, *Pickard* v *Sears*, 6 A & E 469 *Comp Nav Vasconzada* v *Churchill & Sim*, [1906] 1 K B 237

(*l*) *Ramsden* v *Dyson*, L R 1 H L 129, *A G to Prince of Wales* v *Collom*, [1916] 2 K B 193

(*m*) 6 A & E 469

(*n*) 10 A & E 90, at p 98 See *Doe* d *Groves* v *Groves*, 10 Q B 486, (followed in *Woodhouse* v *Honey*, [1915] 1 I R 296), *Nickells* v *Atherstone*, 10 Q B 944, at p 949, and see *Farquharson* v *King*, [1901] 2 K B 697

the buyer "A party," said Lord Denman, C J, in that case, "who negligently or culpably stands by, and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving"

The principle on which such cases are decided was well explained in *Freeman* v *Cooke* (*o*), and the expression, in *Pickard* v *Sears*, "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things," was stated to mean, "if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly, and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth, and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect As, for instance, a retiring partner omitting to inform his customers of the fact in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised In truth, in most cases to which the doctrine in *Pickard* v *Sears* is to be applied, the representation is such as to amount to the contract or licence of the party making it" (*p*)

No estoppel by bare promise

An important limitation to the doctrine of estoppel *in pais* was laid down by the House of Lords in *Jorden* v *Money* (*q*), namely, that there must be a misrepresentation of existing facts, and not of a mere intention, this distinction, which is now well recognised (*r*), is illustrated by *Williams* v *Stern* (*s*)

(*o*) 2 Exch 654, at pp 663—664, see *Miles* v *McIlwraith*, 8 App Cas 120 (where, at p 132, the above statement of the law was approved by Ld Blackburn), and *Pierson* v *Altrincham U C*, 86 L J K B 969

(*p*) See *per* Ld Chelmsford in *Clarke* v *Hart*, 6 H L Cas 633, at p 656 See also in illustration of the text, *Martyn* v *Gray*, 14 C B N S 824, *Stephens* v *Reynolds*, 5 H & N 513, *Gurney* v *Evans*, 3 Id 122, *Summers* v *Solomon*, 7 E & B 879, *Ramazotti* v *Bowring*, 7 C B N S 851, at p 857, *Castellani* v *Thompson*, 13 C B N S 105, at pp 121—122

(*q*) 5 H L Cas 185

(*r*) See *Bank of Louisiana* v *First Nat Bank of New Orleans*, L R 6 H L 352, at p 360, *Gresham Life Ass Co* v *Crowder*, [1914] 2 Ch 219, at p 228

(*s*) 5 Q B D 409

There a loan, repayable by instalments, was secured by a bill of sale over the debtor's goods An instalment having fallen due, the debtor asked for time, and the creditor gave him a week, yet he seized the goods only three days later It was held he had a right to seize them, as his promise to wait was not a misstatement of an existing fact, nor was it founded on any consideration to make it binding (*s*)

Allegans contraria non est audiendus

Furthermore, a person who has expressly made a verbal representation, on the faith of which another has acted, shall not afterwards be allowed to contradict his former statement, in order to profit by that conduct which it has induced (*t*) Whenever an attempt is made in the course of legal proceedings to violate this principle, the law replies in the words of a maxim which we have already cited (*u*), *allegans contraria non est audiendus*, and, by applying the doctrine of estoppel therein contained, prevents the unjust consequences which would otherwise ensue (*v*) We may, therefore, lay it down as a general rule, applicable alike in law and equity, that a party shall not entitle himself to substantiate a claim, or to enforce a defence, by reason of acts or misrepresentations which proceeded from himself, or were adopted or acquiesced in by him after full knowledge of their nature and quality (*y*) and further, that where misrepresentations have been made by one of two litigating parties, in his dealings with the other, a Court of law will either decline to interfere, or will so adjust the equities between them, as to prevent an undue benefit from accruing to that party who is unfairly endeavouring to take advantage of his own wrong (*z*)

If, therefore, the acceptor of a bill of exchange at the time of acceptance knew the payee to be a fictitious person, he shall

(*s*) See note (*s*), p 205

(*t*) *Trickett* v *Tomlinson*, 13 C B N S 663

(*u*) *Ante*, p 116 See also *Cannam* v *Farmer*, 3 Exch 698, *Hallisax* v *Lyle*, Id 446, *Fairhurst* v *Liverpool Adelphi Loan Assoc*, 9 Exch 422, *Standish* v *Ross*, 3 Exch 527, *Freeman* v *Steggall*, 14 Q B 202, *Morgan* v *Couchman*, 14 C B 100, *Dunston* v *Paterson*, 2 C B N S 495

(*v*) *Price* v *Carter*, 7 Q B 838, *R* v *Mayor of Sandwich*, 10 Q B 563, 571, *Banks* v *Newton*, 11 Q B 340, *Petch* v *Lyon*, 9 Q B 147, and cases there cited, *Braithwaite* v *Gardiner*, 8 Q B 473 See *Dresser* v *Bovanquet* 4 B & S 460 486 (*y*) *Vigers* v *Pike*, 8 Cl & F 562

(*z*) See *Harrison* v *Ruscoe*, 15 M & W 231, where an unintentional misrepresentation was made in giving notice of the dishonour of a bill *Rayner* v *Grote*, Id 359, where an agent represented himself as principal (citing *Bickerton* v *Burrell*, 5 M & S 383), *Humble* v *Hunter*, 12 Q B 310, *Schmaltz* v *Avery*, 16 Q B 655, *Cox* v *Hubbard*, 4 C B 317, at p 319, *Cooke* v *Wilson*, 1 C B N S 153

not take advantage of his own fraud, but a *bona fide* holder may recover against him on the bill, treating it as payable to bearer (*a*) and, generally, a person will not be allowed as plaintiff in a Court of law to rescind his own act, on the ground that such act was a fraud on another person, whether the party seeking to do this has sued in his own name or jointly with such other person (*b*)

Further remarks

Further, we may remark that the maxim which precludes a man from taking advantage of his own wrong is, in principle, closely allied to the maxim, *ex dolo malo non oritur actio*, which is likewise of general application, and will be treated of hereafter in the Chapter upon Contracts The latter maxim is, indeed, included in that above noticed, for it is clear, that since a man cannot be permitted to take advantage of his own wrong, he will not be allowed to found a claim upon his own iniquity *nemo ex proprio dolo consequitur actionem*, and, as before observed, *frustra legis auxilium quærit qui in legem committit* (*c*)

Principal maxim, how qualified

Nevertheless, the principal maxim under our notice, and likewise the kindred rule, *fraus et dolus nemini patrocinari debent* (*d*), are sometimes qualified in operation by the maxim cited at a former page (*e*) *quod fieri non debet factum valet* (*f*) 'Fraud renders any transaction voidable at the election of the party defrauded, and if, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning, but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration" (*g*) This may be

(*a*) *Gibson* v *Minet*, 1 Black, H, 569, see the Bills of Exchange Act, 1882 (45 & 46 Vict c 61), s 7 (3)

(*b*) *Per* Ld Tenterden in *Jones* v *Yates*, 9 B & C 532, at p 538, *Sparrow* v *Chapman*, Id 241, *Wallace* v *Kelsall* 7 M & W 264, which cases are recognised in *Gordon* v *Ellis*, 8 Scott, N R 290, at p 305, *Brandon* v *Scott*, 7 E & B 234 *Husband* v *Davis*, 10 C B 645 See *Heilbut* v *Nevill*, L R 4 C P 354, L R 5 C P 478

(*c*) The following cases also illustrate the maxim, that a man shall not be permitted to take advantage of his own wrong or default, respecting the right to costs, *Pope* v *Fleming*, 5 Exch 249, the enrolment of memorial of an annuity, *Molton* v *Camroux*, 4 Exch 17, an action against the sheriff for an escape, *Arden* v *Goodacre*, 11 C B 371, at p 377

(*d*) *Fermor's Case*, 3 Rep 77 a, at 78 b

(*e*) *Ante*, p 126

(*f*) Cited *per* Martin, B, and Wilde, B, in *Atkinson* v *Denby*, 6 H & N 778, at pp 787, 792

(*g*) *Per* Blackburn, J, in *R* v *Saddlers' Co*, 10 H L Cas 404, at pp 420—421 (citing *Clarke* v *Dickson*, E B & E 148, and *Feret* v *Hill*, 15 C B 207)

illustrated by *R* v *Saddlers' Co* (*h*) By the charter of this company, the warden and assistants were empowered to elect assistants from the freemen, and to remove any for ill-conduct or other reasonable cause, and to make bye-laws for the good government of the body in general and its officers A bye-law was made "that no person who has become insolvent, shall hereafter be admitted a member of the court of assistants, unless it be proved to the satisfaction of the Court that such person, after his insolvency, has paid his creditors in full" D being otherwise qualified, but being insolvent, was elected an assistant, and after his election, of which he was not aware, but before his admission, he made to the agents of the wardens and assistants a statement, false to his own knowledge, that he was solvent, he was then admitted, and exercised the office of assistant The bye-law being adjudged good, it was further held that the mere statement of a falsehood by D did not nullify his election, and that D could not be legally removed from his office by the wardens and assistants without being heard in his defence (*i*)

In *Hooper* v *Lane* (*k*), which strikingly illustrates the rule that "no man shall take advantage of his own wrong," various instances were put by Bramwell, B (*l*), showing that the rule "only applies to the extent of undoing the advantage gained, where that can be done, and not to the extent of taking away a right previously possessed" The instances adduced are as follows "If A lends a horse to B, who uses it, and puts it in his stable, and A comes for it, and B is away and the stable locked, and A breaks it open and takes his horse, he is liable to an action for the trespass to the stable, and yet the horse could not be got back, and so A would take advantage of his own wrong So, though a man might be indicted at common law for a forcible entry, he could not be turned out if his title were good So, if goods are bought on a promise of cash payment, the buyer, on non-payment, is subject to an action, but may avail himself of a set-off and the goods cannot be gotten back So, if I promise a man I will sell him more goods on credit if he pays what he already owes, and he does so, and I

(*h*) 10 H L Cas 404

(*i*) See the maxim, *Audi alteram partem*, *ante*, p 78

(*k*) 6 H L Cas 443, see *Ockford* v *Freston*, and *Chapman* v *Freston*, 6 H & N 466, at pp 472, 480, 481

(*l*) 6 H L Cas, at p 461 See also *per* Bowen, L J, in *Lond Celluloid Co*, *Re*, 39 Ch D 190, at p 206

refuse to sell, I may retain the money So, if I force another from a fishing-ground at sea, and catch fish, the fish are mine "

The maxim, moreover, according to the opinion of the same learned judge, "is never applicable where the right of a third party is to be affected Can one man by his wrongful act to another deprive a third of his right against that other? A obtains goods from B under a contract of sale, procured by A from B by fraud A sells to C, C may retain the goods (*m*) Surely A might recover the price from C at which he sold to him, yet he would in so doing take advantage of his own wrong So, if my lessee covenants at the end of his term to deliver possession to me, and in order to do so forcibly evicts one to whom he had sub-let for a longer term, and I take possession without notice, surely I can keep it, at least, at the common law I could So, if a sub-lessee at an excessive rent purposely omits to perform a covenant, the performance of which would be a performance of the lessee's covenant to his lessor, and by such non-performance the lessee's covenant is broken, and the first lessor enters and avoids the lease and evicts the sub-lessee, the sub-lessee may defend himself against a claim for rent by his lessor (*n*), yet there he takes advantage of his own wrong, because of the right of the third person So, if I sell goods, the property not to pass till payment or tender, and the vendee has a week in which to pay, and during that week I resell and deliver to a third person, no action is maintainable against me as for a detention or conversion, but only for non-delivery, yet there I take advantage of my own wrong, because the right of a third party has accrued " (*o*)

Upon the same principle of protecting the rights of third parties acquired *bona fide* under a fraudulent transaction, a shareholder in a company who has been induced to take shares by the fraud of the company cannot avoid the contract and have his name removed from the register after an order for the winding-up of the company has been made, nor after a petition for winding-up has been presented on which an order is subsequently made (*p*), because of the intervening rights of the creditors accruing under the order

(*m*) *White* v *Garden*, 10 C B 919 Cf *Lindsay* v *Cundy*, 3 App Cas 459
(*n*) *Logan* v *Hall*, 4 C B 598
(*o*) *Per* Bramwell, B, in *Hooper* v *Lane*, 6 H L Cas 443, at pp 461—462
(*p*) *Oakes* v *Turquand*, L R 2 H L 325, *Houldsworth* v *City of Glasgow Bank*, 5 App Cas 317

ACTA EXTERIORA INDICANT INTERIORA SECRETA (8 *Rep* 291)—
Acts indicate the intention

The Six Carpenters' Case

The law, in some cases, judges of a man's previous intentions by his subsequent acts, and, on this principle, it was resolved in a well-known case, that if a man abuse an authority given him by the law, he becomes a trespasser *ab initio*, but that if he abuse an authority given him by the party, he does not The reason assigned for this distinction is that, where a general licence is given by the law, the law judges by the subsequent act with what intent the original act was done, but where the party himself gives a licence, he cannot for any subsequent cause punish that which is done by his own licence In the latter case, therefore, the abuse alone is punishable (*q*)

For instance, the law gives authority to a traveller to enter a common inn to seek refreshment (*r*), to the owner of land to distrain beasts thereon damage feasant, to detain them until satisfaction made (*s*), and to the commoner to enter upon the common to see his cattle But, if the traveller at the inn commits a trespass, or if the landowner after distraining works or kills the distress, or if the commoner cuts down a tree, the law adjudges that he entered or distrained for the specific purpose of committing the particular injury, and because the act which demonstrates the intention is a trespass, he is adjudged a trespasser *ab initio* (*t*), or, in other words, the subsequent illegality shows that the party contemplated an illegality all along so that the whole becomes a trespass (*u*)

Distress for rent

This doctrine bore hard upon landlords when distraining for rent, and therefore for their relief the Distress for Rent Act, 1737 (11 Geo 2, c 19) (*v*), has provided that where a distress is made for rent justly due, and an irregularity or unlawful act is afterwards done, the distress is not to be deemed unlawful, nor the party distraining a trespasser *ab initio*, but satisfaction

(*q*) *The Six Carpenters Case*, 8 Rep 146 a as to which see 1 Smith L C 12th ed p 145 See also *Jacobsohn* v *Blake*, 6 M & Gr 919, *Peters* v *Clarson* 7 Id 548, *Webster* v *Watts*, 11 Q B 311, *North* v *L & S W Ry Co*, 14 C B N S 132, *per* Erle, J, in *Ambergate Ry Co* v *Midland Ry Co*, 23 L J Q B 17, at p 20, Wing Max, p 108

(*r*) See *Lamond* v *Richard*, [1897] 1 Q B 541

(*s*) See *Layton* v *Hurry*, 8 Q B 811, *Gulliver* v *Cosens*, 1 C B 788, *Green* v *Duckett*, 11 Q B D 275;

(*t*) *The Six Carpenters' Case* 8 Rep 146 a, Wing Max, p 109, *Oxley* v *Watts*, 1 T R 12, *Bagshaw* v *Goward*, Cro Jac 147

(*u*) *Per* Littledale, J, in *Smith* v *Eggington*, 7 A & E 167, at p 176

(*v*) See ss 19, 20

for the special damage sustained (*y*) may be recovered by action (*z*) unless tender of amends be made before action brought Like provisions are contained in the Poor Relief Act, 1743 (17 Geo 2, c 38), s 9, with regard to a distress for money justly due for the relief of the poor

or poor rate

The Distress for Rent Act, 1737, does not, it should be observed, render either the entry to distrain or the distress legal if the entry be effected in an unlawful manner (*a*) Nor does it protect from the doctrine of trespass *ab initio* a landlord who distrains upon goods not distrainable by law (*b*) A limit, however, has been set to the doctrine itself in cases where several chattels are seized, for the seizure of one chattel which is seizable by law is not rendered unlawful by the wrongful seizure of another chattel, and consequently a landlord who distrains upon goods some of which are distrainable, but others not, is a trespasser *ab initio* only as regards the latter (*c*)

Seizure of several chattels

Similarly, where several beasts are distrained damage feasant, the subsequent abuse of one does not invalidate the seizure of the others (*d*) On the other hand, both the entry by the lord of a manor to seize a beast as a heriot, and the seizure, are rendered unlawful by the wrongful seizure therewith of an additional beast, for to make the entry good it must be good with reference to the seizure (*e*)

Sheriffs and gaolers

A sheriff who enters premises to execute a writ of *fi fa* becomes a trespasser by remaining thereon for a longer time than is reasonable for that purpose, and the trespass may be alleged as commencing when the reasonable time expired (*f*) His delay to withdraw, however, does not invalidate his previous seizure of goods under the writ (*g*), nor does it render him a trespasser *ab initio* (*h*) There are authorities which seem to support the contrary proposition (*i*), but it seems that they must be treated now as overruled A gaoler by detaining a

(*y*) See *Rogers* v *Parker*, 18 C B 112 *Lucas* v *Tarleton*, 3 H & N 116

(*z*) See *Winterbourne* v *Morgan*, 11 East, 395

(*a*) *Attack* v *Bramwell* 3 B & S 520

(*b*) *Harvey* v *Pocock*, 11 M & W 740, *Can Pac Wine Co* v *Tuley*, [1921] 2 A C 417, at p 425

(*c*) *Harvey* v *Pocock*, *supra*

(*d*) *Dod* v *Monger*, 6 Mod 215

(*e*) *Price* v *Woodhouse*, 1 Exch 559

(*f*) *Playfair* v *Musgrove*, 14 M & W 239, *Ash* v *Dawnay*, 8 Exch 237, *Lee* v *Dangar*, [1892] 1 Q B 231, 2 Id 337

(*g*) *Lee* v *Dangar*, *supra*, see also *Percival* v *Stamp*, 9 Exch 167

(*h*) See *per* Denman J in *Lee* v *Dangar*, [1892] 1 Q B 231, at p 242

(*i*) *Reed* v *Harrison*, 2 Black, W , 1218, *Astkenhead* v *Blades*, 5 Taunt 198

prisoner beyond the time at which he ought to be discharged becomes a trespasser (*k*), but not, it appears, a trespasser *ab initio*, because it would be unreasonable to assume that he contemplated that illegality when he first received the prisoner (*l*) It is, probably, for the like reason that a sheriff does not become a trespasser *ab initio* by remaining too long upon premises For that reason he does not become such by demanding fees to which he is not entitled, and also because such demand is not a trespass (*m*)

Non feasance

The point actually decided in the *Six Carpenters' Case* was that trespass does not lie against a guest at an inn for non-payment of his bill, because a mere non-feasance, not being a trespass, cannot make a man a trespasser *ab initio* (*n*) The importance of the doctrine of trespass *ab initio* was much diminished when the old forms of action were abolished

Implied licence

With respect to the proposition that the abuse of a licence given by the party does not make a man a trespasser *ab initio*, it may be noticed that if a person wrongfully take my goods and place them on his own close I may enter for the purpose of recaption (*o*), and that the reason given is that I have an implied licence from the wrong-doer (*p*) For the like reason, if my neighbour has wrongfully placed his goods upon my close, I may enter his for the purpose of there depositing them for his use (*q*), or if his cattle have trespassed on to my close, I may drive them back on to his (*r*), and in neither case am I bound to distrain damage feasant If my horse has been distrained and impounded, I may nevertheless retake it upon the distrainor removing it from the pound and wrongfully working it (*s*), and, generally, if a trespasser take my goods by force from my actual possession, I may, after demand and refusal, use force sufficient to defend my right and to recover them (*t*)

On the other hand, the mere fact that my goods are upon

(*k*) *Moone* v *Rose*, L R 4 Q B 486

(*l*) *Smith* v *Eggington* 7 A & E 167, at p 176, *per* Littledale, J

(*m*) *Shorland* v *Govett*, 5 B & C 485, at p 489, *per* Bayley, J , see also *Lee* v *Dangar*, [1892] 1 Q B 231

(*n*) See *West* v *Nibbs*, 4 C B 172, at p 187, *Jacobsohn* v *Blake*, 6 M & Gr 919

(*o*) Vin Abr , " Trespass' (I a), *Patrick* v *Colerick*, 3 M & W 483, *Burridge* v *Nicholetts*, 6 H & N 383

(*p*) *Per* Parke, B , in *Patrick* v *Colerick*, 3 M & W 483, at p 485

(*q*) *Rea* v *Sheward*, 2 M & W 424

(*r*) *Tyrringham s Case*, 4 Rep 38 b

(*s*) *Smith* v *Wright*, 6 H & N 821

(*t*) *Blades* v *Higgs*, 11 H L Cas 621

my neighbour's land does not justify my entry thereon to recover them (*u*), nor does the fact that they were placed there by a trespasser who had wrongfully taken them from me (*v*), except, perhaps, in cases where he has feloniously stolen them (*x*), or has taken them to an inn, a fair, or a common (*y*)

It has been said that if my fruit tree hang over my neighbour's land, I may enter his land to gather up the fruit which falls on to it (*z*), but, as I ought not to permit my tree to hang over his land (*a*), this proposition may be doubted It has been also said that if my tree be blown down by the wind, I may enter the land on to which it falls to retake it (*b*), but, even if that be true (*c*), I may not enter my neighbour's land without leave to retake a tree which has fallen there through my negligence in cutting it (*d*)

RES IPSA LOQUITUR (*the thing speaks for itself*)

The onus of proving negligence lies upon the party who alleges it, for *ei qui affirmat, non ei qui negat, incumbit probatio* (*e*), and, to establish a case to be left to the jury, he must prove the negligence charged affirmatively, by adducing reasonable evidence of it (*f*) As a rule, the mere proof that an accident has happened, the cause of which is unknown, is not evidence of negligence (*g*)

(*u*) *Anthony* v *Haney*, 8 Bing 186, see *Williams* v *Morris*, 8 M & W 488

(*v*) 3 Blac Comm 4, 5, citing *Higgins* v *Andrewes* 2 Rolle, 55, and *Higgins* v *Andrewes*, 2 Rolle, 208 2 Roll Abr 564, see *per* Tindal, C J , and Park, J , in *Anthony* v *Haney*, 8 Bing 186, at pp 192, 193, and Com Dig , ' Pleader (3 M 39) citing *Tayler* v *Fisher*, Cro Eliz 246

(*x*) 2 Blac Comm 5, see also *Webb* v *Beavan*, 6 M & Gr 1055 As to entering to search for stolen goods, see *Toplady* v *Scaley*, 2 Roll Abr 565

(*y*) 3 Blac Comm 5

(*z*) Vin Abr , Trespass ' (L a 6), citing *Millen* v *Fawdry*, Latch, 119, at p 120, *per* Doderidge, J

(*a*) *Lemmon* v *Webb*, [1895] A C 1, *Smith* v *Giddy*, [1904] 2 K B 448

(*b*) Vin Abr , Trespass ' (H a, 2 11), citing *Millen* v *Hawery*, Latch, 13, in which Crew C J , cites Y B 6 Ed IV 7, Bac Abr , " Trespass ' (F), citing Bro Tresp 213 (*qu* , for 310, where the reference is to Y B 6 Ed IV 7, *per* Choke, J)

(*c*) See Story, Bailments, 83 a

(*d*) See the authorities cited *supra*, n (*b*), and in *Anthony* v *Haney*, 8 Bing 186, at p 192, *per* Tindal, C J

(*e*) *Per* Ld Halsbury in *Wakelin* v *L & S W Ry Co* , 12 App Cas 41, at p 45, see *McKenzie* v *Chilliwack*, [1912] A C 888

(*f*) *Per Curiam* in *Scott* v *Lond &c* , *Dock Co* , 3 H & C 596, at p 601

(*g*) *Per* Bovill, C J , in *Simpson* v *Lond Gen Omnibus Co* , L R 8 C P 390, at p 392

In special circumstances, indeed, the mere fact that an accident has happened may be *prima facie* evidence of negligence, casting upon the party charged with it the onus of proving the contrary, for owing to the nature of the accident, *res ipsa loquitur* Thus, where a ship in motion collides with a ship at anchor the collision is, generally, *prima facie* evidence of negligence in the management of the former (*h*), and where two trains of the same railway company collide, the burden of proving that the collision was not due to their servants' negligence falls upon the company (*i*) Similarly, it was held that a *prima facie* case of negligence was established by evidence that, while the plaintiff was lawfully passing under the doorway of the defendants' premises, a bag of sugar fell upon him from a crane fixed above the door (*k*), or that, while he was lawfully passing along a highway, he was struck by a brick falling from the defendants' railway bridge (*l*), or by a barrel tumbling out of an upper window of their shop (*m*) For where an accident happens from an inanimate object, which does not ordinarily happen if the persons who have the management of it use proper care, it may reasonably be inferred, in the absence of any explanation from them, that it happened through their want of care (*n*)

The general rule, however, is that where the evidence adduced is equally consistent with the absence as with the existence of negligence in the defendant, the case ought not to be left to the jury (*o*), and the maxim, *res ipsa loquitur*, ought not to be applied unless the facts proved are more consistent with negligence in the defendant than with a mere accident (*p*) It is not enough, it has been said, for the plaintiff to show that he has sustained an injury under circumstances which may lead to

(*h*) *The Annot Lyle*, 11 P D 114, *The Indus*, 12 P D 46

(*i*) *Carpue* v *L B & S C Ry Co*, 5 Q B 747, *Skinner* v *L B & S C Ry Co*, 5 Exch 787

(*k*) *Scott* v *Lond &c*, *Dock Co*, 3 H & C 596

(*l*) *Kearney* v *L B & S C Ry Co*, L R 5 Q B 411, 6 Id 759

(*m*) *Byrne* v *Boadle*, 2 H & C 722, see also *Briggs* v *Oliver*, 4 H & C 403, and *per* Ld Halsbury in *Smith* v *Baker*, [1891] A C 325, at p 335

(*n*) *Scott* v *Lond &c*, *Dock Co*, 3 H & C 596, at p 601 The rule is not strictly limited to inanimate things Where a dog was given into the sole custody of a person as bailee and the dog was lost whilst in his custody, the maxim applied to throw on him the burden of showing circumstances negativing negligence (*Phippe* v *New Claridges Hotel, Ltd*, 22 T L R 49)

(*o*) *Cotton* v *Wood*, 8 C B N S 568

(*p*) *Crisp* v *Thomas*, 63 L T R 756, see also *Smith* v *Midl Ry Co*, 77 Id 813

a suspicion that there may have been negligence on the part of the defendant, but he must give evidence of some specific act of negligence (*q*)

Accordingly, where damage is done by a horse bolting in the street, the bolting is not in itself evidence of negligence, for it is indisputable that a horse sometimes becomes unmanageable from fright or other cause without want of care or skill in the person who has charge of it (*r*)

Again, the maxim ought not to be applied to evidence of an unexplained accident, if the evidence is as consistent with the cause of the accident having been the victim's own negligence, as with its having been that of the defendant For instance, if a railway company be sued by a widow under Lord Campbell's Act, evidence that her husband's dead body was found on the lines near a level crossing, having been apparently run over by a passing train, is insufficient, for it is not to be presumed that persons are careful when crossing lines, nor is it sufficient to give evidence of acts of negligence, if it remains merely conjectural whether these acts were the cause of the accident (*s*)

For this reason the decision in *Fenna* v *Clare* (*t*) is perhaps open to criticism There the only evidence for the plaintiff, a child of tender years, was that she was found on the highway near a spiked wall which was a nuisance, with injuries consistent either with her having stumbled against the spikes while lawfully using the highway, or with her having wrongfully climbed on to the wall (*u*), yet it was held that the case was properly left to the jury

In conclusion, it may be observed that, in deciding in any particular case whether the maxim, *res ipsa loquitor*, should be applied, the reported facts of other cases are of little value, each case must be decided upon its own facts

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(*q*) *Per* Willes, J , in *Lovegrove* v *L B & S C Ry Co*, 16 C B N S 669, at p 692

(*r*) *Hammack* v *White*, 11 C B N S 588, *Manzoni* v *Douglas*, 6 Q B D 145, see also *Holmes* v *Mather*, L R 10 Ex 261

(*s*) *Wakelin* v *L & S W Ry Co*, 12 App Cas 41, see *Smith* v *S E Ry Co*, [1896] 1 Q B 178

(*t*) [1895] 1 Q B 199

(*u*) See, however, *Harrold* v *Watney*, [1898] 2 Q B 320

ACTUS NON FACIT REUM NISI MENS SIT REA (3 *Inst* 107)—"*The intent and the act must both concur to constitute the crime*" (*Fowler* v *Padget*, 7 T R 509, at p 514, *per* Lord Kenyon, C J)

Two leading cases upon this maxim of our criminal law are *R* v *Prince* (*v*) and *R* v *Tolson* (*w*) The points actually decided in these cases are mentioned below, but the reader is advised to consult the judgments delivered therein upon the general relation of *mens rea* to crime In the latter case Stephen, J, though he criticised the above maxim, yet pointed out that the full definition of most crimes contains expressly or by implication a proposition as to a state of mind, that the mental element is often marked by the word "maliciously," "fraudulently," "negligently," or "knowingly," and that competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, though not introduced into the statutory definitions of particular crimes (*x*), while with regard to felony, of which it is said that 'it is always accompanied by an evil intention" (*y*), Hawkins, J, defined the term "feloniously" as meaning "with a mind bent on doing wrong, or, as it has been sometimes said, with a guilty mind" (*z*)

General rule

Having regard to the judicial opinions expressed in the above cited cases, and also in later cases, some of which will be referred to shortly, it seems not inaccurate to say that, as a general rule of our law, a guilty mind is an essential ingredient of crime, and that this rule ought to be borne in mind in construing all penal statutes

Its limitations

The rule, however, is not inflexible, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether or not there has been any intention to break the law or otherwise to do wrong There is a large body of municipal law in the present day which is so conceived Whether a statute should be construed in that sense or as subject to an implied qualification that there must be a guilty mind depends, not entirely upon its language, but also upon its subject-

(*v*) L R 2 C C R 154
(*w*) 23 Q B D 164
(*x*) 23 Q B D 187
(*y*) Hawk P C, bk 1, c 25, s 3, see *R* v *Harvey*, L R 1 C C R 284, at p 289
(*z*) 23 Q B D 193, 194

matter, and the various circumstances that make the one construction or the other reasonable, including the nature of the punishment imposed for its infringement (*a*) As an instance of an offence to which a guilty mind is not essential, it may be mentioned that a dealer in tobacco is liable to penalties under the statute 5 & 6 Vict c 93, s 3, for having in his possession adulterated tobacco, although he be ignorant of the adulteration (*b*)

Mistake or ignorance of fact

At common law, an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a man is indicted an innocent act, is a good defence, this defence being embodied in the maxim under consideration (*c*) Accordingly, where a woman is indicted for bigamy, it is a good defence that she believed on reasonable grounds that her husband was dead (*d*), or, where a publican is charged with supplying liquor to a constable on duty, that he similarly believed that the constable was off duty (*e*) Yet, there are several classes of cases to which the doctrine does not apply (*f*), and it has its limitations It has been held that a prisoner charged, under the Offences against the Person Act, 1861 (*g*) with unlawfully taking an unmarried girl under the age of sixteen out of the possession and against the will of her father is not to be excused merely because he believed that the girl was over that age (*h*) One of the grounds, however, for that decision was that, notwithstanding such belief, the prisoner intended to do and did a wrongful or immoral act, and not an innocent act, when he took the girl away (*i*) Moreover, as has been already stated, it may be proper to construe a penal statute as intending that ignorance of a material fact shall not excuse the doing of the act thereby prohibited Thus, it is an offence for a publican to sell intoxicating liquor to a person who is in fact drunk, and the publican's ignorance of that

(*a*) See *per* Wills, J , in *R* v *Tolson* 23 Q B D 164 at pp 172—176, citing several cases in support of this view of the law

(*b*) *R* v *Woodrow*, 15 M & W 404

(*c*) *Per* Cave, J , 23 Q B D 181

(*d*) *R* v *Tolson*, *supra*

(*e*) *Sherras* v *De Rutzen*, [1895] 1 Q B 918 Cf *Bank of N S Wales* v *Piper*, [1897] A C 383, at p 390

(*f*) See the cases collected in *Sherras* v *De Rutzen*, *supra*, and *Hobbs* v *Winchester Corp*, [1910] 2 K B 471

(*g*) 24 & 25 Vict c 100, s 25

(*h*) *R* v *Prince*, L R 2 C C R 154

(*i*) See *per* Wills and Cave, JJ , in *R* v *Tolson*, 23 Q B D , at pp 17[illegible]

fact is no excuse (*j*) He can commit the offence of delivering such liquor to a child under fourteen in a vessel not corked and sealed, though he honestly believes it is corked and sealed (*k*) And a person exposing unsound meat for sale can be convicted under s 117 of the Public Health Act, 1875, whether he is or is not aware of the unsoundness of the meat (*l*)

Master and servant

As a general rule, which is founded upon our maxim, a master is not criminally responsible for acts done by his servant without his knowledge, and the condition of the servant's mind is not to be imputed to the master (*m*) "The criminal law makes no one punishable for an offence but the person who either committed it or incited and procured the other to commit it, or who aided in its commission" (*n*) But this rule is not absolute, a person may be guilty of an offence of selling milk adulterated with water under s 6 of the Sale of Food and Drugs Act, 1875 (*o*), although the water has been added by his servant without his knowledge or authority, or by a stranger without his knowledge or authority, and without any default or negligence on his part or the part of any servant of his (*p*), a man may be indicted for a public nuisance upon his premises caused by the acts of his servants without his knowledge (*q*), and where a penal statute has been infringed by servants and criminal proceedings are taken against the master, although it lies upon the prosecutor to establish the master's liability, yet the question whether he is liable turns necessarily upon what is the true construction to be placed upon the statute (*r*) And in several cases the statute has been construed against the master Thus, a publican has been held guilty of the offence of supplying liquor to a constable on duty, although it was supplied without

(*j*) *Cundy* v *Le Cocq*, 13 Q B D 207

(*k*) *Brooks* v *Mason*, [1902] 2 K B 743, cf *Emary* v *Nolloth* [1903] 2 K B 264

(*l*) *Hobbs* v *Winchester Corp*, [1910] 2 K B 471

(*m*) *Chisholm* v *Doulton*, 22 Q B D 736, *Massey* v *Morriss*, [1894] 2 Q B 412

(*n*) *Per* Lush, J, in *R* v *Holbrook*, [1878] 4 Q B D 42, at p 47

(*o*) 38 & 39 Vict c 63

(*p*) *Parker* v *Alder*, [1899] 1 Q B 20 (followed in *Andrews* v *Luckin*, 117 L T 726), *Brown* v *Foot*, 61 L J M C 110, see also *Betts* v *Armstead*, 20 Q B D 771 *Dyke* v *Gower*, [1892] 1 Q B 220, see, too, *Coppen* v *Moore* [1898] 2 Q B 306 (applied in *Monsell Bros* v *L & N W Ry Co*, [1917] 2 K B 836), and *Christie, Manson & Woods* v *Cooper*, [1900] 2 Q B 522, cases of offences under the Merchandize Marks Act, 1887

(*q*) *R* v *Stephens*, L R 1 Q B 702, see *A G* v *Tod Heatley*, [1897] 1 Ch

Coppen v *Moore* (No 2), [1898] 2 Q B 306, at p 313

his knowledge by his servant (*s*), and the occupier of a salmon weir, being under a direct and unqualified duty to keep it open during the weekly close season, cannot escape liability by delegating the performance of this duty to a servant (*t*) The rule in such cases is that the master will be held liable where the statute would be rendered nugatory if the general rule were adhered to (*u*)

Evidence of intention

It often happens that where it is necessary to prove a man's intention, evidence of overt acts is sufficient, because every man is deemed *prima facie* to intend the necessary, or even natural or probable consequences of his acts (*x*) Thus, upon an indictment for setting fire to a mill with intent to injure the occupiers, it was held that, as such injury was a necessary consequence of firing the mill, the intent to injure might be inferred from the act (*y*) So, in order to constitute the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is unnecessary to show that the prisoner had any enmity to the deceased, nor is proof of absence of ill-will any defence, when it is proved that the killing was intentional, and done without justification or excusable cause (*z*) And it is, as a general proposition, true, that if an act manifestly unlawful and dangerous be done deliberately, the mischievous intent will be presumed, unless the contrary be shown (*a*) If a man knowingly utters a forged instrument as a genuine one, the intent to defraud the party to whom he utters it is a necessary inference (*b*)

Drunkenness

Although drunkenness, as a general rule, is no excuse for crime, yet it may be a circumstance to be taken into consideration where the question is with what intention an act was done, for a person may be so drunk as to be incapable of forming

(*s*) *Mullins* v *Collins* L R 9 Q B 292, with which cf *Neuman* v *Jones* 17 Q B D 132 See other instances collected in *Coppen* v *Moore supra* and see *Anglo Amer Oil Co* v *Manning*, [1908] 1 K B 536

(*t*) *Fitzgerald* v *Hosford* [1900] 2 I R 391

(*u*) *Farley* v *Higginbotham*, 42 S J 309, *Morris* v *Carbet*, 56 J P 649

(*x*) *Per* Ld Campbell in *Ferguson* v *Kinnoul*, 9 Cl & F 321, *per* Littledale, J , in *R* v *Moore* 3 B & Ad 184, at p 188, and in *R* v *Lovett*, 9 C & P 462, at p 466, *per* Ld Ellenborough, *R* v *Dixon*, 3 M & S 11 at p 15 (cited *R* v *Hicklin*, L R 3 Q B 360 at p 375) *R* v *Harvey*, 2 B & C 257, at pp 261, 264, 267 *R* v *Martin*, 8 Q B D 54, *R* v *Halliday*, 61 L T 701 *R* v *Beech*, 7 Cr App R 197

(*y*) *R* v *Farrington*, Russ & Ry 207

(*z*) *Per* Best, J , in *R* v *Harvey*, 2 B & C at p 268

(*a*) 1 East, P C 231

(*b*) *R* v *Hill*, 2 Moo C C 30 and 8 C & P 274

any intention (*c*) In a case where a woman was charged with attempting to commit suicide, Jervis, C J , said "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself?" (*d*) In a trial for murder, where the evidence was that the prisoner was drunk when he committed the offence, Lord Coleridge, J , directed the jury that "if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent (*i e* , the intent to kill or inflict serious injury), it justifies the reduction of the charge from murder to manslaughter", and this direction was held right (*e*) The form of insanity known as *delirium tremens* is a defence where a crime is committed by one suffering from it (*f*)

Murder

In cases of murder the degree of provocation which will reduce the offence to manslaughter and negative malice aforethought has been elaborately considered in the authorities given below (*g*), and may be briefly summed up thus "if the act was done while smarting under provocation of such a character and so recent that the prisoner might reasonably be considered at the time not to be master of his reason, then the crime is manslaughter, but if the act was done with premeditation, in a spirit of revenge, or under such circumstances that he ought to be considered master of his reason at the time when the act was done, then the crime is murder" (*h*)

Bare intention

It is a rule, laid down by Lord Mansfield, which has been said to comprise all the principles of previous decisions upon the subject, that so long as an act rests in bare intention, it is not punishable by our law, but when an act is done, the law judges not only of the act itself, but of the intent with which it was done, and if the act be coupled with an unlawful and malicious intent, though in itself the act would otherwise have been innocent, yet, the intent being criminal, the act likewise becomes criminal and punishable (*i*)

(*c*) *Per* Patteson, J , in *R* v *Cruse*, 8 C & P 541, at 546

(*d*) *R* v *Moore*, 3 C & K 319

(*e*) *R* v *Meade*, [1909] 1 K B 895

(*f*) *R* v *Davis*, 14 Cox, 563

(*g*) *Stedman's Case*, Fos 292, *R* v *Fisher*, 8 C & P 182, *R* v *Walters*, 17 St Tr 113, *R* v *Thomas*, 7 C & P 817, *R* v *Kirkman*, 8 C & P 115

(*h*) See further on the subject, Stephen's Digest of the Crim Law (1877), p 147

(*i*) *R* v *Scofield*, cited 2 East, P C 1028, at p 1030, *Dugdale* v *R* , 1 E & B 435, at 439

Attempt

It is accordingly important to distinguish an *attempt* (*k*) from a bare *intention*, for the former a man may be made answerable, but not for the latter The "will is not to be taken for the deed," unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it If there be an attempt, if there be something tangible and ostensible of which the law can take hold, which can be alleged and proved, there is nothing offensive to our ideas of justice in declaring it to be punishable Hence, an attempt to commit a felony is, in many cases, a misdemeanour, and the general rule is, that "an attempt to commit a misdemeanour is a misdemeanour, whether the offence is created by statute, or was an offence at common law" (*l*) Moreover, under various statutes, attempts to commit particular offences are indictable and punishable, and the Criminal Procedure Act, 1851 (14 & 15 Vict c 100), s 9, enables a jury to convict of the attempt upon an indictment for commission of the substantive offence, wherever the evidence suffices to establish the one though not the other (*m*)

A man who, by an overt act, attempts to commit a particular crime, but fails to commit it, may be convicted of the attempt, notwithstanding that the failure was inevitable For instance, if he put his hand into another's pocket, intending to steal whatever he may find in it, he may be convicted of the attempt to steal although there was nothing in the pocket (*n*)

Remoteness

It is worthy of remark that in *R* v *Eagleton* (*o*), the Court after observing that, although "the mere *intention* to commit a misdemeanour is not criminal, some *act* is required to make it so," added, "we do not think that *all* acts towards committing a misdemeanour are indictable Acts remotely leading towards the commission of the offence are not to be considered as *attempts* to commit it, but acts immediately connected with it are" The doctrine of "remoteness," already commented on (*p*), has here, consequently, an important application

(*k*) See *R* v *M'Pherson* Dears & B C C 197, *R* v *Cheeseman*, L & C 140, *R* v *Duckworth*, [1892] 2 Q B 83

(*l*) *Per* Parke, B, in *R* v *Roderick*, 7 C & P 795

(*m*) See *R* v *Hapgood*, L R 1 C C 221

(*n*) *R* v *Brown*, 24 Q B D 357, at p 359, *R* v *Ring*, 61 L J M C 116 which cases overrule *R* v *Collins*, L & C 471

(*o*) Dears C C 515, as to which see *R* v *Robinson*, [1915] 2 K B 342, at p 348 See *R* v *Roberts*, Dears C C 539, *R* v *Gardner*, Dears & B C C 40, with which compare *R* v *Martin*, L R 1 C C 56

(*p*) *Ante*, pp 152, 161

Our law, with a view to determining the intention, sometimes couples together two acts which were separated the one from the other by an appreciable interval of time, and ascribes to the later act that character and quality which undeniably attached and was ascribable to the earlier, and the doctrine of relation is also occasionally brought into play to determine the degree of guilt of an offender Thus, if A , whilst engaged in the prosecution of a felonious act, undesignedly causes the death of B , A may be convicted of murder, the felonious purpose conjoined with the homicide being held to fill out the legal conception of that crime (*q*) So, in *R* v *Riley* (*r*), a felonious intent was held to relate back, and couple itself with a continuing act of trespass, so as, taken in connection with it, to constitute the crime of larceny

Natural disabilities

Having thus briefly discussed the general rule, that ' there must be as an essential ingredient in a criminal offence some blameworthy condition of mind " (*s*), it remains to add that such condition of mind cannot justly be imputed to persons who, by reason of their mental imbecility, or immature years, are " under a natural disability of distinguishing between good and evil " (*t*), the maxims of our own, as of the civil law, upon this subject, being, *in omnibus penalibus judicis et ætati et imprudentiæ succurritur* (*u*), and *furiosi nulla voluntas est* (*x*)

Insanity

With regard to insanity, the rule is that every person is presumed to be sane until the contrary be proved, and that to establish the defence of insanity it must be clearly proved that, at the time of committing the act charged, the defendant " was labouring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong " (*y*)

Infancy

The question whether a criminal intention may be ascribed to an infant depends upon the infant's age An infant under seven years of age cannot be guilty of felony, for the law presumes that he is *doli incapax*, and against this presumption no

(*q*) Post Disc Hom 258, 259, Crim L Com , 1st Rep 40, 41
(*r*) Dears C C 149, see also *R* v *Ashwell*, 16 Q B D 190
(*s*) *Per* Cave, J , in *Chisholm* v *Doulton*, 22 Q B D 736, at p 741
(*t*) 1 Hawk P C 1
(*u*) D 50, 17, 108
(*x*) D 50, 17, 5, D 1, 18, 13, § 1 *Furiosus furore solum punitur*, 4 Blac Comm 24
(*y*) *R* v *M'Naghten* 10 Cl & F 200, at p 210, which (see *R* v *True*, 127 L T 561) is still law, see also *R* v *Marsland*, 7 Cr App 77

averment can be received (*z*) An infant above seven but under fourteen years, *prima facie*, is *doli incapax*, but the maxim, *malitia supplet ætatem* (*a*), applies malice, or the intention to do a wrongful act, makes up for the want of mature years Accordingly, this presumption of incapacity may, generally, be rebutted by strong and pregnant evidence of a mischievous discretion, but the evidence ought to be strong and clear beyond all doubt and contradiction (*b*) Two questions should be left to the jury, first, whether the infant committed the acts charged, and secondly, whether he had at the time a guilty knowledge that he was doing wrong (*c*) It is, however, an irrebuttable presumption of law that a boy under fourteen years of age cannot, by reason of physical inability, commit rape or any offence of carnal knowledge (*d*) Yet for aiding and abetting such offence he may be found guilty as a principal in the second degree (*e*), and he may be convicted of an indecent assault (*f*), and he may, it is submitted, be convicted of an attempt to commit any such offence (*g*)

In the case of an infant who has attained fourteen years of age, there is no presumption that he is *incapax doli*, and his acts are subject to the same rule of construction as the acts of an adult (*h*) He may be convicted of larceny as a bailee (*i*)

Connected with the subject of criminal intention are two important rules relative thereto, the first is *in criminalibus sufficit generalis malitia intentionis cum facto paris gradus* (*j*)—if the malefactor conceive a malicious intent in the execution of which he does harm to another person he is equally guilty, although he had no intention of doing that particular person an injury (*k*) The second is, *excusat aut extenuat delictum in capitalibus quod non operatur in civilibus* (*l*)—in capital cases

(*z*) *Marsh* v *Loader*, 14 C B N S 535, 1 Hale, P C 27, 28
(*a*) Dyer, 104 b
(*b*) 4 Blac Comm 23, 24, Hale, P C 26, 27
(*c*) *R* v *Owen*, 4 C & P 236
(*d*) *R* v *Waite* [1892] 2 Q B 600
(*e*) 1 Hale, P C 630 *R* v *Eldershaw* 3 C & P 396
(*f*) *R* v *Williams*, [1893] 1 Q B 320
(*g*) *R* v *Brown*, 24 Q B D 357, judgment of Hawkins, J, in *R* v *Williams*, *supra*
(*h*) 1 Hale, P C 25 As to his liability for misdemeanour, see 4 Blac Comm 22, *R* v *Sutton*, 3 A & E 597
(*i*) *R* v *McDonald*, 15 Q B D 323
(*j*) Bac Max reg 15
(*k*) *R* v *Smith*, Dears 559
(*l*) Bac Max reg 7

the law is in favour of life, and will not punish with death unless a malicious intention appear, but it is otherwise in civil actions, where the intent may be immaterial if the act done were injurious to another (*m*), of which rule a familiar instance occurs in the liability of a sheriff, who, by mistake, seizes under a *fi fa* the goods of the wrong person So, an action for the infringement of a patent "is maintainable in respect of what the defendant *does*, not of what he *intends*" (*n*), the patentee is not the less prejudiced because the invasion of his right was unintentional (*o*)

Gray v R One case, in which the principle *in favorem vitæ*, adverted to by Lord Bacon, was considered, may here be noticed, since it involves a point of considerable importance It was decided by the House of Lords, on writ of error from the Court of Queen's Bench in Ireland, that the privilege of peremptory challenge on the part of the prisoner extends to all felonies, whether capital or not, and it was observed by Wightman, J , commenting on the position, that the privilege referred to is allowed only *in favorem vitæ*, and did not extend to cases where the punishment is not capital, that it would seem that the origin of the privilege in felony may have been the capital punishment usually incident to the quality of crime, but that the privilege was, at all events, annexed to the quality of crime called felony, and continued so annexed in practice in England (at least down to the time when the question was raised), in all cases of felony, whether the punishment was capital or not (*p*)

In all criminal cases whenever upon the evidence given a reasonable doubt as to the prisoner's guilt or innocence is raised, the best rule is to incline to an acquittal *Tutius semper est errare in acquietando quam in puniendo, ex parte misericordiæ, quam ex parte justitiæ* (*q*)

(*m*) *Per* Ld Kenyon in *Haycraft* v *Creasy*, 2 East, 92, at pp 103—104

(*n*) *Stead* v *Anderson*, 4 C B 806, at p 834, *Lee* v *Simpson* 3 C B 871, cited judgm , *Reade* v *Conquest*, 11 C B N S 479, at p 492

(*o*) *Per* Shadwell, V C , in *Heath* v *Unwin*, 15 Sim 552, same case, 5 H L Cas 505

(*p*) *Gray* v *R* , 11 Cl & F 427, *Mulcahy* v *R* , L R 3 H L 306 The right of peremptory challenge by the Crown was much considered in *Mansell* v *R* , 8 E & B 54

(*q*) 2 Hale, P C 290

NEMO DEBET BIS VEXARI PRO UNA ET EADEM CAUSA (5 *Rep* 61)—
It is a rule of law that a man shall not be twice vexed for one and the same cause (*r*)

Roman law

By the Roman law, as administered by the prætors, an action might be defended by showing such acts as might induce the prætor, on equitable grounds, to declare certain defences admissible, the effect of which, if established, would be not, indeed, to destroy the action *ipso jure*, but to render it ineffectual by means of the "exception" thus specially prescribed by the prætor for the consideration of the judge to whose final decision the action was referred The class of exceptions just adverted to include the *exceptio rei judicatæ*, from which our own law presumably derived the plea of judgment recovered (*s*) The *res judicata* was in fact, a result of the definitive sentence or decree of the judge, and was binding upon, and in general unimpeachable by, the litigating parties (*t*), and this was expressed by the well-known maxim, *res judicata pro veritate accipitur* (*u*), which, however, it must be understood, applied only when the same question as had already been judicially decided was again raised between the same parties, the rule being *exceptionem rei judicata obstare quoties eadem quæstio inter easdem personas revocatur* (*x*)

Doctrine of our law as to *res judicata*

In our own law, the plea of judgment recovered at once suggests itself as analogous to the "*exceptio rei judicata*" above mentioned, and as directly founded on the general rule that 'a man shall not be twice vexed for the same cause" "If an action be brought, and the merits of the question be discussed between the parties, and a final judgment (*y*) obtained by either,

(*r*) 5 Rep 61 *Bona fides non patitur ut bis idem exigatur* D 50, 17, 57
(*s*) See *Ralston* v *Rouat*, 1 Cl & F 424, at p 435, Phillimore Rom L 43
(*t*) Brisson ad verb *Res* Pothier, ad D 42, 1, pr
(*u*) D 50, 17, 207
(*x*) D 44, 2, 3, Pothier, ad D 44, 1 1, pr
(*y*) See *Langmead* v *Maple* 18 C B N S 255, *Nouvion* v *Freeman* 15 App Cas 1, *Harrop* v *Harrop*, [1920] 3 K B 386 A judgment or sentence is a judicial determination of a cause agitated between real parties upon which a real interest has been settled In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision Of all these requisites, not one takes place in the case of a fraudulent and collusive suit There is no judge but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him there is no party litigating, there is no party defendant, no real interest brought into question (*per* Wedderburn, S G, arg in *Duchess of Kingston's Case*, 20 St Tr 355, at pp 478, 479, adopted by Ld Brougham in *Bandon* v *Becher*, 3 Cl & F 479, at p 510) As to fictitious special cases, see *Doe* d *Duntze* v *Duntze*, 6 C B 100, *Bright* v *Tyndall*, 4 Ch D 189

the parties are concluded, and cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial, which would have led to a different judgment (*z*) In such a case, the matter in dispute having passed *in rem judicatam* the former judgment, while it stands, is conclusive between the parties, if either attempts, by commencing another action, to re-open that matter, and for this rule two reasons are always assigned the one, public policy, for *interest rei publicæ ut sit finis litium*, the other, the hardship on the individual that he should be twice vexed for the same cause (*a*)

A party who relies upon the doctrine of *res judicata* "must show either an actual merger or that the same point has already been decided between the same parties" (*b*) Our subject may therefore be divided into two branches merger of cause of action, and estoppel by matter of record, with both of which we propose briefly to deal

Merger of cause of action

The doctrine of merger was thus clearly stated the well-known judgment in *King* v *Hoare* (*c*) "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a Court of record, the judgment is a bar (*d*) to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result Hence the legal maxim, *transit in rem judicatam* the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher This appears to be equally true, where there is but one cause of action, whether it be against a single person or several The judgment of a Court of record changes the nature of that cause of action, and prevents it being the subject of another suit, and the cause of action, being single, cannot be afterwards divided into two"

In accordance with this exposition of the law, the general

(*z*) *Per* Ld Kenyon in *Greathead* v *Bromley*, 7 T R 455 See *Bagot* v *Williams*, 3 B & C 235, *Jewsbury* v *Mummery*, L R 8 C P 56, *Hall* v *Levy*, 10 Id 154, *Shoe Machinery Co* v *Cutlan*, [1896] 1 Ch 667

(*a*) *Lockyer* v *Ferryman*, 2 App Cas 519

(*b*) *Per* Willes, J, in *Nelson* v *Couch*, 15 C B N S 99, at p 108

(*c*) 13 M & W 494, at p 504

(*d*) It must be pleaded (*Houston* v *Sligo*, 29 Ch D 448, *Edevain* v *Cohen*, 43 Ch D 187)

rule (*e*) is that a judgment, without satisfaction, recovered against one of two joint (but not joint and several) debtors (*f*), or one of two joint wrong-doers (*g*), may be pleaded as a bar to a subsequent action against the other This rule, however, does not apply where the liability for a debt is several as well as joint, for then a judgment against one of the debtors is not a bar to an action against the other upon his several liability, until the judgment has been satisfied (*h*), and if one of two joint debtors give his cheque for the debt, an unsatisfied judgment upon the cheque does not bar an action for the debt against the other debtor, for the cause of action is not the same (*i*)

Meaning of "same cause of action"

The question whether a defendant is being vexed again for the *same* cause of action depends, not upon technical considerations, but upon matter of substance (*k*) One test of identity is that the same evidence will support both actions (*l*) In *Brunsden* v *Humphrey* (*m*), the defendant had damaged the plaintiff's cab, and also caused him personal injuries, by the same act of negligence Having sued for and recovered damages in respect of the cab, the plaintiff sued again for the personal injuries The majority in the Court of Appeal, applying the above test, held that the second action was not barred While fully recognising the rule that where there is but one cause of action damages must be assessed once for all, they considered that, since two distinct rights of the plaintiff had been infringed, he had a separate cause of action in respect of each of those rights

Further remedy

Although the cause of action is the same, yet to constitute the former recovery a bar, "the circumstances must be such that the plaintiff might have recovered in the former suit that

(*e*) See the Mercantile Law Amendment Act 1856 (19 & 20 Vict c 97) s 11, see also R S C, O 13, r 4, O 14, r 5, O 27, r 5, *Weall* v *James*, 68 L T 515, *McLeod* v *Power*, [1898] 2 Ch 295

(*f*) *King* v *Hoare*, *supra*, *Hammond* v *Schofield*, [1891] 1 Q B 453, *Hoare* v *Niblett*, Id 781, and see *Parr* v *Snell*, [1923] 1 K B 1 As to partnership debts, see the Partnership Act, 1890 (53 & 54 Vict c 39) s 9, cf *Kendall* v *Hamilton*, 4 App Cas 504, *Re Hodgson*, 31 Ch D 177

(*g*) *Brinsmead* v *Harrison*, L R 7 C P 547 (distinguished in *Bradley* v *Ramsay*, 106 L T R 771, and applied in *Gunsbourg Re*, [1920] 2 K B 427)

(*h*) *Bermondsey Vestry* v *Ramsey*, L R 6 C P 247

(*i*) *Wegg Prosser* v *Evans*, [1895] 1 Q B 108 (overruling *Cambefort* v *Chapman*, 19 Q B D 229)

(*k*) *Brunsden* v *Humphrey*, 14 Q B D 141, at p 148

(*l*) *Hitchin* v *Campbell*, 2 Black W 827, at p 831, *Martin* v *Kennedy*, 2 B & P 69, at p 71, *Hunter* v *Stewart*, 31 L J Ch 346, at p 350

(*m*) 14 Q B D 141, cf *Macdougall* v *Knight*, 25 Q B D 1

which he seeks to recover in the second" (*n*) The defendant's ship, having negligently run down the plaintiff's ship at sea, the plaintiff, by proceeding *in rem* in Admiralty, obtained a sale of the defendant's ship and received the sum thereby realised, but as this sum compensated him only for a portion of his loss, he then brought a common law action for damages for the recovery of the residue, and it was held that the Admiralty decree was not a bar to the action (*o*)

Vexatious litigation

When a party to litigation seeks improperly to raise again the identical question which has been decided by a competent Court, a summary remedy may be found in the inherent jurisdiction which our Courts possess of preventing an abuse of process (*p*) Moreover, the legislature has provided means for preventing further abuse of process on the civil side (*q*) by any person who has habitually and persistently instituted vexatious legal proceedings without reasonable ground (*r*) Although it is not a good defence in law to an action brought in this country that another action between the same parties for the same cause is pending in a foreign country, yet the Court here will interfere to protect the defendant from such double litigation if it be shown that it is in fact vexatious (*s*)

Estoppel by record

The distinction between merger and estoppel by record was thus explained by Lord Ellenborough in *Outram* v *Morewood* (*t*) "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury, but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law (*u*), has been, on such issue joined, solemnly found against them" "According to the

(*n*) *Per* Willes, J , in *Nelson* v *Couch*, 15 C B N S 99, at p 109, *Midland Ry Co* v *Martin*, [1893] 2 Q B 172 See *Wright* v *London Gen Omnibus Co* , 2 Q B D 271

(*o*) *Nelson* v *Couch*, 15 C B N S 99

(*p*) *Stephenson* v *Garnett*, [1898] 1 Q B 678

(*q*) *Boaler, In re*, [1915] 1 K B 21

(*r*) Vexatious Actions Act, 1896 (59 & 60 Vict) c 51

(*s*) *McHenry* v *Lewis*, 22 Ch D 397, *Peruvian Guano Co* v *Bockwoldt*, 23 Id 225, *The Christiansborg*, 10 P D 141

(*t*) 3 East, 345, at p 354

(*u*) See *Mercantile, &c , Co* v *River Plate &c , Co* , [1894] 1 Ch 578, *Young* v *Holloway*, [1895] P 87

practice of every Court, after a matter has once been put in issue and tried, and there has been a finding or a verdict upon that issue, and thereupon a judgment, such finding and judgment are conclusive between the same parties on that issue In all Courts it would be treated as an estoppel" (*x*)

Judgment by consent

A judgment by consent, or by default (*y*), however, raises an estoppel no less than does a judgment which results from a decision of the Court after a matter has been fought out to the end (*z*) A judgment by consent is intended to put a stop to litigation between the parties, and a reasonable interpretation should be given to it, in order to prevent questions which were really involved in the action from being litigated again (*a*)

Rules laid down in *Duchess of Kingston's Case*

The following rules relative to judgments being given in evidence in civil suits are taken from the famous opinion of the judges delivered by De Grey, C J, in the *Duchess of Kingston's Case* (*b*) They were prefaced by a reference to the principle, on which the limitation of estoppel *per rem judicatam* to parties and privies depends, embodied in the maxim, *res inter alios acta alteri nocere non potest* (*c*)

1 "The judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court" That is to say, as later authorities show, it is conclusive as evidence, if pleaded in bar, but if not so pleaded, it is not conclusive, unless there has been no opportunity of pleading it (*d*)

2 "The judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the

(*x*) Judgment in *Finney* v *Finney*, L R 1 P & D 483 See *Conradi* v *Conradi*, Id 514 *Butler* v *Butler*, [1894] P 25, *Ruck* v *Ruck*, [1896] P 152 *Humphries* v *Humphries*, [1910] 2 K B 531, *Cooke* v *Rickman*, [1911] 2 K B 1125 (*y*) *Huffer* v *Allen*, L R 2 Ex 15

(*z*) *Re S American Co*, [1895] 1 Ch 37, *The Bellcairn*, 10 P D 161, *Ribble Joint Committee* v *Croston U D C*, [1897] 1 Q B 251, see *G N W Central Ry Co* v *Charlebois*, [1899] A C 114

(*a*) *Per* Ld Herschell in *Re S American Co*, [1895] 1 Ch 37, at p 50 If parties consent to the withdrawal of a juror, no future action can be maintained for the same cause (*Gibbs* v *Ralph*, 14 M & W 804) unless there be a substantial breach of the terms upon which the juror was withdrawn (*Thomas* v *Exeter Fly Po Co*, 18 Q B D 822)

(*b*) 20 St Tr 537, see 2 Sm L C, 12th ed, p 754

(*c*) See *post*, Chap X This maxim applies where a party sues first in one capacity, and then in another, and as a different person in law, see *Leggott* v *G N Ry Co*, 1 Q B D 599, *Re Deeley's Patent*, [1895] 1 Ch 687

(*d*) *Vooght* v *Winch*, 2 B & Ald 662, *Doe* v *Huddart*, 2 C M & R 316, *Doe* v *Wright*, 10 A & E 763, *Magrath* v *Hardy*, 4 Bing N C 782, *Feversham* v *Emerson*, 11 Exch 385

same matter, between the same parties, coming incidentally in question in another Court, for a different purpose"

3 "But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within the jurisdiction, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment" For a judgment "is final only for its own proper purpose and no further" (*e*)

Collusive proceedings

In the *Duchess of Kingston's Case*, in which these three rules were enunciated, the Duchess, being indicted for bigamy, sought to rely upon a sentence against her marriage with her husband, pronounced in a suit between them for jactitation of marriage, this sentence had been obtained by fraud and collusion, and the judges were unanimously of opinion that proof that it had been so obtained wholly destroyed the effect of such sentence And it may be safely laid down that the maxim, *nemo debet bis vexari pro eadem causa*, can never be relied upon where the former proceedings were fraudulent and collusive For instance, in *Girdlestone* v *Brighton Aquarium Co* (*f*), which was an action to recover a penalty incurred by keeping the Aquarium open on a Sunday, the defendants pleaded a judgment already recovered for the same penalty by another informer, but the plaintiff replied, and proved at the trial, that this judgment was recovered by covin and collusion between the parties thereto, who had previously agreed that such judgment should not be enforced, and it was therefore held that such fictitious judgment was no bar to the action

It may be further observed that a judgment of a Court in a matter which is beyond its statutory jurisdiction does not operate as an estoppel (*g*)

Criminal law

The maxim *nemo debet bis vexari pro una et eadem causa* expresses a great fundamental rule of our criminal law, which forbids that a man should be put in jeopardy twice for one and the same offence It is the foundation of the special pleas of *autrefois acquit* and *autrefois convict* (*h*) When a criminal

(*e*) *Per* Ld Ellenborough in *Outram* v *Morewood*, 3 East, 346, at p 357, *per* Bruce, V C, in *Barrs* v *Jackson*, 1 Y & C Ch 585, at p 595 (as to which see *per* Ld Selborne in *R* v *Hutchings*, 6 Q B D 300, at p 304), *Hobbs* v *Henning*, 17 C B N S 826 See also *Concha* v *Concha*, 11 App Cas 541, *De Mora* v *Concha*, 29 Ch D 268

(*f*) 3 Ex D 137, and 4 Id 107

(*g*) *Toronto Railway* v *Toronto Corporation*, [1904] A C 809

(*h*) 2 Hawk P C, c 35, s 1, c 36, s 10

General rule

charge has been once adjudicated upon by a Court of competent jurisdiction, that adjudication is final, whether it takes the form of an acquittal or a conviction, and it may be pleaded in bar of a subsequent prosecution for the same offence, whether charged with or without matters of mere aggravation, and whether such matters relate to the intent with which the offence was committed or to the consequences of the offence (*i*) Provided that the adjudication be by a Court of competent jurisdiction, it is immaterial whether it be upon a summary proceeding before justices or upon a trial before a jury (*k*)

Previous acquittal

Accordingly, a man, who has been indicted for an offence and acquitted, may not be indicted again for the same offence, provided that the first indictment were such that he could have been lawfully convicted upon it by proof of the facts alleged in the second indictment, and if he be thus indicted again, his plea of *autrefois acquit* is a good bar to the indictment The true test by which to decide whether a plea of *autrefois acquit* is a sufficient bar in any particular case is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first (*l*) Thus an acquittal upon an indictment for the murder may be pleaded to an indictment for the manslaughter of the same person, and an acquittal upon an indictment for burglary and larceny to an indictment for the larceny of the same goods, for in either of these cases the prisoner might have been convicted, on the first indictment, of the offence charged in the second (*m*) But an acquittal on indictment for sodomy is no bar to a subsequent indictment for gross indecency with a male person (*n*), of which latter offence the prisoner could not have been convicted on the first indictment

Previous conviction

Similarly, the plea of *autrefois convict* operates to bar a second indictment after the prisoner has been prosecuted to conviction for what is substantially the same offence (*o*) *Nemo debet bis punir pro uno delicto* (*p*), and it is an established principle that out of the same state of facts a series of prosecu-

(*i*) *R* v *Miles*, 24 Q B D 423, at p 431
(*k*) Ibid , *Wemyss* v *Hopkins*, L R 10 Q B 378, at p 381
(*l*) Arch Cr Pl , 26th ed , 156
(*m*) 2 Hale, P C 245, 246
(*n*) *R* v *Barron*, [1914] 2 K B 570
(*o*) Arch Cr Pl , 26th ed , 160
(*p*) *Hudson* v *Lee*, 4 Rep 43a

tions against a prisoner is not to be allowed (*q*), for instance, upon this ground a conviction for obtaining credit for goods by false pretences bars a further indictment for larceny of the same goods (*r*) The pleas of *autrefois convict* and *autrefois acquit*, however, apply "only where there has been a former judicial decision on the same accusation in substance", and therefore where, after a summary conviction for an assault, the victim of the assault died, it was held that an indictment for manslaughter still lay against his assailant (*s*)

Abortive trial

Although our law forbids that a man should be again put in peril, after his conviction or acquittal upon a verdict given by a jury on a good indictment on which he could be legally convicted yet an abortive trial without a verdict is no legal bar to a second trial either on the same or a fresh indictment, for instance, the jury, if unable to agree upon a verdict, may be discharged, and another jury be summoned (*t*) Moreover, the conviction or acquittal of a party is strictly, not by the verdict of the jury, but by the judgment of the Court thereon (*u*), so a plea of *autrefois convict* could not be founded upon a judgment of conviction after the reversal of that judgment for error (*x*), and now the rule is that a prosecution is not barred by an earlier conviction which has been reversed as erroneous in law (*y*), or by a conviction which has been quashed on certiorari as imposing a sentence unauthorized by the law (*z*)

The dismissal at petty sessions of a bastardy summons is no bar in law to a second summons, for it is not an adjudication (*a*) But an order of quarter sessions, quashing, on the ground of insufficient corroboration, an affiliation order made at petty sessions, is an adjudication whereby a second bastardy summons is barred (*b*)

Statutory recognition of maxim

The legislature has frequently recognised the maxim under

(*q*) *R* v *Elrington*, 1 B & S 688, 696, *Welton* v *Taneborne*, 99 L T 668

(*r*) *R* v *King*, [1897] 1 Q B 214 (explained and distinguished in *R* v *Barron*, [1914] 2 K B 570)

(*s*) *R* v *Morris*, L R 1 C C R 90

(*t*) *Winsor's Case*, L R 1 Q B 390

(*u*) See *per* Tindal, C J, in *Burgess* v *Boetefeur*, 7 M & Gr 481, at pp 504, 505

(*x*) *R* v *Drury*, 18 L J M C 189

(*y*) Ibid

(*z*) *Conlin* v *Patterson*, [1915] 2 K B 169

(*a*) *R* v *Gaunt*, L R 2 Q B 466, see *Williams* v *Davies*, 11 Q B D 74

(*b*) *R* v *Glynne*, L R 7 Q B 16 But it is not a bar to an action for seduction brought by the master of the woman, because it is *res inter alios acta* (*Anderson* v *Collinson*, [1901] 2 K B 107)

review, for instance, after a trial upon an indictment for committing an offence, another indictment for attempting to commit it is forbidden by the same enactment which allows a verdict of guilty of the attempt to be found upon the earlier indictment (*c*) Again, it has been enacted that where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence (*d*)

It is important to notice how narrow are the limits within which a conviction operates as a judgment *in rem* A judgment of conviction on an indictment for forging a cheque is conclusive, as between all persons, as to the prisoner being a convicted felon, but it is not even admissible evidence of the forgery in a subsequent action on the cheque (*e*)

(*c*) Criminal Procedure Act 1851 (14 & 15 Vict c 100), s 9

(*d*) Interpretation Act, 1889 (52 & 53 Vict c 63), s 33

(*e*) See *per* Blackburn, J , in *Castrique* v *Imrie*, L R 4 H L 414, at p 434 (cited by Smith, L J , in *Ballantyne* v *Mackinnon*, [1896] 2 Q B 457, at p 462) In the latter case it was held that an underwriter who had insured a ship against the perils of the sea, and who was sued by the shipowner for £350 (being the amount awarded by the Admiralty Court to a tug which had towed the ship into port) was not concluded from setting up the defence that the loss sustained by the shipowner had arisen, not from the perils of the sea, but from failure to provide sufficient bunker coal

CHAPTER VI

ACQUISITION, ENJOYMENT, AND TRANSFER OF PROPERTY

THIS chapter contains three sections, treating respectively of the acquisition, enjoyment, and transfer of property In connection with the first of these subjects, one maxim only has been considered, which sets forth the principle, that title is acquired by priority of occupation, a principle so extensively applicable that the following pages give little more than a mere outline of a course of investigation, which, if pursued in detail, would prove alike interesting and instructive It is, indeed, only proper to observe *in limine*,—since from the titles which have been selected with a view of showing the mode of treatment adopted, much more might be expected in the ensuing pages than has been attempted,—that a succinct statement of only the more important of the rights, liabilities, and incidents annexed to property is here offered, so that a perusal of the contents of this chapter may prove serviceable in recalling the attention of the *practitioner* to the application and illustration of principles with which he must necessarily be already familiar, and may direct the *student*, without wearying his attention, to sources of information whence may be derived more copious supplies of knowledge

§ I —THE MODE OF ACQUIRING PROPERTY

QUI PRIOR EST TEMPORE POTIOR EST JURE (*Co Litt* 14 *a*)— *He has the better title who was first in point of time*

Title by priority of occupation

The title of the finder to unappropriated land or chattels must evidently depend either upon the law of nature, upon international law, or upon the laws of that particular community to which he belongs According to the law of nature, there can be no doubt that priority of occupancy alone constitutes a valid title *quod nullius est id ratione naturali occupanti conce-*

ditur (*a*), but this rule has been so much restricted by the advance of civilization, by international laws, and by the civil and exclusive ordinances of each separate state, that it is now of little practical application It is, indeed, true, that an unappropriated tract of land, or a desert island, may legitimately be seized and reduced into possession by the first occupant, and, consequently, that the title to colonial possessions may, and in some cases does, in fact, depend upon priority of occupation But within the limits of this country, and between subjects, it is apprehended that the maxim which we here propose to consider, has no longer any direct application as regards the acquisition of title to realty by entry and occupation It is, moreover, a general rule, that whenever the owner or person actually seised of land dies intestate and without heir, the law vests the ownership of such land either in the Crown (*b*), or in the subordinate lord of the fee, by escheat (*c*), and this is in accordance with the spirit of the ancient feudal doctrine expressed in the maxim, *quod nullius est, est domini regis* (*d*)

On the maxim, *prior tempore, potior jure*, may depend, however, the right of property in treasure trove, in wreck, derelicts (*e*), waifs, and estrays, which being *bona vacantia*, belong by the law of nature to the first occupant or finder, but which have, in some cases, been annexed to the supreme power by the positive laws of the state (*f*) "There are, ' moreover, ' some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such that nothing but an usufructuary property is capable of being had in them and therefore they still belong to the first occupant during the time he holds possession of them, and no longer Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other

(*a*) D 41, 1 3 I 2, 1, 12

(*b*) So, there is no doubt that, by the law of the land the Crown is entitled to the undisposed of *personal estate* of any person who happens to die without next of kin' (*per* Shadwell V C , in *Taylor* v *Haygarth*, 14 Sim 8 at p 18) see *Robson* v *A G*, 10 Cl & F 471, at pp 497, 498, *Dyke* v *Walford*, 5 Moo P C 434

(*c*) 2 Blac Com 244

(*d*) Fleta, lib 3, Bac Abr , *Prerogative* (B)

(*e*) Goods are ' derelict which have been voluntarily abandoned and given up as worthless, the mind of the owner being alive to the circumstances at the time" (*per* Tindal, C J , in *Legge* v *Boyd*, 1 C B 92, at p 112)

(*f*) The reader is referred for information on these subjects to 2 Broom & Hadley, Commentaries, Chap XXVI

conveniences Such, also, are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition (*g*), which any man may seize upon and keep for his own use or pleasure All these things, so long as they remain in possession, every man has a right to enjoy without disturbance, but, if once they escape from his custody or he voluntarily abandon the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards" (*h*)

So, the finder of a chattel lying apparently without an owner, may, by virtue of the maxim under notice, acquire a special property therein (*i*) But chattels lying upon private lands are, *prima facie*, in the possession of the owner of the land, and he is therefore entitled to them, in the absence of a better title elsewhere (*k*)

As against a wrong-doer, mere right to possession constitutes a valid title, and the wrong-doer cannot set up *jus tertii* against one whose claim to the goods in question rests on possession and nothing more (*l*)

Primogeniture

In accordance with the maxim, *qui prior est tempore potior est jure*, the rule in descents is, that amongst males of equal degree the eldest inherits land in preference to the others, unless, indeed, there is a particular custom to the contrary, as in the case of gavelkind, by which land descends to all the males of equal degree together, or borough English, according to which the youngest son succeeds on the death of his father, or burgage tenure, which prevails in certain towns, and is charac-

(*g*) See *Rigg* v *Lonsdale* 1 H & N 923, and 11 Exch 654 (followed in *Blades* v *Higgs*, 12 C B N S 501), *Morgan* v *Abergavenny*, 8 C B 768, *Ford* v *Tynte*, 31 L J Ch 177, *Hannam* v *Mockett*, 2 B & C 934, *Ibottson* v *Peat*, 3 H & C 644

(*h*) 2 Blac Com 14, Wood, Civ L, 3rd ed, 82, *Holden* v *Smallbrooke*, Vaugh 187 See *Acton* v *Blundell*, 12 M & W 324, at p 333, Judgm in *Embrey* v *Owen*, 6 Exch 353, at pp 369, 372, *Chasemore* v *Richards*, 2 H & N 168, and 7 H L Cas 349

(*i*) *Armory* v *Delamirie*, 1 Stra 504 (cited, *White* v *Mullett*, 6 Exch 7, at p 13, and distinguished in *Buckley* v *Gross*, 3 B & S 566, at p 573), *Bridges* v *Hawkesworth*, 21 L J Q B 75 See also *Waller* v *Drakeford*, 1 E & B 749, *Mortimer* v *Cradock*, 7 Jur 45, *Merry* v *Green*, 7 M & W 623

'There is no authority," however, "nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become *bona vacantia* (*per* Bovill, C J, in *Spence* v *Union Ma Ins Co*, L R 3 C P 427, at p 438) See *ante*, p 200

(*k*) *S Staffs Water Co* v *Sharman*, [1896] 2 Q B 44

(*l*) *Jeffries* v *G W Ry Co*, 5 E & B 802, at p 806, *Glenwood Lumber Co* v *Phillips*, [1904] A C 405, at p 410

terised by special customs (*m*) Where A had three sons, and D the youngest, died, leaving a daughter, E, and then A purchased lands in borough English, and died, it was held, in accordance with the custom, that the lands should go to E (*n*) The right of primogeniture above-mentioned does not, however, exist amongst females, and, therefore if a person dies possessed of land, leaving daughters only, the general rule is that they take jointly as co-parceners (*o*), but sometimes, as in the case of the land dealt with in *Godfrey* v *Bullock* (*p*), it may be the custom of the manor that the eldest daughter shall take to the exclusion of the others

Real property

The maxim now under consideration usually determines the rights of persons who make conflicting claims to real property At law the general rule clearly is that different conveyances of the same lands take effect according to their priority in time, and that prior possession is of no avail against prior title Equity follows the law, and, where the legal estate is outstanding in a first unsatisfied mortgagee, of two subsequent equitable incumbrancers he who is prior in time is prior in equity (*q*) Equitable incumbrancers are ranked, as a rule, according to the dates of their securities *Qui prior est tempore potior est jure*, the first grantee is *potior*, that is *potentior*, he has a better and superior, because a prior, equity (*r*)

Effect of acquiring legal estate

The maxim, however, is, in our law, subject to an important qualification, that "where equities are equal, the legal title prevails" Equality here means, not equality in point of time, but the absence of circumstances rendering the conduct of one of the rival claimants less meritorious Equitable owners who are upon an equality in this respect may struggle for the legal estate, and he who obtains it, having then both law and equity on his side, is in a better position than he who has equity only This doctrine is not confined to tacking mortgages, but applies in favour of all equitable owners or incumbrancers for value without notice of prior equitable interests, who get in the legal estate from persons committing no breach of trust in conveying it to them (*s*) A later incumbrancer, who purchases without notice,

(*m*) 2 Blac Com 83, 84 See *Muggleton* v *Barnett*, 1 H & N 282 2 Id 653
(*n*) *Clements* v *Scudamore*, 2 Raym Ld 1024
(*o*) 2 Blac Com 187, 356, 385
(*p*) 1 Roll Abr 623, n 3, cited by Holt, C J, in *Clements* v *Scudamore*, 2 Raym Ld 1024, at p 1027
(*q*) *Jones* v *Jones*, 8 Sim 633, at pp 641—643
(*r*) *Phillips* v *Phillips*, 4 D F & J, 208, at p 215
(*s*) *Bailey* v *Barnes*, [1894] 1 Ch 25, at pp 36, 37

and who afterwards acquires the legal estate, may hold it, as a rule, against one whose equitable title is prior in point of time, and the mere fact that he has notice of the prior equitable incumbrance when he acquires the legal estate is immaterial (*t*)

Tacking

This doctrine of the protection given by the legal estate (*u*) enables a legal mortgagee, who makes further advances upon the security of the mortgaged property, to "tack" as against mesne incumbrancers of which he had no notice when he made such advances, and also enables an equitable mortgagee, who afterwards acquires the legal estate, to "tack" as against prior equitable mortgagee of whom he had no notice when he took his own equitable mortgage This right of tacking, whereby priority is gained, never arises unless the legal estate is held or acquired, one equitable incumbrance cannot be tacked to another, for "in all cases where the legal estate is outstanding, the several incumbrances must be paid according to their priority in time" (*x*), and it is essential to the right to tack a later incumbrance as against an earlier that the latter be taken without notice of the earlier (*y*)

Mortgagee and tenant

A mortgagee may, (subject to the Conveyancing Act, 1881) (*z*), eject, without notice to quit, a tenant who claims under a lease from the mortgagor, granted *after* the mortgage, and without the mortgagee's privity, for the tenant stands in the place of the mortgagor, and the possession of the mortgagor cannot be considered as holding out a false appearance, since it is of the very nature of the transaction that the mortgagor should continue in possession, and whenever one of two innocent parties must be a loser, then the rule applies, *qui prior est tempore, potior est jure* If, in the instance just given, one party must suffer, it is he who has not used due diligence in looking into the title (*a*)

(*t*) *Taylor* v *Russell*, [1892] A C 244 at pp 255, 259

(*u*) The doctrine was abolished by The Vendor and Purchaser Act, 1874 (37 & 38 Vict c 78), s 7, but that section was repealed by the Land Transfer Act, 1875 (38 & 39 Vict c 87), s 129, without prejudice to anything done meanwhile, and the doctrine now prevails except as regards lands in Yorkshire, which, under the Yorkshire Registry Act, 1884 (47 & 48 Vict c 54), s 16, are no longer affected by it

(*x*) *Brace* v *Marlborough*, 2 Peere Wms 491, at p 495

(*y*) *Hopkinson* v *Rolt*, 9 H L Cas 514 (Applied in *Hughes* v *Britannia, &c, Soc*, [1906] 2 Ch 607, in *Bradford Banking Co* v *Briggs*, 12 App Cas 29, and in *Deeley* v *Lloyds Bank*, [1912] A C 756 Followed in *Union Bank of Scot* v *Nat Bank of Scot*, 12 App Cas 53) See further as to tacking, *Marsh* v *Lee*, 2 Vent 337, discussed at p 118 of II Wh & T, L C, 8th ed

(*z*) 44 & 45 Vict c 41, s 18 (*a*) *Keech* v *Hall*, Dougl 21

Choses in action

With regard to equitable interests in personal property, the general rule is that an assignee for value, who, at the date of the assignment to him, had no notice of an earlier assignment, obtains priority by giving notice, to the person who has legal dominion over the fund, before notice is given by the earlier assignee (*b*) a rule which applies generally to assignments of choses in action, or of such interests in real estate as can only reach the hands of the beneficiary or assignor in the shape of money, but not to assignments of an equitable interest in real estate, such as an equity of redemption (*c*) If the fund be in Court, a stop-order is equivalent to notice (*d*) If the notices be given contemporaneously, then the assignments take effect according to their dates (*e*)

Shares

The above rule as to gaining priority by notice does not, however, apply as between the assignees for value of equitable rights in shares of companies governed by the Companies Clauses Consolidation Act, 1845, or the Companies (Consolidation) Act, 1908, for such companies are relieved by statute from the duty of taking any notice of equitable rights in their shares (*f*), except, indeed, in so far as such notice affects their own right of charging the shares with debts due from the shareholder (*g*) Consequently, where two persons claim title to shares registered in the name of a third, the earlier title usually prevails, and not that of which the company first had notice (*h*)

Bills of sale

If two or more bills of sale be given, comprising the same chattels, their priority generally depends now upon the order of date, not of their execution, but of their registration (*i*) Thus an earlier bill of sale, whether absolute or by way of security, if not registered, cannot prevail against an absolute bill of sale, given later, but registered (*k*) But a bill of sale given by way of security is void, except as against the grantor, in respect of chattels of which the grantor is not the "true owner" at the

(*b*) *Dearle* v *Hall*, 3 Russ 1

(*c*) *Ward* v *Duncombe*, [1893] A C 369, at pp 384, 390, and cases there collected

(*d*) *Mack* v *Postle*, [1894] 2 Ch 449, at p 455

(*e*) *Calisher* v *Forbes*, L R 7 Ch 109

(*f*) *Société Générale* v *Walker*, 11 App Cas 20, *Powell* v *Lond & Prov Bank*, [1893] 2 Ch 555

(*g*) *Bradford Bank* v *Briggs*, 12 App Cas 29

(*h*) *Moore* v *N W Bank*, [1891] 2 Ch 599

(*i*) Bills of Sale Act, 1878 (41 & 42 Vict c 31), s 10

(*k*) *Conelly* v *Steer*, 7 Q B D 520, *Lyons* v *Tucker*, Id 523, see also 45 & 46 Vict c 43, s 8

time of the execution of the bill of sale (*l*), and therefore it cannot acquire priority, through registration, over an earlier absolute bill of sale, not registered (*m*) This reasoning, however, does not apply as between two bills of sale given by way of security (*n*) A person who buys goods by a bill of sale and leaves the seller in possession of the goods, now runs the risk of the seller delivering the goods, under a sale or pledge, to a person receiving them in good faith and without notice of the previous sale (*o*)

Transfers of ships

Assignments of ships and shares therein are not affected by the Bills of Sale Acts (*p*), but are regulated, as regards registered British ships, by the Merchant Shipping Act, 1894 (*q*) If there are more mortgages than one registered in respect of the same ship or share, the mortgagees, notwithstanding any express, implied or constructive notice, are entitled in priority, one over the other, according to the date at which each mortgage is recorded in the register book and not according to the date of each mortgage itself (*r*)

Bottomry bonds

Bottomry bonds form an exception to the rule If bonds are given at different periods of a voyage, and the value of the ship is insufficient to discharge them all, the last in point of date is entitled to priority of payment, because the last loan furnished the means of preserving the ship, and without it the former lenders would have entirely lost their security—*salvam fecit totius pignoris causam* (*s*)

Priority of execution

The respective rights of execution creditors *inter se* must often be determined by applying the maxim as to priority Where two writs of execution against the same person are delivered to the sheriff, his duty is to execute both, giving priority to that which first came to his hands (*t*), unless, indeed, the earlier writ be void as against the later, in which case he must disregard the earlier in favour of the later (*u*) For instance, where goods seized under a *fi fa* founded on a judg-

(*l*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict c 43), s 5

(*m*) *Tuck* v *Southern Cos Dep Bank*, 42 Ch D 471

(*n*) *Thomas* v *Searles*, [1891] 2 Q B 408

(*o*) See the Factors Act, 1889 (52 & 53 Vict c 45), s 8, and the Sale of Goods Act, 1898 (56 & 57 Vict c 71), s 25 (1)

(*p*) 41 & 42 Vict c 31, s 4, see *Gapp* v *Bond*, 19 Q B D 200

(*q*) 57 & 58 Vict c 60, ss 24—46

(*r*) Ibid s 33, see *Black* v *Williams*, [1895] 1 Ch 408, *Barclay* v *Poole*, [1907] 2 Ch 284

(*s*) Abbott, Shipping, 14th ed , 196

(*t*) *Dennis* v *Whetham*, L R 9 Q B 345

(*u*) See *per* Cave, J , in *Re Pearce*, 14 Q B D 969

ment fraudulent against creditors remain in the sheriff's hands, or are capable of being seized by him, he ought to sell, or seize and sell, such goods under a subsequent writ of *fi fa* founded on a *bona fide* debt (*x*) Where, moreover, a party is in possession of goods apparently the property of the debtor, the sheriff who has a *fi fa* to execute is bound to inquire whether the party in possession is so *bona fide*, and, if he find that the possession is held under a fraudulent or an unregistered (*y*) bill of sale, he is bound to treat it as null and void, and levy under the writ (*z*)

A writ of *fi fa* or other writ of execution against goods, binds the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed, but subject to the rule that the writ does not prejudice the title to such goods acquired by a person in good faith, and for valuable consideration, unless he had, when he acquired his title, notice that such writ, or any other writ by virtue whereof the debtor's goods might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff (*a*)

Patents

We may observe that the law relative to patents and to copyright is referable to the maxim as to priority With respect to patents, the general rule is that the original inventor of a machine, who has first brought his invention into actual use, is entitled to priority as patentee, and that consequently a subsequent original inventor cannot avail himself of the invention, and this is evidently in accordance with the rule, *qui prior est tempore, potior est jure* If, therefore, several persons simultaneously discover the same thing, the party first communicating it to the public under the protection of the patent is the legal inventor, and is entitled to the benefit of it (*b*)

A person, however, to be entitled to a patent for an invention must be *the first and true inventor*, so that, if there be any public user thereof by himself or others before the grant of the patent (*c*), or if the invention has been previously made public

(*x*) *Christopherson* v *Burton* 3 Exch 160, *Shattock* v *Carden*, 6 Exch 725, *Imray* v *Magnay*, 11 M & W 267, *Drewe* v *Lawson*, 11 A & E 529

(*y*) See *Ex p Blaiberg*, 23 Ch D 254

(*z*) *Lovick* v *Crowder*, 8 B & C 132, at pp 135, 137, *Warmoll* v *Young* 5 B & C 660, at p 666 See, also, the cases cited, Arg, in *Hunt* v *Cooper* 12 M & W 664

(*a*) Sale of Goods Act, 1893 (56 & 57 Vict c 71), s 26 See *Hobson* v *Thelluson*, L R 2 Q B 642

(*b*) *Per* Abbott, C J, in *Forsyth* v *Riviere*, Webs Pat Cas 97, n, *per* Tindal, C J, in *Cornish* v *Keene*, Id 501, at p 508

(*c*) *Household, &c, Co* v *Neilson*, 9 Cl & F 788 See *Brown* v *Annandale*,

in this country by a description contained in a work, whether written or printed, which has been publicly circulated, one who afterwards takes out a patent for it is not the true and first inventor within the statute 21 Jac 1, c 3, even though, in the latter case, he has not borrowed his invention from such publication (*d*) But a communication from abroad of a manufacture openly published there may be the subject of a patent in this country, and an importer of an invention from abroad is an inventor (*e*) A communication made in England by one British subject to another of an invention never published in this country does not make the person to whom the invention is communicated the first and true inventor (*f*)

Although it is generally true that a new principle, or *modus operandi*, carried into practical and useful effect by the use of new instruments, or by a new combination of old ones, is an original invention, for which a patent may be supported (*g*), yet, if a person merely substitute, for part of a patented invention, some well-known equivalent, whether chemical or mechanical, then this, being in truth but a colourable variation, amounts to an infringement of the patent (*h*), and where letters patent were granted for improvements in apparatus for manufacturing certain chemical substances, and the jury found that the apparatus was not new, but that the patentee's mode of connecting the parts of that apparatus was new, the Court, in an action for an alleged infringement of the patent, directed the verdict to be entered for the defendant, upon an issue taken as to the novelty of the invention (*i*), and "no sounder or more wholesome doctrine" in reference to this subject was ever established than that a patent cannot be had "for a well-known mechanical contrivance merely when it is applied in a manner or to a purpose which is not quite the same, but is analogous to

Webs Pats Cas 433 And generally, in regard to the question, what is such prior user as will avoid a patent, see Terrell on Patents, 6th ed , pp 59 *et seq*

(*d*) *Stead* v *Williams*, 7 M & Gr 818, *Stead* v *Anderson*, 4 C B 806 See *Booth* v *Kennard*, 2 H & N 84 See Patents and Designs Act, 1907, s 1

(*e*) *Re Claridge's Patent*, 7 Moo P C 394

(*f*) *Marsden* v *Saville Street Foundry Co* , 3 Ex D 203

(*g*) *Boulton* v *Bull*, 2 H Bla 463, *Hall's Case*, Webs Pat Cas 98 (cited, *per* Ld Abinger in *Losh* v *Hague*, Id 200, at pp 207, 208), *Holmes* v *L & N W Ry Co* , 12 C B 831, at p 851 See *Tetley* v *Easton*, 2 C B N S 706, *Patent Bottle Envelope Co* v *Seymer*, 5 Id 164

(*h*) See *Heath* v *Unwin*, 13 M & W 583, and 5 H L Cas 505 And see further on this subject, *Newton* v *Gr June Ry Co* , 5 Exch 331, *Newton* v *Vaucher*, 6 Exch 859

(*i*) *Gamble* v *Kurtz*, 3 C B 425

the manner or the purpose in or to which it has been hitherto notoriously used" (*k*)

Copyright is now altogether regulated by statute law (*l*) and at present depends entirely on the Copyright Act, 1911 (1 & 2 Geo 5), c 46, which (s 31) enacts that "no person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force," and (ss 3, 21) that copyright is the property of the author and his assigns but that it subsists in respect of such works only where they are original (s 1 (1)) The object of the Act, as of the Copyright Act, 1842 (which it replaces) is to stimulate the production of such works (*m*), and the protection which it affords to the producers thereof extends to the whole of the King's dominions (s 1 (1)) other than the self-governing dominions, in any of which, however, it may (s 25) be applied by the local legislature

Copyright

§ II —PROPERTY—ITS RIGHTS AND LIABILITIES

This section contains remarks upon the legitimate mode of enjoying property, the limits and extent of that enjoyment, and the rights and liabilities attaching to it The maxims commented upon, in connection with this subject, are four that a man shall so use his own property as not to injure his neighbour, that the owner of the soil is entitled to that which is above and underneath it, that what is annexed to the freehold usually becomes subject to the same rights of ownership, that "every man's house is his castle"

(*k*) *Per* Ld Westbury in *Harwood* v *G N Ry Co*, 11 H L Cas 654, at p 682

(*l*) See *Jefferys* v *Boosey*, 4 H L Cas 815

(*m*) See *per* Ld Cairns in *Routledge* v *Low*, L R 3 H L 100, at p 108

SIC UTERE TUO UT ALIFNUM NON LÆDAS (9 *Rep* 59)—*Enjoy your own property in such a manner as not to injure that of another person* (*n*)

Injuries caused by a wrongful use of property

A man must enjoy his own property in such a manner as not to invade the legal rights of his neighbour *expedit reipublicæ ne sua re quis male utatur* (*o*) "Every man," observed Lord Truro (*p*), "is restricted against using his property to the prejudice of others," and "the principle embodied in the maxim, *sic utere tuo ut alienum non laedas*, applies to the public in at least as full force as to individuals There are other maxims equally expressive of the principle *nihil quod est inconveniens est licitum* (*q*) and *salus reipublicæ suprema lex*" (*r*) To so large a class of cases, indeed, and under circumstances so dissimilar, is the rule before us capable of being applied, that we can here merely suggest some few leading illustrations, omitting references to many reported decisions which might equally well exemplify its meaning

In the first place, then, we must observe that, as a rule the invasion of an established right, of itself, constitutes an injury, for which damages are recoverable, for "in all civil acts our law does not so much regard the intent of the actor as the loss and damage of the party suffering" In trespass *quare clausum fregit*, the defendant pleaded that he had land adjoining plaintiff's close, and upon it a hedge of thorns, that he cut the thorns, and that they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could On demurrer, judgment was given for the plaintiff, on the ground that, "though a man do a lawful thing, yet if damage thereby befalls another, he shall answer it, if he could have avoided it" (*s*)

(*n*) Such is the literal translation of the above maxim its true legal meaning would rather be, "So use your own property as not to injure *the rights* of another See Arg, *Jeffries* v *Williams*, 5 Exch 792 at p 797

The maxim is cited commented on, or applied, in *Bonomi* v *Backhouse*, E B & E 622, at pp 637, 639, 643, in *Chasemore* v *Richards*, 7 H L Cas 349 at p 388, *per* Pollock, C B in *Bagnall* v *L & N W Ry Co*, 7 H & N 423, at p 440, in *Williams* v *Groucott*, 4 B & S 149, at pp 155 156

(*o*) I 1, 8, 2 (*p*) *Egerton* v *Brownlow*, 4 H L Cas 1, at p 195

(*q*) *Ante*, p 128 (*r*) *Ante*, p 1

(*s*) See *Lambert* v *Bessey* Raym T 421, at p 422, *Weaver* v *Ward* Hob 134 *per* Blackstone J in *Scott* v *Shepherd*, 3 Wils 403 at p 410, *per* Ld Kenyon in *Haycraft* v *Creasy*, 2 East, 92, at p 104, *Turberville* v *Stampe*, 1 Raym Ld 264, *Jones* v *Festiniog Ry Co*, L R 3 Q B 733, *Vaughan* v *Menlove*, 3 Bing N C 468, *Piggott* v *E Counties Ry Co*, 3 C B 229, *Grocers' Co* v *Donne*, 3 Bing N C 34, *Aldridge* v *G W Ry Co*, 4 Scott, N R 156

So, where the defendants planted on their own land, about four feet from their boundary fence, a yew tree, which grew so as to project beyond the fence and over an adjoining field hired by the plaintiff for pasture, and his horse, feeding in the field, ate of that part of the yew tree which so projected, and thereby died of poison it was held that the defendants were liable for the value of the horse (*t*)

Accordingly, 'in considering whether a defendant is liable to a plaintiff for damage which the latter has sustained, the question often is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage" and this doctrine "is founded on good sense For when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer He is bound *sic uti suo ut non ladat alienum*" (*u*)

In the next place, it may be laid down that, although bare negligence unproductive of damage to another will not give a right of action, negligence causing damage will do so (*x*), negligence being defined to be "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (*y*), negligence, moreover, not being "absolute or intrinsic," but "always relative to some circumstances of time, place, or person," imposing a duty to take care (*z*)

(*t*) *Crowhurst* v *Amersham Burial Board*, 4 Ex Div 5, see also *Hurdman* v *N E Ry Co*, 3 C P D 168

(*u*) *Per* Ld Cranworth in *Rylands* v *Fletcher*, L R 3 H L 330, at p 341 (citing *Lambert* v *Bessey*, *supra*, applied in *Jones* v *Llanwrst U C*, [1911] 1 Ch 393, in *Belvedere, &c*, *Co* v *Rainham Chemical Works*, [1920] 2 K B 487, in *Charing Cross, &c*, *Co* v *Lond Hydraulic Power Co*, [1913] 3 K B 442, and [1914] 3 K B 772, in *A G* v *Cory Bros*, [1921] 1 A C 52, and in *Rainham, &c*, *Works* v *Belvedere, &c*, *Co*, [1921] 2 A C 465 Distin guished in *Rickards* v *Lothian*, [1913] A C 263)

(*x*) See Broom s Com, 4th ed p 656, *Whitehouse* v *Birmingham Co*, 27 L J Ex 25, *Bayley* v *Wolverhampton Co*, 6 H & N 241, *Duckworth* v *Johnson*, 4 Id 653

(*y*) *Per* Alderson, B, in *Blyth* v *Birmingham Co*, 11 Exch 781, at p 784 See also *Heaven* v *Pender*, 11 Q B D 503, *Le Lievre* v *Gould*, [1893] 1 Q B 491

Laches has been defined to be a neglect to do something which by law a man is obliged to do (*per* Ld Ellenborough in *Sebag* v *Abitbol*, 4 M & S 462, adopted by Abbott, C J, in *Turner* v *Hayden*, 4 B & C 1)

(*z*) Judgm in *Degg* v *Midland Ry Co*, 1 H & N 773, at p 781 (approved in *Potter* v *Faulkner*, 1 B & S 800) As to proof of negligence see *ante*, p 213, *Assop* v *Yates*, 2 H & N 768, *Perren* v *Monmouthshire Ry Co*, 11 C B 855, *Vose* v *Lanc & Y Ry Co*, 2 H & N 728, *Harris* v *Anderson*,

The following instances will serve to show in what manner the maxim placed at the head of these remarks is applied, to impose restrictions, first, upon the enjoyment of property (*a*), and secondly, upon the conduct of each individual member of the community In illustration of the first branch of the subject, we may observe, that, if a man build a house so close to mine that his roof overhangs mine, and throws the water off upon it, this is a nuisance, for which an action lies (*b*) So, an action lies, if, by an erection on his own land, he causes a nuisance by obstructing my ancient lights and windows (*c*), for a man has no right to erect a new edifice on his ground so as to prejudice what has long been enjoyed by another (*d*) *ædificare in tuo proprio solo non licet quod alteri noceat* (*e*) In like manner, if a man, in pulling down his house, occasion damage to, or accelerate the fall of, his neighbour's, he will be liable, provided there was negligence on the part of those engaged in pulling down the house, and he will not be exonerated from liability by employing a competent contractor to do the work Therefore, where the defendant and the plaintiff occupied adjoining houses, and the defendant rebuilt his house, employing a competent builder and architect for that purpose, and in the course of the work the workmen employed by the builder began to fix a staircase, and, in doing so, negligently and without the knowledge of the defendant or his architect cut into a party wall dividing the defendant's house from the plaintiff's, and thereby injured the plaintiff's house, it was held that the defendant was liable (*f*) The operation being a hazardous one,

Injury to neighbour's house

14 C B N S 499, *Reeve* v *Palmer*, 5 Id 84, *Manchester Ry Co* v *Fullarton*, 14 Id 54, *Roberts* v *G W Ry Co*, 4 Id 506, *North* v *Smith*, 10 Id 572, *Manley* v *St Helen's Canal Co*, 2 H & N 840, *Willoughby* v *Horridge*, 12 C B 742, *Templeman* v *Haydon*, Id 507, *Melville* v *Doidge*, 6 C B 450, *Grote* v *Chest & Holyhead Ry Co*, 2 Exch 251, *Dansey* v *Richardson*, 3 E & B 144, *Roberts* v *Smith*, 2 H & N 213, *Cashill* v *Wright*, 6 E & B 891, *Houlder* v *Soulby*, 8 C B N S 254

(*a*) See *per* Holt, C J, in *Tenant* v *Goldwin*, 2 Raym Ld 1089, at pp 1092—1093 (followed in *Hodgkinson* v *Ennor*, 4 B & S 229, at p 241)

(*b*) *Penruddocke's Case*, 5 Rep 100 b, *Fay* v *Prentice*, 1 C B 828

(*c*) *Colls* v *Home and Colonial Stores*, [1904] A C 179

(*d*) See *per* Pollock, C B, in *Bagnall* v *L & N W Ry Co*, 7 H & N 423, at p 440, which well illustrates the maxim commented on See *Dodd* v *Holme* 1 A & E 493 (recognised in *Bradbee* v *Mayor of London*, 5 Scott, N R 79, at p 120, and in *Partridge* v *Scott*, 3 M & W 220), *Wyatt* v *Harrison*, 3 B & Ad 871, *Brown* v *Windsor*, 1 Cr & J 20 (*e*) 3 Inst 201

(*f*) *Percival* v *Hughes*, 9 Q B D 441, and 8 App Cas 443 See also *Bradbee* v *Mayor of London*, 5 Scott, N R 79, at p 120, *per* Ld Denman in *Dodd* v *Holme*, 1 A & E 493, at p 505 See *Peyton* v *Mayor of London*, 9 B & C 725

the defendant was bound to see that it was carried out with reasonable care and skill, and he could not avoid responsibility by delegating the control of that operation to a third person, however competent that person might be It would seem that the defendant's duty in such a case does not go beyond the exercise of reasonable care and skill, and that, although the law has been varying somewhat in the direction of treating parties engaged in such a work, as insurers of their neighbours, or warranting them against injury, it has not quite reached that point (*g*)

The mere circumstance of juxtaposition does not, in the absence of any right of easement, render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall, nor is such person, if he be ignorant of the existence of the adjoining wall, bound to use extraordinary caution in pulling down his own (*h*)

Neither is any "obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it repaired in a lasting and substantial manner the only duty is to keep it in such a state that his neighbour may not be injured by its fall, the house may, therefore, be in a ruinous state, provided it be shored sufficiently, or the house may be demolished altogether" (*i*) Where, however, several houses belonging to the same owner are built together, so that each requires the support of the adjoining house, and the owner parts with one of these houses, the right to such support is not thereby lost (*k*)

As between the owner of the surface of land and the owner of subjacent mineral strata, and as between owners of adjoining mines, questions frequently arise involving a consideration of the maxim, *sic utere tuo ut alienum non ladas* (*l*), and needing an interpretation of it not too much curtailing the rights of

(*g*) *Per* Ld Fitzgerald in *Hughes* v *Percival*, 8 App Cas 443, at p 455

(*h*) *Chadwick* v *Trower*, 6 Bing N C 1 (reversing the same case, 3 Id 334, and cited in *Bradbee* v *Lond Corporation*, 5 Scott, N R 79, at p 119) See also *Grocers Co* v *Donne*, 3 Bing N C 34, *Davis* v *L & Blackwall Ry Co*, 2 Scott, N R 74 *per* Collins, L J, in *Southwark, &c, Co* v *Wandsworth B of W*, [1898] 2 Ch 603, at p 613

See further, as to the right to support by an adjacent house, *Solomon* v *Vintners' Co*, 4 H & N 585, *Angus* v *Dalton*, 6 App Cas 740

(*i*) Judgm in *Chauntler* v *Robinson*, 4 Exch 163, at p 170 As to the right of support for a sewer see *Metr Board of Works* v *Metr Ry Co*, L R 4 C P 192

(*k*) *Richards* v *Rose*, 9 Exch 218

(*l*) See *Williams* v *Groucott*, 4 B & S 149

ownership In *Humphries* v *Brogden* (*m*), the plaintiff, being the occupier of the surface of land, sued the defendant for working the subjacent minerals negligently and improperly, and without leaving any sufficient pillars and supports, and contrary to the custom of mining in that district, *per quod* the surface gave way Issue being joined on a plea of not guilty, it was proved at the trial that plaintiff occupied the surface, which was not built upon, and defendant the subjacent minerals, but there was no evidence showing how the occupation of the superior and inferior strata came into different hands The jury found that the defendant had worked the mines carefully and according to the custom, but without leaving sufficient support for the surface And the Court held that, upon this finding, the verdict should be for the plaintiff, because of common right the owner of the surface is entitled to support from the subjacent strata

The *prima facie* rights and obligations of parties so situated relatively to each other may, however, be varied by the production of title deeds or other evidence (*n*)

In *Smith* v *Kenrick* (*o*), the mutual obligations of the owners of adjoining mines were much considered, and it was there laid down that "it would seem to be the natural right of each of the owners of two adjoining coal mines—neither being subject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party" It has accordingly been held that, if in consequence of a mine owner on the rise working out his minerals, water comes by natural gravitation into the mines of the owner on the dip, the latter cannot maintain an action if the working

(*m*) 12 Q B 739 (with whom cf *Hilton* v *Whitehead*, Id 734), see also *Haines* v *Roberts*, 7 E & B 625, same case, 6 Id 643, *Rowbotham* v *Wilson*, 8 H L Cas 348, same case, 8 E & B 123, 6 Id 593, *Smart* v *Morton*, 5 E & B 30, *Backhouse* v *Bonomi*, 9 H L Cas 503, same case, E B & E 503, *Davis* v *Treharne*, 6 App Cas 460, *A G* v *Conduit Co*, [1895] 1 Q B 301

(*n*) *Per* Ld Campbell in *Humphries* v *Brogden* and *Smart* v *Morton*, *supra*, *Rowbotham* v *Wilson*, *supra*

There is no general right to the support of land by subjacent water, *Popplewell* v *Hodkinson*, L R 4 Ex 248 See *Jordeson* v *Sutton Gas Co*, [1899] 2 Ch 217, *Trinidad Asphalt Co* v *Ambard*, [1899] A C 594, but see also *Salt Union* v *Brunner, Mond & Co*, [1906] 2 K B 822

(*o*) 7 C B 515, at p 564, with which cf *Baird* v *Williamson*, 15 C B N S 376, which is distinguished from *Smith* v *Kenrick* *supra*, by Ld Cranworth in *Rylands* v *Fletcher*, L R 3 H L 330, at pp 341—342

is carried on with skill, and in the usual manner (*p*) But if one mine owner in working his own mine diverts a natural watercourse, or causes by artificial means more water to come into his mine than otherwise would come, whereby an adjoining mine is flooded, the mine owner is liable for the damage so caused (*q*)

From the above and similar cases we may infer that much caution is needed in applying the maxim under our notice—in determining how far it may, on a given state of facts, restrict the mode in which property may be enjoyed or used a principle here applicable under very dissimilar circumstances being, that "if a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril, and is liable for the consequences if it escapes and does injury to his neighbour" (*r*) "The person," therefore, "whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir (*s*), or whose cellar is invaded by the filth of his neighbour's privy (*t*), or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works (*u*), is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property, which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property" (*x*)

Use of flowing water

Again, the rule of law which governs the enjoyment of a

(*p*) *Wilson* v *Waddell* 2 App Cas 95, see *Hurdman* v *N E Ry Co*, 3 C P D 168

(*q*) *Baird* v *Williamson*, 15 C B N S 376, *Fletcher* v *Smith*, 2 App Cas 781, *Crompton* v *Lea* L R 19 Eq 115

(*r*) *Jones* v *Festiniog Ry Co*, L R 3 Q B 733, at p 736, *Rylands* v *Fletcher*, L R 3 H L 330, at pp 339, 340 (where many cases illustrating the text are collected), and the cases noted in connection therewith at p 245, n (*u*), *ante*

(*s*) Suppose A has a drain through the lands of B and C, and C stops up the inlet into his land from B s, and A nevertheless, knowing this, pours water in the drain and damages B A is liable to B," said Pollock, C B, in *Harrison* v *G N Ry Co*, 3 H & C 231, at p 238, see *Collins* v *Middle Level Commrs*, L R 4 C P 279

(*t*) Cf *Foster* v *Warblington Urban Council*, [1906] 1 K B 648

(*u*) *St Helen s Smelting Co* v *Tipping*, 11 H L Cas 642, and see *Rusher* v *Polsue*, [1906] 1 Ch 234

(*x*) Judgm in *Fletcher* v *Rylands*, L R 1 Ex 265, at p 280, adopted by Ld Cairns in the same case, L R 3 H L 330, at p 340 See *East Tel Co* v *Cape Town Tram Co*, [1902] A C 381 (escape of electricity), *Whitmores (Edenbridge)* v *Stanford*, [1909] 1 Ch 427

stream flowing in its natural course over the surface of lands belonging to different owners is well established, and illustrates the maxim under notice Each owner has a right to the advantage of the stream flowing in its natural course over his land, and to use the same as he pleases for any purpose of his own connected with his tenement (*y*), provided that they be not inconsistent with a similar right in the owner of the lands above or below so that neither can any owner above diminish the quantity or injure the quality of the water, which would otherwise naturally descend, nor can any owner below throw back the water without the licence or the grant of the owner above (*z*) Where, therefore, the owner of land applies the stream running through it to the use of a newly erected mill, he may, if the stream be diverted or obstructed by the owner of land above, recover for the consequential injury to the mill, and the same principle seems to apply where the obstruction or diversion has taken place before the erection of the mill, unless, indeed, the owner of land higher up the stream has acquired a right to any particular mode of using the water by prescription, that is, by user continued until the presumption of a grant has arisen (*a*)

Artificial stream

What has been just said applies generally to surface water flowing naturally over land—between which and water artificially flowing the distinction is important as regards the mode of applying our principal maxim, and has been thus explained "The flow of a natural stream creates natural rights and liabilities between all the riparian proprietors along the whole of its course Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality These natural rights and liabilities may be altered by grant or by user of an easement to alter the stream, as by diverting, or fouling, or penning back, or the like If the stream flows at its source by the operation of nature, that is, if it is a natural stream, the rights and liabilities of the party owning the land at its source are the same as those

(*y*) *Macartney* v *Lough Swilly Ry* [1904] A C 301

(*z*) *Mason* v *Hill*, 5 B & Ad 1, see *Ormerod* v *Todmorden Mill Co*, 11 Q B D 155, *Wright* v *Howard*, 1 Sim & Stu 190 (cited in judgments in *Acton* v *Blundell* 12 M & W 324, at p 349, and in *Embrey* v *Owen*, 6 Exch 353, at p 368), *Chasemore* v *Richards*, 7 H L Cas 349, *Rawstron* v *Taylor*, 11 Exch 369 *Broadbent* v *Ramsbotham*, Id 602 See also *Whalley* v *Laing*, 3 H & N 675 and 901, *Hipkins* v *Birm & Sheff Gas Co*, 6 H & N 250, and 5 Id 74

(*a*) Judgm in *Mason* v *Hill*, 5 B & Ad 1 (where the Roman law upon the subject is briefly considered), at p 25

of the proprietors in the course below If the stream flows at its source by the operation of man, that is, if it is an artificial stream, the owner of the land at its source or the commencement of the flow is not subject to any rights or liabilities towards any other person, in respect of the water of that stream The owner of such land may make himself liable to duties in respect of such water by grant or contract, but the party claiming a right to compel performance of those duties must give evidence of such right, beyond the mere suffering by him of the servitude of receiving such water" (*b*)

"Rights and liabilities in respect of artificial streams when first flowing on the surface are entirely distinct from rights and liabilities in respect of natural streams so flowing The water in an artificial stream flowing in the land of the party by whom it is caused to flow is the property of that party, and is not subject to any rights or liabilities in respect of other persons If the stream so brought to the surface is made to flow upon the land of a neighbour without his consent, it is a wrong for which the party causing it so to flow is liable If there is a grant by the neighbour, the terms of the grant regulate the rights and liabilities of the parties thereto If there is uninterrupted user of the land of the neighbour for receiving the flow as of right for twenty years, such user is evidence that the land from which the water is sent into the neighbour's land has become the dominant tenement, having a right to the easement of so sending the water, and that the neighbour's land has become subject to the easement of receiving that water But such user of the easement of sending on the water of an artificial stream is of itself alone no evidence that the land from which the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbour below The enjoyment of the easement is of itself no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbour"

"A party by the mere exercise of a right to make an artificial drain into his neighbour's land, either from mine or surface, does not raise any presumption that he is subject to any duty to continue his artificial drain, by twenty years' user, although there may be additional circumstances by which that presumption could be raised, or the right proved Also, if it be proved

(*b*) Judgm in *Gaved* v *Martyn*, 19 C B N S 732, at p 759 See *Nuttall* v *Bracewell*, L R 2 Ex 1

that the stream was originally intended to have a permanent flow, or if the party by whom or on whose behalf the artificial stream was caused to flow is shown to have abandoned permanently, without intention to resume, the works by which the flow was caused, and given up all right to and control over the stream, such stream may become subject to the laws relating to natural streams" (*c*)

Accordingly, if an artificial water course has existed for a considerable number of years, and is of a permanent nature, the water cannot be diverted or lessened in quantity by the owner of the land at its source, or by owners of land through which it passes, to the injury of owners lower down the stream (*d*), but it is otherwise, if the stream was temporary in its character, as, for instance, created by a pumping-engine used to drain land, and was allowed to flow on to the adjoining land under circumstances which negative an intention to give the use of the artificial stream as a matter of right (*e*)

Underground water

With respect to water percolating underground by undefined channels, the general rule of law is that if a landowner, by any lawful operation upon his own land, as by mining or by sinking a well therein, intercepts such water on its way to his neighbour's land, or drain such water out of his neighbour's land, the neighbour has no cause of action for damage sustained thereby, whether the damage be that the wells or ponds in the neighbour's land run dry (*f*), or that his land subsides from want of the natural subjacent support it formerly derived from the water (*g*) In the absence of any grant, contract, or statute, rendering the general rule inapplicable, such damage is *damnum absque injuria* But a landowner, though he may lawfully deprive his neighbour of water percolating towards his well,

(*c*) Judgm in *Gaved* v *Martyn* 19 C B N S 732, at pp 757—759

(*d*) *Sutcliff* v *Booth*, 9 Jur N S 1037, *Ivimey* v *Stocker* L R 1 Ch 396, *Rameshur, &c s Case*, 4 App Cas 121 See *Kensit* v *G E Ry Co*, 27 Ch D 122, *Mostyn* v *Atherton*, [1899] 2 Ch 360 See also *Whitmores (Edenbridge)* v *Stanford*, [1909] 1 Ch 427, *Baily* v *Clark*, [1902] 1 Ch 649

(*e*) *Arkwright* v *Gell*, 5 M & W 203, at p 232, *Staff & W Can Co* v *Birm Can Navigation*, L R 1 H L 254 *Schwann* v *Cotton* [1916] 2 Ch 459, at p 468 *per* Lord Cozens Hardy, M R

(*f*) *Acton* v *Blundell*, 12 M & W 324, *Chasemore* v *Richards*, 7 H L Cas 349, 2 H & N 168 (where, at p 195, Coleridge, J *diss*, cited the maxim under notice) *Bradford Corpor* v *Pickles*, [1895] A C 587, *Mcnab* v *Robertson*, [1897] A C 129, *Bradford Corpor* v *Ferrand*, [1902] 2 Ch 655 (distinguished in *Schwann* v *Cotton*, [1916] 2 Ch 120, at p 139)

(*g*) *Popplewell* v *Hodkinson*, L R 4 Ex 248, see *Gr Junc Can Co* v *Shugar*, L R 6 Ch 483 and *ante*, p 248, n (*n*), see also *Salt Union* v *Brunner Mond & Co*, [1906] 2 K B 822

is not entitled to foul his neighbour's well by polluting such water with sewage he must keep his own filth in (*h*)

Conflicting rights

The principle, which the above instances have been selected to illustrate, likewise applies where various rights, which are at particular times unavoidably inconsistent with each other, are exercised concurrently by different individuals, as, in the case of a highway, where right of common of pasture and right of common of turbary may exist at the same time, or of the ocean, which in time of peace is the common highway of all (*i*), in that of a right of free passage along the street, which right may be sometimes interrupted by the exercise of other rights (*k*) or in that of a port or navigable river (*l*), which may be likewise subject at times to temporary obstruction In these and similar cases, where such different co-existing rights happen to clash, the maxim, *sic utere tuo ut alienum non ladas*, will, it has been observed, generally serve as a clue to the labyrinth (*m*) And further, the possible jarring of pre existing rights can furnish no warrant for an innovation which seeks to create a new right to the prejudice of an old one, for there is no legal principle to justify such a proceeding (*n*)

Nuisance

Not only, moreover, does the law give redress where a substantive injury to property is committed, but, on the same principle, the erection of anything offensive so near the house of another as to render it useless and unfit for habitation is actionable (*o*), the action in such case being founded on the

(*h*) *Ballard* v *Tomlinson* 29 Ch D 115

(*i*) *Per* Story, J , *The Marianna Flora*, 11 Wheaton (U S), R 42 American decisions do not bind our Courts, but this case is of importance as regards international law

(*k*) See *A G* v *Brighton, &c , Co* , [1900] 1 Ch 276

(*l*) See *Mayor of Colchester* v *Brooke*, 7 Q B 339, *Morant* v *Chamberlin*, 6 H & N 541 *Dobson* v *Blackmore*, 9 Q B 991, *Dimes* v *Petley*, 15 Q B 276, *R* v *Betts*, 16 Q B 1022 As to the liability of the owner of a vessel, anchor, or other thing which, having been sunk in a river, obstructs the navigation, see *Brown* v *Mallett*, 5 C B 599 (recognised in *Manley* v *St Helen's Canal Co* 2 H & N 840, at p 854), *Hancock* v *York, &c , Ry Co* , 10 C B 348, *White* v *Crisp* 10 Exch 312, *per* Bovill, C J , in *Vivian* v *Mersey Docks Board*, L R 5 C P 19, at p 29, *Bartlett* v *Baker*, 3 H & C 153, *The Snark*, [1900] P 105

As to the liability of a shipowner for negligently damaging a telegraphic cable, see *Sub Marine Tel Co* v *Dickson*, 15 C B N S 759

See also *Mersey Docks Trustees* v *Gibbs*, L R 1 H L 93, *White* v *Phillips*, 15 C B N S 245

(*m*) Judgm in *R* v *Ward*, 4 A & E 384, at p 406

(*n*) Judgm in *R* v *Ward*, *supra*

(*o*) *Per* Burrough, J , in *Deane* v *Clayton*, 7 Taunt 489, at p 497, *Doe d Bush* v *Keeling* 1 M & S 95 See *Simpson* v *Savage*, 1 C B N S 347 *Mumford* v *Oxford, &c , Ry Co* , 1 H & N 34

infringement or violation of the rights and duties arising by reason of vicinage (*p*) The doctrine upon this subject, as laid down by the Exchequer Chamber (*q*), and substantially adopted by the House of Lords (*r*), being, "that whenever, taking all the circumstances into consideration, including the nature and the extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be", but trifling inconveniences merely are not to be regarded (*s*), for *lex non favet votis delicatorum* (*t*) An action, however, does not lie if a man build a house whereby my prospect is interrupted (*u*), or open a window whereby my privacy is disturbed, in the latter case the only remedy is to build on the adjoining land opposite to the offensive window (*x*) In these instances the general principle applies—*qui jure suo utitur neminem lædit* (*y*)

In connection with the law concerning nuisances, the practitioner may have to decide between asserted rights which are in conflict with each other—the right to erect or maintain, and the right to abate a nuisance—in doing so the following propositions (*z*) may guide him 1 A person may justify an interference with the property of another for the purpose of abating a nuisance, if that other is the wrongdoer, but only so far as the interference is necessary to abating the nuisance 2 It is the duty of a person who enters upon the land of another to abate a nuisance, to act in the way least injurious to the owner of the land 3 Where there are alternative ways of

(*p*) *Alston* v *Grant*, 3 E & B 128, judgm in *Reedie* v *L & N W Ry Co*, 4 Exch 244, at pp 256, 257

(*q*) *Bamford* v *Turnley*, 3 B & S 62, at p 77 See also *Mudge* v *Penge U C*, [1914] W N 126)

(*r*) *St Helen's Smelting Co* v *Tipping*, 11 H L Cas 642

(*s*) 11 H L Cas, at pp 645, 655, *Gaunt* v *Fynney*, L R 8 Ch 8

(*t*) *Aldred's Case*, 9 Rep 57 b, *Robinson* v *Kilvert* 41 Ch D 88, at p 97 See further as to what may constitute a nuisance, *R* v *Bradford Nav Co*, 6 B & S 631, *Cleveland* v *Spier*, 16 C B N S 399

(*u*) Com Dig, "*Action upon the Case for a Nuisance*" (C), *Aldred's Case*, 9 Rep 57 b According to the Roman law it was forbidden to obstruct the prospect from a neighbour's house see D 8, 2, 3, and 15, Wood, Civ Law, 3rd ed 92, 93

(*x*) *Per* Eyre, C J, as cited in *Chandler* v *Thompson*, 3 Camp 80, *Jones* v *Tapling*, 11 H L Cas 290

(*y*) *Vide* D 50, 17, 151, and 155, § 1

(*z*) See *Roberts* v *Rose*, L R 1 Ex 82 See further as to abating a nuisance, *Drake* v *Pywell*, 4 H & C 78, *Lemmon* v *Webb*, [1895] A C 1

abating a nuisance, if one way would cause injury to the property of an innocent third party or to the public, that cannot be justified, although the nuisance may be abated by interference with the property of the wrongdoer Therefore, where the alternative ways involve an interference with the property either of an innocent person or of the wrongdoer, the interference must be with the property of the wrongdoer

Easement of light

The right to the reception of light in a lateral direction (without obstruction) is an easement The strict right of property entitles the owner only to so much light (and air) as fall perpendicularly on his land (*a*) The law on this subject formerly was, that no action would lie, unless a right had been gained in the lights by prescription (*b*), but it was subsequently held that, upon evidence of an adverse enjoyment of lights for twenty years or upwards unexplained, a jury might be directed to presume a right by grant or otherwise, even though no lights had existed there before the commencement of the twenty years (*c*) and although, formerly, if the period of enjoyment fell short of twenty years, a presumption in favour of the plaintiff's right might have been raised from other circumstances, it is now enacted by the Prescription Act, 1833 (2 & 3 Will 4, c 71), s 6, that no presumption shall be allowed or made in support of any claim upon proof of the exercise of the enjoyment of the right or matter claimed for less than twenty years, and by s 3 of the same statute, that, "when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been *actually enjoyed* (*d*) therewith for the full period of twenty years, *without interruption* (*e*), the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing" And by s 4, "the period of twenty years shall be taken to be the period next before some suit or action wherein the claim shall have been brought into question, and no act or matter shall

(*a*) Gale on Easements, 5th ed 319, and in regard to the enjoyment of light and air, see *White* v *Bass*, 7 H & N 722, *Frewen* v *Philipps*, 11 C B N S 449, *Chastey* v *Ackland*, [1897] A C 155, and [1895] 2 Ch 389

(*b*) See D 8, 2, 9

(*c*) 2 Selw, N P, 12th ed, p 1134

(*d*) See *Courtauld* v *Legh* L R 4 Ex 126

(*e*) See *Bennison* v *Cartwright*, 5 B & S 1, *Plasterers' Co* v *Parish Clerks' Co*, 6 Exch 630

be deemed to be an interruption within the meaning of the statute, unless the same shall have been submitted to or acquiesced in, for one year after the party interrupted shall have had notice thereof, and of the person making or authorising the same to be made" The last section of this Act is applicable not only to obstructions preceded and followed by portions of the twenty years, but also to an obstruction ending with that period, and, therefore, a prescriptive title to the access and use of light may be gained by an enjoyment for nineteen years and 330 days, followed by an obstruction for thirty-five days (*f*)

It may be well to add that "every man may open any number of windows looking over his neighbour's land, and, on the other hand, the neighbour may, by building on his own land, within twenty years after the opening of the window obstruct the light which would otherwise reach it" (*g*)

After a good deal of controversy it is now established that, when an easement of light has been acquired by prescription, no action will lie for obstructing the access of light, unless the obstruction is so great as to amount to a nuisance The owner of the dominant tenement is not *necessarily* entitled to complain because there has been some diminution of the light previously enjoyed (*h*)

Air

The right to air as distinguished from light appears in some respects to be governed at common law by the same principles as apply to light, but the right to the uninterrupted passage of air across one's neighbour's ground cannot be acquired under the Prescription Act, 1833 (2 & 3 Will 4, c 76), s 2, and it would further seem that no presumption of a grant of such a right will arise from a long and continuous user of the right claimed (*i*) A total deprivation of air would, however, under certain circumstances, amount to a nuisance, and as such would be restrained, and in the cases cited below injunctions were granted to prevent and remove obstructions which impeded the ventilation of the plaintiff's premises (*j*)

Liability for negligence

To the instances already given, showing that, according to the maxim, *sic utere tuo ut alienum non lædas*, a person is held

(*f*) *Flight* v *Thomas*, 11 A & E 688, affirmed 8 Cl & F 231 See *Eaton* v *Swansea Waterworks Co*, 17 Q B 267

(*g*) *Per* Ld Cranworth in *Tapling* v *Jones*, 11 H L Cas 290, at p 311

(*h*) *Colls* v *Home & Colonial Stores*, [1904] A C 179

(*i*) *Webb* v *Bird*, 10 C B N S 268, and 13 Id 841

(*j*) *Gale* v *Abbot*, 8 Jur (N S) 987, *Dent* v *Auction Mart Co*, L R 2 Eq 238

liable at law for the consequences of his negligence, may be added the following —It has been held, that an action lies against a party for so negligently constructing a hay-rick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's house was burnt down (*k*) So, the owners of a canal, taking tolls for the navigation, are, by the common law, bound to use reasonable care in making the navigation secure, and are responsible for the breach of such duty, upon a similar principle to that which makes a shopkeeper, who "invites" (*l*) the public to his shop, liable for neglect in leaving a trapdoor open without any protection, by which his customers suffer injury (*m*) The trustees of docks are likewise answerable for their negligence and breach of duty causing damage (*n*)

Dangerous instruments

The law also, through regard to the safety of the community, requires that persons having in their custody instruments of danger, should keep them with the utmost care (*o*) Accordingly, where the defendant sent a young girl to fetch his loaded gun, and the girl, having got the gun, pointed it at a child and drew the trigger, in the mistaken belief that the priming had been removed it was held that the defendant was liable for the injuries the child sustained through the gun going off (*p*) "If," observed Lord Denman in a subsequent case, "I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if

(*k*) *Vaughan* v *Menlove* 3 Bing N C 468 see also *Turberville* v *Stampe*, 1 Raym , Ld 264 *Jones* v *Festiniog Ry Co* , L R 3 Q B 733 As to liability for fire, caused by negligence, see further *Filliter* v *Phippard* 11 Q B 347, *per* Tindal, C J , in *Ross* v *Hill*, 2 C B 877, at p 889, and in *Piggot* v *East Counties Ry Co* , 3 C B 229, at p 241, *Smith* v *Frampton*, 1 Raym Ld , 62, *Canterbury* v *A G* , 1 Phill 306, *Smith* v *L & S W Ry Co* , L R 5 C P 98

(*l*) See *Nicholson* v *Lanc & Y Ry Co* , 3 H & C 534, *Holmes* v *N E Ry Co* , L R 4 Ex 254, *Lunt* v *L & N W Ry Co* , L R 1 Q B 277, at p 286, *Hayward* v *Drury Lane Theatre*, [1917] 2 K B 899

(*m*) *Parnaby* v *Lancaster Canal Co* , 11 A & E 233, at p 243, *Birkett* v *Whitehaven Junction Ry Co* , 4 H & N 730, *Chapman* v *Rothwell*, E B & E 168, *Bayley* v *Wolverhampton Waterworks Co* , 6 H & N 241

(*n*) *Mersey Docks Trustees* v *Gibbs*, L R 1 H L 93, see also *Winch* v *Thames Conservators*, L R 7 C P 458, *Coe* v *Wise*, L R 1 Q B 711, *R* v *Williams*, 9 App Cas 418, *Gibraltar Commissioners* v *Orfila*, 15 App Cas 400

(*o*) 'The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons,' *per* Erle, C J , *Potter* v *Faulkner*, 1 B & S 800, at p 805 *Rylands* v *Fletcher*, L R 3 H L 330, also exemplifies the text

(*p*) *Dixon* v *Bell*, 5 M & S 198, *Sullivan* v *Creed*, [1904] 2 Ir R 317, see also *Clark* v *Chambers*, 3 Q B D 327, and compare *Ruoff* v *Long*, [1916] 1 K B 148

that injury should be brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first" (*q*) This principle has been applied in later cases to the sale of dangerous articles, and it has been laid down that a person who sells a dangerous article, knowing that it is dangerous and that the purchaser is or may be unaware of its dangerous character, is bound to give warning of the danger to the purchaser, and is liable for the consequences of his failure to give it (*r*)

Mischievous animals

Although the owner of an animal which is *ferœ naturœ* has the right to keep it, yet he keeps it at his peril, and if the animal does an injury to any person, the owner is answerable for the injury, unless the person injured brought it upon himself In this respect there is no distinction between an animal which is *ferœ naturœ*, and an animal which, though it belong to a class of animals considered to be *mansuetœ naturœ*, is in fact dangerous, and is known by its owner to be such (*s*) Whoever keeps an animal accustomed to attack or bite mankind, with knowledge that it is so accustomed, is *prima facie* liable to any person attacked or bitten by it, and the gist of an action for the injury is the keeping the animal with knowledge of its mischievous propensity (*t*) Not every propensity which causes mischief is in law a mischievous propensity Thus where a dog, not given to rushing at bicycles, gambolled across a road so as to cause a bicycle accident, the owner was held not liable (*u*), and an owner of sheep is not liable for damage caused by untended sheep as the result of their rushing suddenly across a road so as to upset a motor car (*x*), but where an unbroken colt, not under control, was being driven along a highway at night, it was held that the owner was liable for an accident resulting

(*q*) *Lynch* v *Nurdin*, 1 Q B 29, at p 35 (with which cf *Mangan* v *Atterton*, L R 1 Ex 239), see *Lygo* v *Newbold*, 9 Exch 302, *Caswell* v *Worth*, 5 E & B 849, *Engelhart* v *Farrant* [1897] 1 Q B 240 (with which compare *McDowall* v *G W Ry*, [1903] 2 K B 331, *Dominion Natural Gas Co* v *Collins*, [1909] A C 640), *Cooke* v *Mid G W Ry*, [1909] A C 229, *Richards* v *Lothian*, [1913] A C 263, at p 274

(*r*) *Clarke* v *Army & Navy Stores*, [1903] 1 K B 155, *Blacker* v *Lake*, 106 L T 533 See also *George* v *Skivington*, L R 5 Ex 1, discussed in *Blacker* v *Lake*, *supra*

(*s*) *Filburn* v *People's Palace Co*, 25 Q B D 258, *Jackson* v *Smithson*, 15 M & W 563 565, *Brady* v *Warren*, [1900] 2 I R 632

(*t*) *May* v *Burdett*, 9 Q B 101, *Hudson* v *Roberts*, 6 Ex 679, *Baker* v *Snell*, [1908] 2 K B 825

(*u*) *Milligan* v *Henderson*, [1915] S C 1030.

(*x*) *Heath's Garage* v *Hodges*, [1916] 2 K B 370

from the colt bolting on seeing a bicycle light (*y*) An owner of an animal known to be savage is liable for injuries caused by it to persons who, with his leave or by his permission, are on the place where it is kept (*z*), he is not, however, liable for injuries inflicted on persons trespassing on enclosed land in which the animal is kept (*a*) To render the owner of a dog liable for its biting the plaintiff, it is sufficient to prove his knowledge that it had previously attempted to bite another person, but his knowledge that it had bitten some other animal is generally not enough (*b*) As a rule, the owner of a dog is only liable for the particular vice which he knew that it had (*c*), but, by statute, he is now liable, without proof of *scienter*, for injury done by his dog to cattle, including horses, sheep, and swine (*d*)

The owner of animals *mansuetæ naturæ*, such as oxen, horses, sheep, and pigs, is, as a general rule, bound to prevent their straying upon his neighbour's land, and if they so stray, he is liable for all the ordinary consequences of the trespass, the question whether the trespass was due to his negligence being, generally, immaterial (*e*) To this rule there is an exception, necessary for the conduct of the common affairs of life, in cases where such an animal, in the course of being lawfully driven along a highway, strays upon adjoining premises The defendant's ox, while being driven through the street, entered the plaintiff's shop through the open doorway, and damaged his goods In the absence of proof of negligence on the drover's part, it was held that the defendant was not liable, on the ground that owners of property adjacent to a highway hold it subject to risk of injury from accidents not caused by negligence (*f*) It seems too that the owner of domestic animals is not liable for the damage they cause, while straying on a highway, to a person using the highway, who is not the owner of the soil (*g*)

(*y*) *Turner* v *Coates*, [1917] 1 K B 670
(*z*) *Lowery* v *Walker*, [1911] A C 10
(*a*) *Marlor* v *Ball*, 16 T L R 239
(*b*) *Worth* v *Gilling*, L R 2 C P 1, *Osborne* v *Chocqueel*, [1896] 2 Q B 109
(*c*) See *Read* v *Edwards*, 17 C B N S 245, cf *Cooke* v *Waring*, 2 H & C 332
(*d*) Dogs Act, 1906 (6 Edw 7, c 32), ss 1, 7
(*e*) *Cox* v *Burbidge*, 13 C B N S 430, 438, *Ellis* v *Loftus Iron Co*, L R 10 C P 10, *Lee* v *Riley* 18 C B N S 722, see *Singleton* v *Williamson*, 7 H & N 410, *Dixon* v *G W Ry Co*, [1897] 1 Q B 300
(*f*) *Tillett* v *Ward*, 10 Q B D 17
(*g*) *Per* Bray, J, in *Hadwell* v *Righton*, [1907] 2 K B 345, at p 346, *Higgins* v *Searle*, 100 L T 280

The above instances (which might easily be extended through a much greater space than it has been thought desirable to occupy), will, it is hoped, suffice to give a general view of the manner in which the maxim, *sic utere tuo ut alienum non lædas*, is applied in our law to restrict the enjoyment of property, and to regulate in some measure the conduct of individuals, by enforcing compensation for injuries wrongfully occasioned by a violation of the principle which it involves, a principle which is obviously based in justice, and essential to the peace, order, and well-being of the community As deducible from the cases cited in the preceding pages, and from others to be found in our Reports, the following propositions may, it is conceived, be stated —

1 It is, *prima facie*, competent to any man to enjoy and deal with his own property as he chooses

2 He must, however, so enjoy and use it as not to affect injuriously the rights of others

3 Where rights are such as, if exercised, to conflict with each other, we must consider whether the exercise of the right claimed by either party be not restrained by the existence of some duty imposed on him towards the other Whether such duty be or be not imposed must be determined by reference to abstract rules and principles of law

4 A man cannot by his tortious act impose a duty on another

5 But, lastly, a wrongdoer is not necessarily, by reason of his being such, disentitled to redress by action, as against the party who causes him damage, for sometimes the maxim holds that *injuria non excusat injuriam* (*h*)

CUJUS EST SOLUM EJUS EST USQUE AD CŒLUM (*Co Litt* 4 *a*) — *He who possesses land possesses also that which is above it* (*i*)

Signification of term "land"

Land, in its legal signification, has an indefinite extent upwards, so that, by a conveyance of land, all buildings, growing

(*h*) This maxim is also sometimes applicable where the action is founded upon contract See (*ex gr*) *Alston* v *Herring*, 11 Exch 822, at p 830, *Hilton* v *Eckersley*, 6 E & B 47, at p 76, *Hornby* v *Close*, L R 2 Q B 153, *Farrer* v *Close*, L R 4 Q B 602

(*i*) A maxim of general application (*per* Grove, J , in *R* v *Keyn*, 2 Ex D 63, at p 116)

timber, and water, erected and being thereupon, likewise pass (*k*) So, if a man eject another from land, and afterwards build upon it, the building belongs to the owner of the ground on which it is built, according to the principle *ædificatum solo solo cedit* (*l*), which we shall presently consider

Injury caused by adjoining building

From the maxim *cujus est solum ejus est usque ad cœlum*, it follows that a person has no right to erect a building on his own land which interferes with the due enjoyment of adjoining premises, and occasions damage thereto, either by overhanging them, or by the flow of water from the roof and eaves upon them, unless, indeed, a legal right so to build has been conceded by grant, or may be presumed by user and by operation of the Prescription Act, 1833 (2 & 3 Will 4, c 71)

Where the declaration alleged that the defendant had erected a house upon his freehold, so as to project over the plaintiffs' house *ad nocumentum liberi tenementi ipsorum*, but did not assign any special nuisance, the Court held the declaration good, because the erection must evidently have been a nuisance productive of legal damage (*m*), and it has been held that the erection of a cornice projecting over another's garden is a nuisance, from which the law will infer injury, and for which, therefore, an action will lie (*n*)

Injury to reversion

With respect to the nature of the remedy for an injury of this kind, not only will an action lie at suit of the occupier, but the reversioner may also sue where injury is done to the reversion, provided such injury be of a *permanent* character (*o*), or prejudicially affect the reversionary interest (*p*) It is well

(*k*) Co Litt 4 a, *Baten's Case* 9 Rep 53 b, at 54 a *Allaway* v *Wagstaff*, 4 H & N 307

(*l*) *Post*, p 264

(*m*) *Baten's Case*, 9 Rep 53 b See also *Penruddock's Case*, 5 Rep 100 b

(*n*) *Fay* v *Prentice*, 1 C B 828, *per* Pollock, C B, in *Solomon* v *Vintners Co*, 4 H & N 585, at p 600

(*o*) *Simpson* v *Savage*, 1 C B N S 347, where the cases are collected See particularly *Mumford* v *Oxford, &c, Ry Co*, 1 H & N 34, *Battishill* v *Reed*, 18 C B 696, *Cox* v *Glue*, 5 C B 533, *Tucker* v *Newman*, 11 A & E 40 *Jackson* v *Pesked*, 1 M & S 234, *Kidgill* v *Moor*, 9 C B 364, *Bell* v *Mid Ry Co*, 10 C B N S 287

As to the distinction between injuries to realty of a permanent and of a merely temporary kind, see also *Hammersmith & City Ry Co* v *Brand*, L R 4 H L 171, *Rickett* v *Metr Ry Co*, L R 2 H L 175

Case will lie by the reversioner for a permanent injury to a chattel let out on hire, *Mears* v *L & S W Ry Co*, 11 C B N S 850

(*p*) *Metr Association* v *Petch*, 5 C B N S 504, *Nott* v *Shoolbred*, L R 20 Eq 22, *Cooper* v *Crabtree*, 20 Ch D 589

settled that a man may be guilty of a nuisance as well in continuing as in erecting a building on the land of another (*q*)

Injury by overhanging trees

If a landowner allows the branches of his trees to overhang his boundary, his neighbour has a right of action for actual damage caused thereby, and the neighbour is entitled to cut the branches back, whether or not they cause damage, but it is doubtful whether, in the absence of actual damage, an action lies (*r*) In an action of trespass for nailing a board on the defendant's own wall, so as to overhang the plaintiff's garden, the maxim *cujus est solum ejus est usque ad cœlum* was cited in support of the form of action, but Lord Ellenborough (*s*) observed that he did not think it was a *trespass* to interfere with the column of air superincumbent on the close that, if it was, then an aeronaut was liable to an action of trespass by the occupier of every field over which his balloon might pass, since the question, whether the action was maintainable, could not depend upon the length of time for which the superincumbent air was invaded and that, if any damage arose from the board overhanging the close, the remedy was by action on the case, and not by action of trespass (*t*)

Action for nuisance

It must be observed, moreover, that the maxim under consideration is not a presumption of law applicable in all cases and under all circumstances, for example, it does not apply to chambers in the inns of court (*u*) or to flats, for "a man may have an inheritance in an upper chamber, though the lower buildings and soil be in another" (*x*)

Land extends downwards as well as upwards

Not only has land in its legal signification an indefinite extent upwards, but in law it extends also downwards, so that whatever is in a direct line between the surface and the centre of the earth belongs to the owner of the surface, and hence the word "land," which is *nomen generalissimum*, includes, not only the face of the earth, but everything under it or over it, and if a man grants all his lands, he grants thereby all his mines, woods, waters, and houses, as well as his fields and meadows (*y*) Where, however,

(*q*) *Battishill* v *Reed*, 18 C B 696, at p 713 (citing *Holmes* v *Wilson*, 10 A & E 503, *Thompson* v *Gibson*, 7 M & W 456, *Bouyer* v *Cook*, 4 C B 236)

(*r*) *Smith* v *Goddy*, [1904] 2 K B 448, *Lemmon* v *Webb*, [1895] A C 1

(*s*) *Pickering* v *Rudd*, 4 Camp 219, see also *per* Shadwell, V C, in *Saunders* v *Smith*, ed by Crawford, at p 20 *Kenyon* v *Hart* 6 B & S 249, at p 252

(*t*) See *Reynolds* v *Clarke* 2 Raym, Ld, 1399, *Fay* v *Prentice*, 1 C B 828, *Corbett* v *Hill*, L R 9 Eq 671

(*u*) *Per* Maule, J, in *Fay* v *Prentice*, 1 C B 828, at p 840

(*x*) Co Litt 48 b

(*y*) 2 Blac Com 18

a demise was made of premises late in the occupation of A (particularly described), part of which was a yard, it was held, that a cellar, situate under the yard, and late in the occupation of B, did not pass; for though *prima facie* it would pass, yet that might be regulated and explained by circumstances (*z*)

The maxim, then, above cited, gives to the owner of the soil all that lies beneath its surface Whether, therefore, it be solid rock, or porous ground, or venous earth, or part soil and part water, the owner of the surface may dig therein, and apply all that is there found to his own purposes, at his free will and pleasure (*a*), although, as already stated, he may incur liability by so digging at the extremity and under the surface of his own land as to occasion damage to his neighbour's ancient house (*b*)

Separate property in surface and minerals

But, although the general rule, which obtains in the absence of any express agreement between the parties interested in land, is as above stated, and although it is a presumption of law that the owner of the freehold has a right to the minerals underneath, yet this presumption may be rebutted by showing a distinct title to the surface, and to that which is beneath, for mines may form a distinct possession and different inheritance and it frequently happens that a person, being entitled both to the mines and to the land above, grants away the land, excepting out of the grant the mines, which would otherwise have passed thereby, and also reserving to himself power to enter upon the surface of the land granted away, in order to do all acts necessary for the purpose of getting the minerals excepted out of the grant, compensation being made to the grantee for the exercise of the power In this case one person has the land above, the other has the mines below, with the power of getting the minerals, and the rule is, according to the maxim *sic utere tuo ut alienum non lædas*, already considered, that each shall so use his own right of property as not to injure his neighbour, and, therefore, the grantor will be entitled to such mines only as he can work, leaving a proper support to the surface And here we may observe, that if a man *excepts* out of a grant all mines and minerals, he excepts also the right of

(*z*) *Doe* d *Freeland* v *Burt*, 1 T R 701 See *Denison* v *Holliday*, 1 H & N 631, and the maxim, *cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit*, *infra*, p 307

(*a*) Judgm in *Acton* v *Blundell*, 12 M & W 324, at p 354

(*b*) 1 Crabb, Real Prop, p 93

doing all things necessary for the purpose of obtaining the mines and minerals so excepted (*c*), as, for example, the right of going upon the land and making shafts and erecting engines

If there be a grant of an upper room in a house with a reservation of a lower room to the grantor, he undertaking not to do anything which will derogate from the right to occupy the upper room, in this case, if the grantor were to remove the supports of the upper room, he would be liable in an action of covenant (*d*)

It may be noticed, in conclusion, that the maxim under consideration does not apply in favour of local authorities, in whom streets are vested by virtue of the Public Health Act, 1875, s 149, or any similar enactment Such enactments vest in the authority such property only as is necessary for the control, protection and maintenance of the streets as highways for public use, and confer no general proprietary rights in the air above or the ground below the streets (*e*)

QUICQUID PLANTATUR SOLO SOLO CEDIT (*Wentu Off Ex*, 14*th ed* 145)—*Whatever is affixed to the soil belongs thereto*

It may be stated, as a general rule of great antiquity, that, whatever is affixed (*f*) to the soil becomes, in contemplation of law, a part of it, and is subjected to the same rights of property as the soil itself In the Institutes of the Civil Law it is laid down, that if a man build on his own land with the materials of another, the owner of the soil becomes, in law, the owner also of the building *quia omne quod solo inædificatur solo cedit* (*g*) In this case, indeed, the property in the materials used still continued in the original owner, and although, by a law of the XII Tables, the object of which was to prevent the destruction of buildings, he was unable, unless

(*c*) *Cardigan* v *Armitage*, 2 B & C 197, *Clark* v *Cogge*, Cro Jac 170, *Hayles* v *Pease*, [1899] 1 Ch 567

(*d*) *Harris* v *Ryding*, 5 M & W 60, at pp 71, 76

(*e*) *Tunbridge Wells* v *Baird*, [1896] A C 434, *Wandsworth* v *United Tel Co*, 13 Q B D 904

(*f*) "In several of the old books the word *fixatur* is used as synonymous with *plantatur*" in this maxim (Judgm in *Climie* v *Wood*, L R 3 Ex 257, at p 260) As to buried chattels, see *Elwes* v *Brigg Gas Co*, 33 Ch D 562, at pp 566, 567

(*g*) I 2, 1, 29 D 47, 3, 1

the building were taken down, to reclaim the materials *in specie*, he was, nevertheless, entitled to recover double their value as compensation by the action *de tigno juncto* (*g*) On the other hand, if a person built, with his own materials, on the land of another, the house likewise belonged to the owner of the soil, for in this case, the builder was presumed intentionally to have transferred his property in the materials to such owner (*h*) In like manner, if trees were planted or seed sown in the land of another, the owner of the soil became owner also of the tree, the plant, or the seed, as soon as it had taken root (*i*) And this latter proposition is fully adopted, almost in the words of the civil law, by our own law writers—Britton, Bracton, and the author of Fleta (*k*) By Roman law, indeed, where buildings were erected upon, or improvements made to property, by the party in possession, *bona fide* and without notice of any adverse title, compensation was, it seems allowed for such buildings and improvements to the party making them, as against the rightful owner (*l*), and although this principle is not recognised by our own common law, nor to its full extent by Courts of equity, yet, where a man, supposing that he has an absolute title to an estate, builds upon the land with the knowledge of the rightful owner, who stands by, and suffers the erection to proceed, without giving any notice of his own claim, he will be compelled, by a Court of equity, in a suit brought for recovery of the land, to make due compensation for such improvements (*m*) As to the equity arising from valuable and lasting improvements, I do not consider," remarked Lord Chancellor Clare (*n*), "that a man who is conscious of a defect in his title, and with that conviction on his mind expends a sum of money in improvements, is entitled to avail himself of it If the person really entitled to the estate will

(*g*) See note (*g*), p 264

(*h*) I 2, 1, 30

(*i*) I 2, 1, 31 & 32 D 41, 1, 7, 13

(*k*) Britton (by Wingate) c 33, 180, Bracton, c 3, ss 4, 6, Fleta lib 3, c 2, s 12

(*l*) *Sed quamvis ædificium fundo cedat, fundi tamen dominus condemnari solet ut eum duntaxat recipiat, reddito sumptu quo pretiosior factus est aut super fundo atque ædificio pensio imponatur ex meliorationis æstimatione si maluerit* Gothofred *ad* I 2 1 30 (Corp Jur Civ , 1633d ed , p 10)

(*m*) 1 Story, Eq Jurisp , 12th ed s 388 2 Id s 1237, *Ramsden* v *Dyson*, L R 1 H L 129

(*n*) *Kenney* v *Browne*, 3 Ridg P C 462, at p 519 cited Arg *Austin* v *Chambers* 6 Cl & F 1, at p 31 See, *per* Ld Brougham, in *Perrott* v *Palmer*, 3 My & K 632, at p 640

encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such expenditure without apprising the party of his intention to dispute his title, and will afterwards endeavour to avail himself of such fraud—upon the ground of fraud the jurisdiction of a Court of equity will clearly attach upon the case "

Having thus touched upon the general doctrine, that what has been affixed to the freehold becomes a portion of it, we shall consider how the maxim, *quicquid plantatur solo solo cedit*, applies to 1st, trees, 2ndly, emblements, 3rdly, away-going crops, and, 4thly, fixtures,—treating these important subjects with brevity, and merely endeavouring to give a concise outline of the law respecting each

Who may cut timber

1 A tree, whether alive or dead, so long as it is attached to the soil, is realty by severance from the soil it becomes personalty (*o*) Trees are divisible into two classes, timber trees and trees which do not bear timber By the general law oak, ash and elm are timber, if they be of the age of twenty years or more and contain a reasonable quantity of useable wood, whereas other trees are not timber except by special local custom (*p*) As a rule, timber is part of the inheritance, and may not be felled by a tenant for life or years impeachable for waste, but an exception to this rule has been established in the case of "timber estates," cultivated merely for the produce of saleable timber and where the timber is cut periodically in due course (*q*) Moreover, a tenant, who is answerable for waste only, may fell timber of suitable wood, as well as other trees, for the purpose of making therewith necessary repairs to the premises, the decay not being due to his own default (*r*)

Who may cut other trees

Trees which are not timber may, as a rule, be cut by a tenant for life or years impeachable for waste, but he may not cut down trees planted for ornament, or protection of a house or bank, nor may he change the nature of the premises, as by stubbing up a wood or a hedge, or stools of underwood, for such acts, being prejudicial to the inheritance, are acts of waste, and he may not cut trees destined to become timber, except for

(*o*) *Re Anslie*, 30 Ch D 485, *Re Llewellin*, 37 Ch D 317, at p 324

(*p*) *Honywood* v *Honywood*, L R 18 Eq 306, at p 309, see Cru Dig, 4th ed 116 (7)

(*q*) *Dashwood* v *Magniac*, [1891] 3 Ch 306, where much of the law relating to timber is collected *Re Trevor Batye's Settlement*, [1912] 2 Ch 339

(*r*) Co Litt 41 b, 53 a, b, 54 b, *Simmons* v *Norton*, 7 Bing 640, *Sowerby* v *Fryer*, L R 8 Eq 417

the purpose of allowing the growth of other timber in a proper manner (*s*)

Tenant without impeachment of waste

A tenant for life or years, "without impeachment of waste," is entitled to cut down all the ordinary timber, as well as other trees, upon the estate, but it has long been established that equity will restrain him from committing what is called "equitable waste," as by felling timber planted or left standing for the shelter or ornament of the mansion house or grounds (*t*)

Tenant in tail

An ordinary tenant in tail may fell timber at his pleasure, but if standing woods be sold by him and these be not felled during his life, the property therein descends with the estate and the buyer cannot cut them (*u*) A tenant in tail, after possibility of issue extinct, may cut timber, but his position differs from that of an ordinary tenant in tail, for he may be restrained from equitable waste (*x*)

Settled Land Act

The Settled Land Act, 1882 (*y*), provides that where a tenant for life is impeachable for waste in respect of timber, and there is timber ripe and fit for cutting, he may, on obtaining the consent of the trustees of the settlement, or an order of the Court, cut and sell that timber Three-fourths of the net proceeds become capital money, and the residue goes as rents and profits

Property in severed trees

Apart from "timber estates," and from cases where timber is cut pursuant to statute, the general rule is that timber, severed during the possession of a tenant for life or years who is impeachable for waste, belongs to the person entitled to the first vested estate of inheritance in fee or in tail (*z*), and this rule holds, although there be intermediate interests (*a*) Equity, however, will interfere to protect such interests, and will prevent the tenant from deriving benefit from his wrongful act, if the owner of the first vested estate of inheritance collude with the

(*s*) *D Arcy* v *Askwith*, Hob 234, *Phillipps* v *Smith*, 14 M & W 589, *Honywood* v *Honywood*, L R 18 Eq 306, at p 310 See *Bagot* v *Bagot*, 32 Beav 509

(*t*) *Packington's Case*, 3 Atk 215, *Downshire* v *Sandys*, 6 Ves 107, *Baker* v *Sebright*, 13 Ch D 179

(*u*) *Liford's Case*, 11 Rep 46 b, at 50 a, *Cholmeley* v *Paxton*, 3 Bing 207, at p 211

(*x*) *Williams* v *Williams*, 15 Ves 419, at p 427, and 12 East, 209, *A G* v *Marlborough*, 3 Mad 498, at p 538

(*y*) 45 & 46 Vict c 38, s 35

(*z*) *Bowle's Case*, 11 Rep 79 b at 81 b, *Bewick* v *Whitfield*, 3 Peere Wms 266, at p 268, *Honywood* v *Honywood*, L R 18 Eq 306, at p 311

(*a*) *Pigot* v *Bullock*, 1 Ves 479, at p 484, *Re Barrington*, 33 Ch D 527

tenant to induce him to cut down timber (*b*) If the tenant in possession be without impeachment of waste, the property in the timber, when severed, generally vests in him (*c*) The property in trees not being timber generally vests, upon their severance, in the tenant in possession (*d*)

Emblements

2 Emblements comprise not only corn sown, but roots planted, and other annual artificial profits of the land (*e*), and these, in certain cases, are distinct from the realty, and subject to many of the incidents attending personal property The rule at common law, and irrespective of the statute noticed below (*f*) is, that those only are entitled to emblements who have an uncertain estate or interest in land, which is determined by the act of God, or of the law, between the sowing and the severance of the crop (*g*) Where, however, the tenancy is determined by the tenant's own act, as by forfeiture for waste, or by the marriage of a tenant *durante viduitate*, the tenant is not entitled to emblements, for the principle on which the law gives emblements is, that the tenant may be encouraged to cultivate by being sure of receiving the fruit of his labour, notwithstanding the determination of his estate by some unforeseen and unavoidable event (*h*) By this rule, however, the tenant is not entitled to every single one of the fruits of his labour, or such right might be extended to things of a more permanent nature, such as trees, or to more crops than one since the cultivator often looks for a compensation for his capital and labour in the produce of successive years, but the principle is limited to this extent, that he is entitled to one crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period (*i*)

(*b*) *Honywood* v *Honywood*, L R 18 Eq 306, at p 311, *Re Harrison's Trusts*, 28 Ch D 220, at p 228, see *Seagram* v *Knight*, L R 2 Ch 628 *Lowndes* v *Norton*, 6 Ch D 139

(*c*) *Pyne* v *Dor*, 1 T R 55 see *Re Barrington*, 33 Ch D 523, at p 527

(*d*) *Honywood* v *Honywood*, *supra*, at p 311, *Channon* v *Patch*, 5 B & C 897, *Berriman* v *Peacock*, 9 Bing 384

(*e*) Com Dig, "*Biens*" (G 1)

(*f*) *Post*, p 321

(*g*) Co Litt 55 a

(*h*) Com Dig, "*Biens*' (G 2)

(*i*) *Graves* v *Weld*, 5 B & Ad 105, at pp 117, 118, citing *Kingsbury* v *Collins*, 4 Bing 202 In *Latham* v *Atwood*, Cro Car 515, hops growing from ancient roots were held to be emblements, being ' such things as grow by the manurance and industry of the owner "

Tenant for life

If, then, a tenant for life, or *pur autre vie*, sow the land, and die before harvest, his executors shall have the emblements or profits of the crop, and if a tenant for life sow the land, and afterwards grant over his estate, and the grantee die before the corn is severed, it shall go to the tenant for life, and not to the grantee's executor, whereas, if a man sow land, and let it for life, and the lessee for life die before the corn is severed, the reversioner, and not the lessee's executor, shall have the emblements, although, if the lessee himself had sown, it would have been otherwise (*k*)

Further, the tenants or under-tenants of tenant for life will be entitled to emblements, in cases where tenant for life shall not have them, viz , where the life estate determines by the act of the tenant for life Thus, where a woman holds *durante viduitate*, her marriage is her own act, and therefore deprives her of the emblements but if she lease her estate to a tenant who sows the land, and she then marries, this act shall not deprive her tenant of his emblements, for he is a stranger and could not prevent her (*l*) All these cases evidently involve the application of the general principle above stated

Parson

So, the parochial clergy are tenants for their own lives, with a power enabling the parson to dispose of the corn by will, but, if the estate is determined by the act of the parson himself, as by his resigning his living, then according to the principle above stated, he will not be entitled to emblements The position, however, of the lessee of the glebe, if the parson resign, is different, for, his tenancy being determined by another's act, he shall have the emblements (*m*)

Tenant for years and tenant from year to year

A tenant for years, where the end of the term is certain, is not entitled to emblements (*n*), but a tenant from year to year, if the lessor determine the tenancy, seems to be entitled to emblements because he does not know in what year his lessor may determine the tenancy by notice to quit, and in that respect he has an uncertain estate (*o*) If the tenancy depend upon an uncertainty, as upon the death of the lessor, who is tenant for life or a husband seised in right of his wife, or if the term be determinable upon a life or lives, in these and similar cases, the estate not being certainly to expire for a time foreknown,

(*k*) Arg *Knevett* v *Pool*, Cro Eliz 463
(*l*) Co Litt 55 b
(*m*) *Bulwer* v *Bulwer*, 2 B & Ald 470, at p 472
(*n*) Co Litt 56 a
(*o*) *Kingsbury* v *Collins*, 4 Bing 202, at p 207

but merely by the act of God, the tenant, or his representatives, shall have the emblements in the same manner as a tenant for life would be entitled to them (*p*), and if the lessee of tenant for life be disseised, and the lessee of the disseisor sow, and then the tenant for life dies, and the remainderman enters, the latter shall not have the corn, but the lessee of the tenant for life (*q*)

Where, however, a tenant for years, or from year to year, himself determines the tenancy, as if he commit forfeiture, the landlord shall have the emblements (*r*), and it is a general rule that he shall take them when he enters for a condition broken, because he enters by title paramount, and is in as of his first estate (*s*) Where a lease was granted on condition, that, if the lessee should be sued for any debt to judgment, followed by execution, the lessor should re-enter as of his former estate, it was held that the lessor, having re-entered after a judgment and execution, was entitled to the emblements (*t*)

Tenant at rack rent

Where a tenant of any farm or lands holds the same at a rack-rent, it is now provided by the Landlord and Tenant Act, 1851 (*u*), that, instead of claiming emblements, he "shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate", and the section further provides for an apportionment of the rent as between the tenant and the succeeding owner The Act applies to, and only to, any tenancy in respect of which there is a substantial claim to emblements (*x*) and now, in practically all cases, tenants avail themselves of its provision, so that claims for emblements by agricultural tenants have become rare

Heir, devisee, &c

It has been mentioned that emblements are subject to many of the incidents attending personal property Thus, by the Distress for Rent Act (*y*), they may be distrained for rent (*z*),

(*p*) Woodf , L & T , 20th ed , pp 902 903
(*q*) *Knevett* v *Pool*, Cro Eliz 463 (*r*) Co Litt 55 b
(*s*) *Per* Bosanquet, J , in *Davis* v *Eyton*, 7 Bing 154, at p 160, Com Dig , *Biens* " (G 2), Co Litt 55 b
(*t*) *Davis* v *Eyton*, 7 Bing 154 (*u*) 14 & 15 Vict c 25, s 1
(*x*) *Haines* v *Welch*, L R 4 C P 91, *Stradbroke* v *Mulcahy*, 2 Ir C L R 406
(*y*) 11 Geo 2, c 19
(*z*) See also the Sale of Farming Stock Act, 1816 (56 Geo 3, c 50, *Hutt* v *Morrell*, 11 Q B 425

they were forfeitable by outlawry in a personal action, they were devisable before the Statute of Wills, and at the death of the owner they vest in his executors as personalty (*a*) So, where tenant in fee or in tail dies after the corn has been sown, but before severance, it shall go to his personal representatives and not to the heir (*b*) If, however, tenant in fee sows land, and then devises the land by will and dies before severance, the devisee shall have the corn (*c*), and although it is not easy to account for this distinction, which gives growing corn to the devisee, but denies it to the heir (*d*), it is clear law that the growing crops pass to the devisee of the land, unless expressly bequeathed to some one else (*e*) The remainderman for life shall also have the emblements sown by the devisor in fee, in preference to the executor of the tenant for life (*f*), and the legatee of goods, stock, and movables, is entitled to growing corn in preference both to the devisee of the land and the executor (*g*)

Tenant at will

In the case of strict tenancy at will—which seldom exists in the case of an agricultural holding—if the tenant sow his land, and the landlord, before the corn is ripe, or reaped, put him out, the tenant shall have the emblements, since he could not know when his landlord would determine his will, and therefore could not provide against it, but it is otherwise if the tenant himself determine the will, for then the landlord shall have the profits of the land (*h*)

Tenant under execution

Tenants under execution are entitled to emblements when, by some sudden and casual profit, arising between seed-time and harvest, the tenancy is determined by the judgment being satisfied (*i*) Again, if A acknowledge a statute or recognizance, and afterwards sow the land, and the conusee extend the land, the conusee shall have the emblements (*k*) Where judgment was given against a person, and he then sowed the land and brought a writ of error to reverse the judgment, but

(*a*) 2 Blac Com 404
(*b*) Com Dig, "*Biens*" (G 2), Co Litt 55 b, n (2), by Hargrave
(*c*) *Anon*, Cro Eliz 61, Co Litt 55 b, n (2), *Spencer's Case*, Winch 51
(*d*) See Co Litt 55 b, n (2), Gilb Ev 250
(*e*) *Cooper* v *Woolfitt*, 2 H & N 122, at p 127, citing Shepp Touch (ed by Preston), 472
(*f*) Toll Exors 157
(*g*) *Cox* v *Godsalve*, 6 East, 604, n, *West* v *Moore*, 8 East, 339
(*h*) Litt s 68 Co Litt 55
(*i*) Woodf L & T, 20th ed p 905
(*k*) *Bardens and Withington's Case*, 2 Leon 54

it was affirmed, it was held that the recoveror should have the corn (*l*)

Away going crops

3 An away-going crop may be defined to be the crop sown during the last year of tenancy, but not ripe until after its expiration The right to this is usually vested in the out-going tenant, either by the express terms of the lease or contract, or by the usage or custom of the country, but in the absence of any contract or custom, and provided the law of emblements does not apply, the landlord is entitled to crops unsevered at the determination of the tenancy, as being a portion of the realty, and by virtue of the general maxim, *quicquid plantatur solo solo cedit*, and this rule of the common law still obtains, except in so far as it has been modified by statute (*m*)

The common law, it has been observed, does so little to prescribe the relative duties of landlord and tenant, that it is not surprising that the Courts have been favourably inclined to the introduction of those regulations in the mode of cultivation which custom and usage have established in each district to be the most beneficial to all parties (*n*) The rule, therefore, is that evidence of custom is receivable, although there be a written instrument of demise, provided the incident which it is sought to import into the contract be consistent with the terms of such contract, but evidence of custom is inadmissible, if inconsistent with the express or implied terms of the instrument, and this rule applies to tenancies as well by oral agreement as by deed or written contract (*o*)

Wigglesworth v Dallison

In *Wigglesworth* v *Dallison* (*p*), a leading case on this subject, the tenant was allowed an away-going crop, although there was a formal lease under seal The lease was entirely silent concerning such a right, and Lord Mansfield said that "the custom did not alter or contradict the lease, but only added something to it"

Hutton v Warren

In *Hutton* v *Warren* (*q*), it was held that a custom, by

(*l*) *Wicks* v *Jordan*, 2 Bulstr 213

(*m*) As to the tenant's right, under modern statutes, to compensation for improvements, see the Agricultural Holdings Act, 1923 (13 & 14 Geo 5, c 9)

(*n*) Judgm in *Hutton* v *Warren*, 1 M & W 466

(*o*) *Wigglesworth* v *Dallison*, 1 Dougl 201, *Faviell* v *Gaskoin*, 7 Exch 273, *Tuncey* v *Dennis*, 1 H & N 216, *Clarke* v *Roystone*, 13 M & W 752

(*p*) 1 Dougl 201, affirmed in error, Id 207, n (8) See *Beavan* v *Delahay*, 406 Tack H, 5 (recognised in *Griffiths* v *Puleston*, 13 M & W 358, at p 360),

(*q*) Ut v *Bennett* 3 Bing 361, *White* v *Sayer*, Palm 211

(*r*) 8 1 M & W 466 Proof of the custom lies on the out going tenant (*Caldecott v Sorrell*, Thies, 7 C & P 808)

which the tenant, cultivating according to the course of good husbandry, was entitled on quitting to receive from the landlord or incoming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and was bound to leave the manure for the landlord, if he would buy it, was not excluded by a stipulation in the lease to consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be so spread on the land for the use of the landlord on receiving a reasonable price for it

Tenant holding over

Where a tenant continues to hold over after the expiration of his lease, without coming to any fresh agreement with his landlord, he must be taken to hold generally under the terms of the lease (*r*), on which, therefore, the admissibility of evidence of custom will depend (*s*)

Principle on which right depends

The principle with respect to the right to an away-going crop applies equally to a tenancy from year to year as to a lease for a longer term (*t*), such custom, it has been observed, is just, for he who sows ought to reap, and it is for the encouragement of agriculture It is, indeed, against the general rule concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is their fault or folly to sow when they know their interest will expire before they can reap But the custom of a particular place may rectify what otherwise would be imprudence (*u*) It may be observed, too, that the question as to away-going crops under custom is quite a different matter from emblements, which are by the common law (*x*)

Fixtures — Preliminary remarks

4 The doctrine as to fixtures peculiarly illustrates the maxim under consideration, for the general rule, laid down in the old books, is, that "whenever a tenant has affixed anything to the demised premises during his term, he can never again sever it without the consent of his landlord" (*y*) The old rule,

(*r*) See further as to this, *Hyatt* v *Griffiths*, 17 Q B 505, *Thomas* v *Packer*, 1 H & N 669

(*s*) *Boraston* v *Green*, 16 East, 71, *Roberts* v *Barker*, 1 C & M 808, *Griffiths* v *Puleston*, 13 M & W 358 See *Kimpton* v *Eve*, 3 Ves & B 349

(*t*) *Onslow* v ——, 16 Ves jun 173 See *Thorpe* v *Eyre*, 1 A & E 926, where the custom was held not to be available upon a tenancy being determined by an award, *Ex p Maundrell*, 2 Mad 315

(*u*) Judgm in *Wigglesworth* v *Dallison*, 1 Dougl 201, *Dalby* v *Hirst*, 1 B & B 224

(*x*) See Com Dig, "*Biens*" (G 2)

(*y*) Amos & Fer on Fixtures, 2nd ed p 19

observed Martin, B (*z*), is, "that if the tenant or the occupier of a house or land annex anything to the freehold, neither he nor his representatives can afterwards take it away, the maxim being, *quicquid plantatur solo solo cedit* But as society progressed, and tenants for lives or for terms of years of houses, for the more convenient or luxurious occupation of them, or for the purposes of trade, affixed valuable articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and of deeming such things practically forfeited to the owner of the fee simply by the mere act of annexation, became apparent to all, and there long ago sprang up a right, supported by the Courts of law and equity, in the temporary owner or occupier of real property, or his representative, to disannex and remove certain articles, though annexed by him to the freehold, and these articles have been denominated *fixtures*"

Questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons, 1st, between the heir and the personal representatives of tenant in fee, 2ndly, between the personal representatives of tenant for life or in tail and the remainderman or reversioner, 3rdly, between landlord and tenant In the first of these cases, the general rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to treat as a personal chattel anything which has been affixed thereto, in the second case, the claims of the personal representatives to fixtures are considered more favourably, and, in the last case, the greatest indulgence has been allowed in favour of the tenant (*a*),—so that decisions, establishing the right of the personal representatives to fixtures in the first or second case, apply, *a fortiori*, to the third

Meaning of term

It is here necessary to remark, that the term "fixtures" is often used indiscriminately of articles which are not by law removable when once attached to the freehold, and of articles which are severable therefrom (*b*) But, in its correct sense,

(*z*) In *Elliott* v *Bishop* 10 Exch 496, at pp 507, 508

(*a*) *Per* Ld Ellenborough in *Elwes* v *Maw*, 3 East, 38, at p 51, *per* Abbott, C J, in *Colegrave* v *Dias Santos*, 2 B & C 76, at p 78

(*b*) *Per* Parke, B, in *Minshall* v *Lloyd*, 2 M & W 450, at p 459, Judgm in *Climie* v *Wood*, L R 3 Ex 257, at p 260 'There is no doubt that sometimes things annexed to land remain chattels as much after they have been annexed as they were before The case of pictures hung on a wall for the purpose of being more conveniently seen may be mentioned by way of illustration On the other hand things may be made so completely a part of the land as being essential to its

to constitute an article a fixture, *i e*, part of the realty, it must be actually annexed thereto, and, *e converso*, whatever is so annexed becomes part of the realty, and the person, who was the owner of it when a chattel, loses his property in it, which immediately vests in the owner of the soil It must be observed, however, that the mere fact of physical attachment is not conclusive as to whether an article is a fixture Thus, even if a chattel is actually affixed to the freehold it does not become part thereof if the annexation is incomplete so that it can be easily removed without damage to itself or the premises to which it is attached, and the annexation is merely for a temporary purpose and its more complete enjoyment and use as a chattel (*c*) On the other hand articles, such as movable dog-grates, placed in the house with the object of improving the inheritance are fixtures and become part of the freehold even though they are not physically attached to the structure of the house (*d*) Moreover, there are cases in which things which are fixtures may be disannexed and carried away by some person claiming property in them, as against the owner of the freehold (*e*)

Trade fixtures

The strictness of the rule under consideration was very early relaxed, as between landlord and tenant, in favour of such fixtures as are partly or wholly essential to trade or manufacture (*f*), and the same relaxation has, in several cases, been extended to disputes between heir and executor In *Elwes* v *Maw*, which is a leading authority on fixtures, Lord Ellenborough observed (*g*) that, in determining whether a particular fixed instrument, machine, or even building should be considered as removable by the executor as against the heir, the

convenient use, that even a tenant could not remove them An example of this class of chattel may be found in doors or windows Lastly, things may be annexed to land for the purposes of trade, or of domestic convenience or ornament, in so permanent a manner as really to form a part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration, said Willes, J, delivering the judgment of the Court of Exchequer Chamber in *Climie* v *Wood*, L R 4 Ex 328, see also *Longbottom* v *Berry*, L R 5 Q B 123, *per* Blackburn, J, in *R* v *Lee* L R 1 Q B 241, at p 253

(*c*) *Lyon* v *Lond Cit & Mid Bank*, [1903] 2 K B 135, *Leigh* v *Taylor*, [1902] A C 157, *Hill* v *Bullock*, [1897] 2 Ch 482

(*d*) *Monti* v *Barnes*, [1901] 1 Q B 205

(*e*) 2 Smith s L C, 12th ed pp 209 *et seq*

(*f*) Judgm in *Elwes* v *Maw*, 3 East, 38, at pp 51, 52

(*g*) 3 East, 38, at p 59

Court in three earlier cases (*h*) may be considered as having decided mainly on this ground, that where the fixed instrument, engine, or utensil (and the building covering it falls within the same principle), was an accessory to a matter of a personal nature, it should be itself considered as personalty In two of these cases (*i*), a fire-engine was considered as an accessory to the trade of getting and vending coals—a matter of a personal nature In *Dudley* v *Warde*, Lord Hardwicke said, "A colliery is not only an enjoyment of the estate, but in part carrying on a trade," and in *Lawton* v *Lawton* he said, "One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands and carrying on a species of trade, and, considering it in this light, it comes very near the instances in brewhouses, &c , of furnaces and coppers" Upon the same principle Comyns, C B , may be considered as having decided the case of the cyder-mill (*k*), *i e*, as a mixed case, between enjoying the profits of the land and carrying on a trade, and as considering the cyder-mill as properly an accessory to the trade of making cyder In the case of the salt-pans (*l*), Lord Mansfield does not seem to have considered them as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance Upon this principle he considered them as belonging to the heir as parcel of the inheritance, for the enjoyment of which they were made, and not to the executor as the instrument of carrying on a trade (*m*)

In a case before the House of Lords, it appeared that the absolute owner of land, for the purpose of better using and enjoying that land, had affixed to the freehold certain machinery It was held that, in the absence of any disposition by him of this machinery it went to the heir as part of the real estate, and, further, that if the *corpus* of the machinery passed to the heir,

(*h*) *Lawton* v *Lawton*, 3 Atk 13, *Dudley* v *Warde*, Amb 113, and *Lawton* v *Salmon*, 1 Black H , 259, n

(*i*) *Lawton* v *Lawton*, *supra* *Dudley* v *Warde*, *supra*

(*k*) Cited in *Lawton* v *Lawton*, 3 Atk 13, but see Ld Hardwicke's observations on this case in *Lawton* v *Salmon*, 1 Black H , 259, n , in *Dudley* v *Warde*, Amb 113, and in *Ex p Quincey*, 1 Atk 477, see also Bull , N P 34 It seems that no rule of law can be extracted from a case of the particulars of which so little is known (*per* Ld Cottenham in *Fisher* v *Dixon*, 12 Cl & F 312, at p 329, and see also *per* Wood, V C , in *Mather* v *Fraser*, 2 K & J 536, reviewing the prior authorities)

(*l*) *Lawton* v *Salmon*, 1 Black H 259 *n*

(*m*) *Per* Ld Ellenborough in *Elwes* v *Maw*, 3 East, 38, at p 54 See *Winn* v *Ingilby*, 5 B & Ald 625 *R* v *St Dunstan*, 4 B & C 686, at p 691, *Harvey* v *Harvey*, Stra 1141

all that belonged to such machinery, although more or less capable of being detached from it, and of being used in such detached state, also passed to him (*n*) On the other hand, an engine or other article, though used for the purpose of trade, may be so affixed to the premises as to become a fixture and, as such, part of the freehold (*o*) and it is deemed to be so affixed, irrespective of the purpose for which it was used, if it cannot be removed without seriously damaging the premises (*p*)

Devisee and executor

As between devisee and executor the rule is the same as that already considered, the devisee standing in place of the heir as regards his right to fixtures, for, if a freehold house be devised, fixtures pass (*q*), but if tenant for life or in tail devise fixtures, his devise is void, he having no power to devise the realty to which they are incident He may, however, devise such fixtures as would pass to his executor (*r*)

Devisee and heir

As between the heir and devisee, it may be considered as a rule, that the devisee is entitled to all articles which are affixed to the land, whether the annexation took place before or after the date of the devise, according to the maxim, *quod adificatur in area legata cedit legato,* and, therefore, by a devise of a house, all personal chattels annexed to the house and essential to its enjoyment pass to the devisee (*s*)

Vendor and vendee

As between vendor and vendee, everything which forms part of the freehold passes by a sale and conveyance of the freehold itself, if there be nothing to indicate a contrary intention (*t*) Thus, in *Colegrave* v *Dias Santos* (*u*), the owner of a freehold house, containing fixtures, sold it by auction

(*n*) *Fisher* v *Dixon*, 12 Cl & F 312 In this case the exception in favour of trade was held not applicable, the judgments delivered contain, however, some remarks as to the limits of this exception which are worthy of consideration See also *Mather* v *Fraser*, 2 K & J 536, at p 545, Judgm in *Climie* v *Wood*, L R 4 Ex 328, Judgm in *Longbottom* v *Berry*, L R 5 Q B 123, at p 136

(*o*) *Hobson* v *Gorringe*, [1897] 1 Ch 182, *Reynolds* v *Ashby*, [1903] 1 K B 87, *Crossley Bros* v *Lee*, [1908] 1 K B 86, *Provincial Bill Posting Co* v *Low Moor Iron Co*, [1909] 2 K B 344 (advertisement hoarding)

(*p*) *Wake* v *Hall*, 8 App Cas 195, at p 204

(*q*) *Per* Best, J, in *Colegrave* v *Dias Santos*, 2 B & C 76, at p 80, *Norton* v *Dashwood*, [1896] 2 Ch 497, at p 500, *Whaley* v *Rochrich*, [1908] 1 Ch 615

(*r*) Shep Touch 469, 470 See *D Eyncourt* v *Gregory*, L R 3 Eq 382

(*s*) Amos & Fer, Fixtures, 3rd ed p 322

(*t*) *Colegrave* v *Dias Santos*, 2 B & C 76, cited, Arg, *Thresher* v *E Lond Water Works*, Id 608, at p 610, *per* Parke, B, in *Hitchman* v *Walton*, 4 M & W 409, at p 416, *per* Patteson, J, in *Hare* v *Horton*, 5 B & Ad 715, at p 730 See *Steward* v *Lombe*, 1 B & B 506, at p 513, *Ryall* v *Rolle*, 1 Atk 165, at p 175, *Thompson* v *Pettitt*, 10 Q B 101, *Wiltshear* v *Cottrell*, 1 E & B 674

(*u*) 2 B & C 76 See *Manning* v *Bailey*, 2 Exch 45

Nothing was said about the fixtures A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house It was held that they passed by the conveyance, and that even if they did not, the vendor, after giving up possession, could not maintain trover for them

Mortgagor and mortgagee

The maxim *quicquid plantatur solo solo cedit* applies in favour of a legal mortgage (*x*) of freeholds (*y*) or leaseholds (*z*), and in the absence of a stipulation to the contrary (*a*) all fixtures, whether annexed before (*b*) or after (*c*) the date of the mortgage, including trade fixtures (*d*), form part of the mortgagee's security and may not be removed without his consent, expressed or implied (*e*) Where the mortgagor attorns tenant to the mortgagee, this rule applies to fixtures annexed by the mortgagor during the tenancy (*f*), but if a mortgagor in possession lets the premises with the mortgagee's consent, his tenant has the same right to remove fixtures as other tenants (*g*) A mortgage of lands, which discloses no intention to confer such a power, does not empower the mortgagee to sever the fixtures thereon and sell them as chattels (*h*) The effect of the Bills of Sale Acts, 1878 and 1882 (*i*), is that a separate bill of sale is necessary in order that the mortgagee may have this power over any fixtures which are trade machinery, as defined by s 5 of the earlier of these Acts (*k*) The Acts, however, do not affect

(*x*) As to an equitable mortgagee, see *Tebb* v *Hodge*, L R 5 C P 73, *Re Lusty*, 60 L T 160, *Re Samuel Allen & Son, Ltd*, [1907] 1 Ch 575, *Re Morrison, Jones and Taylor*, [1914] 1 Ch 50

(*y*) *Climie* v *Wood*, L R 3 Ex 257 4 Id 328, *Longbottom* v *Berry*, L R 5 Q B 123, *Holland* v *Hodgson*, L R 7 C P 328, *Hobson* v *Gorringe*, [1897] 1 Ch 182, *Ellis* v *Glover & Hobson Ltd*, [1908] 1 K B 388

(*z*) *Ex p Astbury*, L R 4 Ch 630, *Meux* v *Jacobs*, L R 7 H L 481, *Southport Banking Co* v *Thompson*, 37 Ch D 64, *Reynolds* v *Ashby & Son*, [1904] A C 466

(*a*) It is a question of construction whether a mortgage which specifies some fixtures passes all, *Southport Banking Co* v *Thompson supra*

(*b*) *Climie* v *Wood*, *Holland* v *Hodgson*, *Hobson* v *Gorringe*, *supra*

(*c*) *Walmsley* v *Milne*, 7 C B N S 115, *Longbottom* v *Berry*, *Reynolds* v *Ashby & Son Ellis* v *Glover & Hobson, Ltd*, *supra*

(*d*) *Climie* v *Wood Longbottom* v *Berry*, *Hobson* v *Gorringe*, *Reynolds* v *Ashby & Son*, *supra*

(*e*) *Gough* v *Wood*, [1894] 1 Q B 713, was a case of implied consent, see *Hobson* v *Gorringe* and *Ellis* v *Glover & Hobson, Ltd*, *supra*

(*f*) *Ex p Punnett*, 16 Ch D 226

(*g*) *Sanders* v *Davis* 15 Q B D 218, recognised in *Gough* v *Wood* [1894] 1 Q B 713, see *Thomas* v *Jennings*, 66 L J Q B 5

(*h*) *Southport Banking Co* v *Thompson*, 37 Ch D 64, *Re Yates*, 38 Ch D 112, *Small* v *National Prov Bank*, [1894] 1 Ch 686, *Re Brooke*, [1894] 2 Ch 600

(*i*) 41 & 42 Vict c 31, 45 & 46 Vict c 43

(*k*) *Re Yates*, *supra*, *Small* v *National Provincial Bank*, *supra*

mortgages of lands which give such a power over fixtures thereon other than trade machinery, or which pass trade machinery thereon without giving any power to sever and sell it (*l*)

Valuation of fixtures

In case of an absolute sale of premises, where the conveyance is not general, but contains a stipulation that "the fixtures are to be taken at a valuation," those things only should in strictness be valued which would be deemed personal assets as between heir and executor, and would not pass with the inheritance (*m*)

Ornamental fixtures

It has been thought that ornamental fixtures form an exception to the general rule, and that fixtures which otherwise would pass to the heir or remainderman, do not pass, if they can be shown to be used for purposes of ornament merely The true test nevertheless seems to be, in questions between a tenant for life or other limited owner and the remainderman, the intention with which they are fixed If they are fixed with the intention of enjoying them whilst they are there and not with the intention of improving the freehold, they do not become part of the freehold, but remain personalty (*n*) An element in determining the intention is the method of fixing to the permanent structure and the extent to which it would be damaged by their removal (*o*) As between heir or devisee and legatee of personalty, the question is rather as to the intention of the testator—whether or not he intends them to pass by his will as chattels or to go with the freehold and here also it is material to consider whether the things in question were fixed as part of a general scheme of decoration, or merely for their better enjoyment as chattels (*p*) In the former case they pass under a devise of the house and not under a general gift of chattels

Trade fixtures as between tenant for life and remainder man

In the case of trade fixtures as between tenant for life and remainderman, the same question arises as in the case of ornamental fixtures, viz, the intention with which they are fixed, having regard to all the facts of the case, not the mode of attachment And as it is advantageous that the tenant for life should be able to improve the estate for his own enjoyment without being compelled to make a present to the remainderman, the strict rule has been largely relaxed in his case and the law will regard trade fixtures as personalty unless there is

(*l*) *Re Yates, supra*
(*m*) Amos & Fer, Fixtures, 3rd ed p 289
(*n*) *Leigh* v *Taylor*, [1902] A C 157
(*o*) *Hill* v *Bullock*, [1897] 2 Ch 482
(*p*) *Whaley* v *Roehrich*, [1908] 1 Ch 615

evidence of an intention to make a present of them to the remainderman (*q*)

Landlord and tenant

In cases between landlord and tenant, the general rule, that whatever has once been annexed to the freehold becomes a part of it, and cannot afterwards be removed, except by or with the consent of him who is entitled to the inheritance (*r*), must be qualified more largely than in the preceding classes Thus, the tenant may take away during his term, or at the end of it, although not after he has quitted possession, such fixtures as he has himself put upon the demised premises, either for the purposes of trade, or for the ornament or furniture of his house (*s*), but here a distinction must be observed between erections for the purposes of trade annexed to the freehold, and erections for purposes merely agricultural (*t*) With respect to the former, the exception engrafted upon the general rule is of almost as high antiquity as the rule itself, being founded upon principles of public policy, and originating in a desire to encourage trade and manufactures With respect to the latter,

(*q*) *In re Hulse*, [1905] 1 Ch 406, *Lawton* v *Lawton*, 3 Atk 13, *Dudley* v *Warde*, Amb 113

(*r*) Co Litt 53 a, *per* Kindersley, V C, in *Gibson* v *Hammersmith Ry Co*, 32 L J Ch 337, at pp 340 *et seq* Trover does not lie for fixtures until after severance, *Dumergue* v *Rumsey*, 2 H & C 777, at p 790 *Minshall* v *Lloyd*, 2 M & W 450, recognised, *Mackintosh* v *Trotter*, 3 Id 184, *Roffey* v *Henderson*, 17 Q B 574 at p 586, *London, &c Loan Co* v *Drake*, 6 C B N S 798, at p 811 In *Wilde* v *Waters*, 16 C B 637, at p 651 Maule, J, observes " Generally speaking, no doubt, fixtures are part of the freehold, and are not such goods and chattels as can be made the subject of an action of trover But there are various exceptions to this rule, in respect of things which are set up for ornament or for the purpose of trade, or for other particular purposes As to these, there are many distinctions, some of which are nice and intricate See, also, *Clarke* v *Holford*, 2 C & K 540

(*s*) Such as stoves, grates, ornamental chimney pieces, wainscots fastened with screws, coppers, a pump very slightly affixed to the freehold, and various other articles See *Bishop* v *Elliott*, 11 Exch 113, *Grymes* v *Boweren*, 6 Bing 437, *per* Tindal, C J, Id, at pp 439, 440, *Horn* v *Baker*, 9 East, 215, at p 328 In *Buckland* v *Butterfield*, 2 B & B 54, which is an important decision on this subject, it was held that a conservatory erected on a brick foundation, attached to a dwelling house, and communicating with it by windows, and by a flue passing into the parlour chimney, becomes part of the freehold, and cannot be removed by the tenant or his assignees See *West* v *Blakeway*, 2 M & Gr 729, *Burt* v *Haslett*, 18 C B 162, 893

See also *Powell* v *Farmer*, 18 C B N S 168, 178, *Powell* v *Boraston*, Id 175

(*t*) *Per* Ld Kenyon in *Penton* v *Robart*, 2 East, 88 Judgm in *Mansfield* v *Blackburne*, 3 Bing N C 426, at p 438 A nurseryman may remove fruit trees and fruit bushes 'planted by him and not permanently set out" (Agricultural Holdings Act, 1923, s 48 (1) (m)), but not orchard trees (*Mears* v *Callender*, [1901] 2 Ch 388), but he may by the terms of his lease contract himself out of this right or out of any other right of removal see *Premier Dairies* v *Garlick*, [1920] 2 Ch 17

however, it has been expressly decided that to such cases the general rule must be applied, unless the provisions of the Landlord and Tenant Act, 1851, or some other statute apply, or the purpose of the erections related partly to trade of any description, such as cyder-mills, machinery for working mines or collieries (*u*)

Elwes v *Maw*

In the leading case on this subject (*x*), it was held that a tenant in agriculture, who erected at his own expense, and for the necessary and convenient occupation of his farm, a beast-house and carpenter's shop, built of brick and mortar, and tiled, and let into the ground, could not legally remove them even during his term, although by so doing he would leave the premises in the same state as when he entered, and a distinction was taken between annexations to the freehold for purposes of trade, and those made for purposes of agriculture and for better enjoying the immediate profits of the land

Later cases

In a later case it was held that glass houses erected by a tenant for the purposes of his trade as a market gardener (and not for mere pleasure and ornament) are removable as trade fixtures (*y*) And where a superincumbent shed is erected as a mere accessory to a personal chattel, as an engine, it may, as coming within the definition of a trade fixture, be removed, but where it is accessory to the realty it cannot be removed (*z*)

The right of removal, where is exists, should be exercised during the continuance of the term, or during a certain time after its expiration during which the tenant has a right to consider himself as still in possession of the premises as tenant under the landlord (*a*) In one case, the lessee of business premises having become bankrupt, the trustee sold the fixtures upon the terms that they were to be removed within two days after the sale, which was not done, as the buyer was negotiating with the landlord of the premises for their purchase The negotiations having fallen through, the trustee surrendered the

(*u*) Woodfall, L & T, 20th ed p 780 See the Landlord and Tenant Act, 1851 (14 & 15 Vict c 25), s 3, and the Agricultural Holdings Act, 1923

(*x*) *Elwes* v *Maw*, 3 East, 38 See *Smith* v *Render* 27 L J Ex 83

(*y*) *Mears* v *Callender*, [1901] 2 Ch 388 See now s 48 of the Agricultural Holdings Act, 1923

(*z*) *Whitehead* v *Bennett*, 27 L J Ch 474

(*a*) *Ex parte Stephens*, 7 Ch D 127 *Weeton* v *Woodcock* 7 M & W 14 at p 19 see *Thomas* v *Jennings*, 66 L J Q B 5 See also *In re Glasdir Copper Works*, [1904] 1 Ch 819, as to the right of mortgagee or purchaser from tenant to remove tenant's fixtures within a reasonable time after surrender of lease

lease to the landlord, who relet the premises with the fixtures on them About a fortnight afterwards the buyer, hearing of the surrender, applied for the fixtures, and it was held he was entitled to them, as he had not lost his right by delay or *laches* (*b*) This case seems to engraft an equitable exception upon the common law rule that the fixtures must be removed during such time as the tenant has a right to consider himself in possession It is also important to remark that the legal right of a tenant to remove fixtures may be either extended or controlled by the express agreement of the parties, and the ordinary right of the tenant to disannex tenants' fixtures during the term may thus be renounced (*c*) Leases often contain a covenant for this purpose, either specifying what fixtures shall be removable by the tenant, or stipulating that he shall, at the end of the term, deliver up all fixtures annexed during its continuance (*d*) Where a lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh lease to a third party, the mortgagees were held entitled to enter and sever the fixtures (*e*)

It is also worthy of notice, that a special usage prevailing in the particular neighbourhood may modify the right of property in fixtures as between parties bound by that usage (*f*), and that an agreement may, as between the parties thereto, confer upon the one party a right to remove chattels which he has affixed to the soil of the other, but that such right, not being an easement created by deed, nor conferred by a covenant running with the land, does not affect a purchaser of the land for value without notice (*g*)

Wake v *Hall*

Mining fixtures

In *Wake* v *Hall* (*h*) the question of the right of a mine owner against the surface owner to remove buildings erected by the mine owner on the surface for the purpose of winning the minerals was discussed From this case it appears that the mine owner has the right to remove all buildings and other

(*b*) *Saint* v *Pilley*, L R 10 Ex 137

(*c*) *Dumergue* v *Rumsey*, 2 H & C 777

(*d*) See *Bishop* v *Elliott*, 11 Exch 113, *Stansfeld* v *Mayor of Portsmouth*, 4 C B N S 120, *Mansfield* v *Blackburne*, 3 Bing N C 438, *Foley* v *Addenbrooke*, 13 M & W 174, *Sleddon* v *Cruikshank*, 16 M & W 71, *Heap* v *Barton*, 12 C B 274, *Premier Dairies* v *Garlick*, [1920] 2 Ch 17

(*e*) *London, &c Loan Co* v *Drake*, 6 C B N S 798

(*f*) Vin Abr, 'Executors,' U 74 See *Davis* v *Jones*, 2 B & Ald 165, at p 168

(*g*) See *Hobson* v *Gorringe* [1897] 1 Ch 182, where *Wood* v *Hewett*, 8 Q B 913, and *Lancaster* v *Eve*, 5 C B N S 717, were explained

(*h*) 8 App Cas 195 7 Q B D 295

erections lawfully erected by him on the surface for the purpose of his mining operations, and that this right of removal continues for a reasonable time after he has ceased to work the minerals

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DOMUS SUA CUIQUE EST TUTISSIMUM REFUGIUM (5 *Rep* 92) —*Every man's house is his castle* (*i*)

Seymayne's Case

In a leading case which well exemplifies the application of this maxim, the defendant and one B were joint tenants of a house in London B acknowledged a recognizance in the nature of a statute staple to the plaintiff, and, being possessed of certain goods in the house, died, whereupon the house in which the goods remained became vested in the defendant by survivorship Subsequently the plaintiff sued out process of extent on the statute, and had a writ to extend all the goods which B had at the day of his death This writ he delivered to the sheriffs, telling them that divers goods belonging to B at the time of his death were in the defendant's house, whereupon the sheriffs charged the jury to make inquiry according to the writ, and the sheriffs and jury came to the house, and offered to enter in order to extend the goods, the outer door of the house being then open, but the defendant, *præmissorum non ignarus*, and intending to disturb the execution, shut the door against them, whereby the plaintiff lost the benefit of his writ (*k*)

The five points bearing upon the present subject, which were resolved in this case, will now be stated shortly, with some references to other authorities affecting them

First resolution

1 The house of every one is to him as his castle, as well for his defence against injury and violence, as for his repose, wherefore, although the life of man is a thing precious in law, yet if thieves come to a man's house to rob or murder him, and he or his servants kill any of the thieves in defence of himself and his house, this is not felony

Accordingly, if a person attempt to burn or burglariously to break and enter a dwelling-house in the night-time, or attempt to break open a house in the day-time with intent to rob, and be killed in the attempt, the slayer shall be acquitted and dis-

(*i*) *Nemo de domo sua extrahi debet*, D 50, 17, 103
(*k*) *Seymayne's Case*, 5 Rep 91

charged, for the homicide is justifiable (*l*) And in such cases, not only the owner whose person or property is thus attacked, but his servant and the members of his family, or even strangers who are present at the time, are equally justified in killing the assailant (*m*) In order, however, that a case may fall within this rule, the intent to commit the crime above mentioned must be clearly manifested by the felon, otherwise, the homicide will amount to manslaughter, at least, if not to murder (*n*)

Second resolution

2 When any house is recovered by action, the sheriff may break the house, and deliver the possession to the plaintiff, for after judgment it is not the house of the defendant

It is the duty of the sheriff, before he delivers possession, to remove from the house all persons and goods within it (*o*), unless the plaintiff has recovered only an undivided portion of the house, in which case he should merely put the plaintiff in possession of his portion (*p*) After verdict and judgment in ejectment, it was in practice usual for the lessor of the plaintiff to point out to the sheriff the premises recovered, and then the sheriff gave the lessor, at his own peril, execution of what he demanded (*q*)

Third resolution

3 In all cases where the king is party (as where a felony or misdemeanour (*r*) has been committed), the sheriff, if the doors be not open, may break the party's house, to execute the king's process, if otherwise he cannot enter, but before he breaks it, he ought to signify the cause of his coming, and make request to open doors

Bare suspicion, however, touching the guilt of the party will not warrant proceeding to this extremity, though a felony has been actually committed, unless the officer comes armed with a warrant from a magistrate grounded on such suspicion (*s*)

(*l*) 1 Hale, P C 481, 488 By the Offences against the Person Act, 1861 (24 & 25 Vict c 100), s 7, no punishment is incurred by a person who kills another in his own defence

(*m*) 1 Hale, P C 481, 484 *et seq*

(*n*) 1 Hale, P C 484, *R* v *Scully*, 1 C & P 319

(*o*) *Upton* v *Wells* 1 Leon 145

(*p*) *Per* Parke, B , in *Doe* d *Helyer* v *King*, 6 Exch 791, at p 794

(*q*) Adamson, Ejectt , 4th ed pp 300, 301 See, *per* Patteson, J , in *Doe* d *Stevens* v *Lord*, 6 Dowl 256, at p 266

(*r*) *Launock* v *Brown*, 2 B & Ald 592 The rule extends to process for contempt of Court, *Burdett* v *Abbot*, 14 East, 1, at p 157 (where the breaking was justified under the Speaker s warrant), *Harvey* v *Harvey*, 26 Ch D 644 As to the power of arrest under the warrant of a Secretary of State, see *R* v *Wilkes*, 2 Wils 151, *Entick* v *Carrington*, Id 275

(*s*) Foster on Homicide, 320

And the mere entry, by an open door, into a man's house, on suspicion of felony, but without a warrant, is not justified by a plea which does not show that the defendant had reason to believe that the suspected person was there, and entered for the purpose of apprehending him (*t*)

Fourth resolution

4 In all cases when the door is open, the sheriff may enter the house and do execution, at the suit of any subject, and so may the lord in such case enter the house and distrain for his rent But it is not lawful for the sheriff, on request made and denial, to break the defendant's house, to execute any process at the suit of any subject

This rule is well established "Nothing is more certain than that in the ordinary cases of the execution of civil process between subject and subject, no person is warranted in breaking open the outer door in order to execute such process, the law values the private repose and security of every man in his own house, which it considers as his castle, beyond the civil satisfaction of a creditor" (*u*) This rule, however, is strictly confined, as regards the sheriff's officer, to a man's house, and barns and other buildings, not parcel of or connected with his dwelling-house, may be broken open to levy an execution (*x*) On the other hand, the landlord's bailiff, though he may lift the latch of a door (*y*), or enter through an open window (*z*), or over a wall (*a*), to distrain for rent, may not break open the outer door (*b*) or any window (*c*) of any building whatever, except in the case of goods fraudulently removed (*d*) The rule also admits of this exception, that if a defendant escape from arrest, the sheriff may, after demand of admission and refusal, break open either his own house or that of a stranger for the purpose of retaking him (*e*), and if an officer or bailiff, who has

(*t*) *Smith* v *Shirley*, 3 C B 142

(*u*) *Per* Lord Ellenborough in *Burdett* v *Abbot*, 14 East, 1 at p 154

(*x*) *Penton* v *Browne*, 1 Sid 186, *Hodder* v *Williams*, [1895] 2 Q B 663

(*y*) *Ryan* v *Shilcock*, 7 Exch 72

(*z*) *Nixon* v *Freeman*, 5 H & N 652, *Crabtree* v *Robinson*, 15 Q B D 312, *secus*, of a window closed, *Nash* v *Lucas*, L R 2 Q B 590, or fastened by a hasp, *Hancock*, v *Austin*, 14 C B N S 634

(*a*) *Long* v *Clarke*, [1894] 1 Q B 119

(*b*) *Brown* v *Glenn*, 16 Q B 254, *American Mast Co* v *Hendry*, 62 L J Q B 388

(*c*) *Attack* v *Bramwell*, 3 B & S 520

(*d*) *Williams* v *Roberts*, 7 Exch 618, Distress for Rent Act, 1737 (11 Geo 2, c 19), s 6

(*e*) *Anon*, 6 Mod 105, Lofft 390, *Lloyd* v *Sandilands*, 8 Taunt 250, *Sandon* v *Jervis*, E B & E 942, see *Genner* v *Sparkes*, 1 Salk 79

lawfully entered a house to execute process (*f*), or to distrain for rent (*g*), be forcibly ejected, or locked in, he may break open the outer door to re-enter the house, or to quit it In these cases a request to re-open the door is usually unnecessary, "for the law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary" (*h*)

The rule applies only to outer doors When the sheriff has lawfully obtained admission within a house, he may break open inner doors and cupboards, if necessary, in order to execute his process (*i*), and a landlord has the same right when distraining (*k*)

It was laid down in a very early case that if the sheriff, in order to execute a *fi fa*, break open an outer door when not justified in doing so, this does not vitiate the execution, but merely renders the sheriff liable to an action of trespass (*l*) This doctrine, so far as it relates to an execution against goods, seems to be countenanced by later cases (*m*), but it apparently does not apply to an arrest of the person (*n*)

Fifth resolution

5 The house of any one is not a castle but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought into his house to prevent a lawful execution, and to escape the ordinary process of the law, and therefore in such cases, after denial on request made, the sheriff may break the house

It must be observed, however, that the sheriff, whether he breaks the stranger's house, or merely enters it by an open door, does so at his peril, and if the defendant or his goods be not in the house, the sheriff is a trespasser (*o*) He may enter the

(*f*) *White* v *Wiltshire*, Palm 52, *Pugh* v *Griffith*, 7 A & E 827, *Aga Kurboolie Mahomed* v *R*, 4 Moo P C 239

(*g*) *Eagleton* v *Gutteridge*, 11 M & W 465, *Eldridge* v *Stacey*, 15 C B N S 458, see *Bannister* v *Hyde*, 2 E & E 627

(*h*) *Per* Ld Campbell in *Aga Kurboolie Mahomed's Case*, *supra*

(*i*) *R* v *Bird*, 2 Show 87, *Lee* v *Gansell*, Cowp 1, *Ratcliffe* v *Burton*, 3 B & P 223, *Hutchinson* v *Birch*, 4 Taunt 619, which shows that, in the case of a *fi fa* no request is necessary

(*k*) *Browning* v *Dann*, Lee temp Hardw 167, but see *per* Holt, C J, in *Dod* v *Monger*, 6 Mod 215

(*l*) Y B 18 Edw 4, 4a, cited in *Seymayne's Case*, 5 Rep 91, see 4th resolution, *ad fin*

(*m*) See *Percival* v *Stamp*, 9 Exch 167, *Brunswick* v *Slowman*, 8 C B 317, *De Gondouin* v *Lewis*, 10 A & E 117, but see also *Yates* v *Delamayne*, Bac Abr, "*Execution* (N)

(*n*) *Kerbey* v *Denby*, 1 M & W 336, *Hodgson* v *Towning*, 5 Dowl 410

(*o*) *Cooke* v *Birt*, 5 Taunt 765, *Johnson* v *Leigh*, 6 Taunt 246, *Morrish* v *Murrey*, 13 M & W 52

defendant's own house to ascertain whether the defendant or his goods be there (*p*), at any rate if he has reasonable grounds for believing that such is the case (*q*), but if he enter the house of a stranger with the like object, he can be justified only by the event (*r*) The reason for this distinction is that the most probable place to find the defendant or his goods is the house in which he dwells (*s*), and therefore the husband's house must be treated as being also that of the wife, if they are cohabiting (*s*) It has been suggested that, for this reason, if the defendant be on a visit with a stranger, the latter's dwelling-house must be considered to be *pro tempore* also that of the defendant, so as to justify the sheriff's entry to search for him, though he be not actually there (*t*) It is clear that the sheriff may not enter the stranger's house after the defendant has ended his visit and gone away (*u*)

Forcible entry

It may not be inappropriate to add, in connection with the maxim under consideration, that, although, as a general rule, where a house has been unlawfully erected on a common, a commoner, whose enjoyment of the common has been thus interrupted, may pull it down (*x*), he is, nevertheless, not justified in doing so, without previous notice or request, while there are persons actually in it (*y*) But, as remarked by Lord Campbell (*z*), it would be a most dangerous extension of this doctrine "to hold that the owner of a house could not exercise the right of pulling it down because a trespasser was in it" The right of the owner of a house who is entitled to possession of it to take possession of it peaceably (*a*), and, when he has done that, to expel all trespassers therefrom without unnecessary force (*b*) is clearly established, and even if he enter forcibly,

(*p*) *Ratcliffe* v *Burton*, 3 B & P 223
(*q*) *Morrish* v *Murrey*, 13 M & W 52, *per* Alderson, B
(*r*) See note (*o*), *supra*
(*s*) *Cooke* v *Birt*, 5 Taunt 765
(*t*) Smith s L C , 12th ed , vol 1 , p 123, citing *Sheers* v *Brooks*, 2 Black H 120
(*u*) *Morrish* v *Murrey*, 13 M & W 52
(*x*) *Arlett* v *Ellis*, 7 B & C 346, 9 Id 671, see *Smith* v *Brownlow*, L R 9 Eq 241
(*y*) *Perry* v *Fitzhowe*, 8 Q B 757 *Davies* v *Williams*, 16 Id 546, *Jones* v *Jones*, 1 H & C 1, see *Lane* v *Capsey*, [1891] 3 Ch 411
(*z*) *Burling* v *Read*, 11 Q B 904 See *Jones* v *Foley*, [1891] 1 Q B 730
(*a*) *Taunton* v *Costar*, 7 T R 431, *Butcher* v *Butcher*, 7 B & C 399, *Weldon* v *Rainforth*, 8 B & C 4, *Browne* v *Dawson*, 12 A & E 624, *Delaney* v *Fox*, 1 C B N S 166, *Pollen* v *Brewer*, 7 C B N S 371
(*b*) *Hey* v *Moorehouse*, 6 Bing N C 52, *Butcher* v *Butcher*, 7 B & C 399, *Browne* v *Dawson*, 12 A & E 624, see *Lows* v *Telford*, 1 App Cas 414

thereby rendering himself liable to an indictment (*c*), he is not liable either to an action for trespass to the land (*d*) or to an action for assaults to the person or damage to goods committed or done in the course of the forcible entry (*e*)

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§ III —THE TRANSFER OF PROPERTY

Two leading maxims relative to the transfer of property are, first, that alienation is favoured by the law, and, secondly, that an assignee holds property subject to the same rights and liabilities as attached to it whilst in the possession of the grantor Besides these very general principles, we have included in this section several minor maxims of practical importance, connected with the same subject, and, according to the plan pursued throughout this Work, each maxim has been briefly illustrated

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ALIENATIO REI PREFERTUR JURI ACCRESCENDI *(Co Litt 185 a) —Alienation is favoured by the law rather than accumulation*

Alienatio is defined to be, *omnis actus per quem dominium transfertur* (*f*), and it is the well-known policy of our law to favour alienation, and to discountenance every attempt to tie up property unreasonably, or in other words, to create a perpetuity

Feudal system was opposed to alienation

The reader will at once remark, that the feudal policy was directly opposed to those wiser views which have now long prevailed It is, indeed, generally admitted (*g*), that, during the Saxon period, the power of alienating real property was unrestricted, and that land first ceased to be alienable when the feudal system was introduced after the Norman conquest, for, according to the fundamental principle of the feudal system,

(*c*) See the statute 5 Ric 2, st 1, c 7 (c 8, Ruff), *Milner* v *Maclean*, 2 C & P 17

(*d*) *Turner* v *Meymott*, 1 Bing 158, *Harvey* v *Bridges* 14 M & W 437, 1 Exch 261, *Davison* v *Wilson*, 11 Q B 890, *Burling* v *Read*, 11 Q B 904, *Wright* v *Burroughes*, 3 C B 685, *Beddall* v *Maitland* 17 Ch D 174

(*e*) *Hemming* v *Stoke Poges Golf Club*, [1920] 1 K B 720 This decision of the Court of Appeal overrules *Newton* v *Harland*, 1 M & Gr 644, *Beddall* v *Maitland*, *supra*, and *Edwick* v *Hawkes*, 18 Ch D 199

(*f*) Brisson, ad verb "*Alienatio*

(*g*) Wright, Tenures, 154 *et seq*

all land within the king's territories was held to be derived, either mediately or immediately, from him as the supreme lord, and was subjected to the burthens and restrictions incident to the feudal tenure Now this tenure originated in the mutual contract between lord and vassal, whereby the vassal, in consideration of the feud with which he was invested, bound himself to render services to his lord, and as the vassal could not, without the lord's consent, substitute the services of another for his own (*h*), so neither could the lord transfer the vassal's fealty and allegiance, without his consent, to another (*i*) It is, however, necessary to bear in mind the distinction, recognised by the feudal laws, between alienation and subinfeudation for, although alienation, meaning thereby the transfer of the original feud or substitution of a new for the old feudatory, was prohibited, yet subinfeudation, whereby a new and inferior feud was carved out of that originally created, was permitted Moreover, as feudatories did, in fact, under cover of subinfeudation, frequently dispose of their lands, this practice, being opposed in its tendency to the spirit of the feudal institutions, was expressly restrained by Magna Charta, c 32, which was merely in affirmance of the common law of this subject, and which allowed tenants of mesne lords—though not, it seems, tenants holding directly of the Crown—to dispose of a *reasonable part* of their lands to subfeudatories

The right of subinfeudation to the extent thus expressly allowed by statute prepared the way for the more extensive power of alienation conferred on mesne feudatories by the statute *Quia Emptores* (18 Edw 1, st 1, c 1) This statute, which effected a material change in the nature of the feudal tenure, by permitting the transfer or alienation of lands in lieu of subinfeudation, after stating, by way of preamble, that in consequence of this latter practice, the chief lords had many times lost their escheats, marriages, and wardships of land and tenements belonging to their fees, enacted "that from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as his feoffee held before"

Stat *Quia Emptores*

This statute did not extend to tenants *in capite*, and although

17 Edw 2, c 6

(*h*) See *Bradshaw* v *Lawson*, 4 T R 443
(*i*) Wright, Tenures, 171, Mr Butler's note, Co Litt 309 a (1)

by the 17 Edw 2, c 6, *De Prærogativa Regis*, it was subsequently declared that no one holding of the Crown by military service could, without the king's licence, alien the *greater part* of his lands, so that enough should not remain for the due performance of such service (from which it has been inferred that, before this enactment, tenants *in capite* had the same right of subinfeudation as ordinary feudatories had before the statute *Quia Emptores*) yet it does not appear that, even after the statute *De Prærogativa*, alienation of any part of lands held *in capite* ever occurred without the king's licence, and, at all events, this question was set at rest by the subsequent statute 34 Edw 3, c 15, which rendered valid such alienations as had been made by tenants holding under Henry III and preceding sovereigns, although there was a reservation of the royal prerogative as regarded alienations made during the reigns of the first two Edwards

Having thus remarked that, by a fiction of the feudal law, all land was held, either directly or (owing to the practice of subinfeudation) mediately of the Crown, we may next observe that gifts of land were in their origin simple, without any condition or modification annexed to them, and although limited or conditional donations were gradually introduced for the purpose of restraining the right of alienation, yet, since the Courts construed such limitations liberally, in order to favour that right which they were intended to restrain, the Statute of Westm 2 (13 Edw 1), usually called the statute *De Donis*, was passed, which enacted, "that the will of the giver according to the form in the deed of gift, manifestly expressed, shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given, after their death, or shall revert unto the giver, or his heir, if issue fail" The effect, therefore, of this statute was to prevent a tenant in tail from alienating his estate for a greater term than that of his own life, or rather, its effect was to render the grantee's estate certain and indefeasible only during the life of the tenant in tail, upon whose death it became defeasible by his issue or the remainderman or reversioner (*k*)

Stat *De Donis*

Before this Act indeed, where land was granted to a man

(*k*) 1 Cruise, Dig , 4th ed 77, 78

and the heirs of his body, the donee was held to take a conditional fee-simple, which became absolute the instant issue was born, but after the passing of the statute *De Donis*, the estate was, in contemplation of law, divided into two parts, the donee taking a new kind of particular estate, which our judges denominated a fee-tail, the ultimate fee-simple of the land expectant on the failure of issue remaining vested in the donor

"At last," says Lord Mansfield (*l*), 'the people having groaned for two hundred years under the inconveniences of so much property being unalienable, and the great men, to raise the pride of their families, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the legislature," the judges adopted various modes of evading the statute *De Donis*, and of enabling tenants in tail to charge or alien their estates (*m*) The first of these was founded on the idea of a recompense in value, in consequence of which it was held that the issue in tail was bound by the warranty of his ancestor, where assets of equal value descended to him from such ancestor In the next place, they held, in the reign of Edward IV, that a feigned recovery should bar the issue in tail and the remainders and reversion (*n*) And, by the 32 Hen 8, c 36, the legislature expressly declared that a fine should be a bar to the issue in tail (*o*) Ultimately, under the Fines and Recoveries Act, 1833 (3 & 4 Will 4, c 74), a tenant in tail became empowered by any species of deed, made and enrolled in conformity with the Act, absolutely to dispose of the estate of which he is seised in tail in the same manner as if he were absolutely seised thereof in fee (*p*)

Evasion of stat *De Donis*

3 & 4 Will 4, c 74

Having thus seen how the restrictions which were, in accordance with the spirit of the feudal laws imposed upon the alienation of land by *deed*, were gradually relaxed, we may further observe that the power of disposing of land by *will* was equally opposed to the policy of those laws Consequently,

(*l*) In *Taylor* v *Horde*, 1 Burr 60, at p 115

(*m*) *In Portington's Case*, 10 Rep 35 b, it was held, in accordance with prior authorities, that tenant in tail could not be restrained by any condition or limitation from suffering a common recovery

(*n*) *Taltarum's Case* Yr Bk 12 Edw 4, 14, 19, where the Court assumed that a recovery properly suffered would destroy an entail, although they decided that in the particular case, the entail had not been destroyed

(*o*) Except where the reversion was in the Crown, see the statute 34 & 35 Hen 8, c 20 As to the respective effects of the statutes 4 Hen 7, c 24, and 32 Hen 8, c 36, see Mr Hargrave's note (1), Co Litt 121 a

(*p*) See 1 Cruise, Dig, 4th ed 83

although land was devisable until the Conquest, yet shortly afterwards it became inalienable by will (*q*), and so remained until the enactment of the statutes 32 Hen 8, c 1, and 34 & 35 Hen 8, c 5 The latter of these statutes was explanatory of the former, and declared that every person (except as therein mentioned) having a sole estate or interest or being seised in fee-simple of and in any manors, lands, tenements, rents, or other hereditaments in possession, reversion, remainder, or of rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise to any person or persons (except bodies politic and corporate) by his last will in writing, all his said manors, lands, tenements, rents, and hereditaments, or any of them, at his own free will and pleasure It is, indeed, true that, by these statutes, some restriction was imposed upon the right of alienating by will lands held by military tenure, yet since such tenures were, by the 12 Car 2, c 24, converted into free and common socage tenures, we do, in fact, derive from the Acts of Henry VIII the important right of disposing by will of all lands and tenements other than copyholds (*r*) a privilege which received important extensions by the Wills Act, 1837 (7 Will 4, and 1 Vict c 26) (amended by the Wills Act Amendment Act, 1852 (15 & 16 Vict c 24)), and which now attaches to all real and personal estate to which a person may be entitled, either at law or in equity, at the time of his death (*s*)

1 Vict, c 26

Right of alienation a common law

It remains to consider how far the right of alienation exists at common law, when viewed without reference to the arbitrary restrictions imposed under the feudal system, and to show how this right has been favoured by our Courts of law, and encouraged by the legislature In the first place, we may observe that the *potestas alienandi*, or right of alienation, is a right necessarily incident, in contemplation of law, to an estate in fee-simple, it is inseparably annexed to it, and cannot, in general, be indefinitely restrained by any proviso or condition whatsoever (*t*), for, although a "fee-simple" is explained by Littleton (*u*) as being *hæreditas pura*, yet it is not so described

(*q*) A tenant in gavelkind however, could devise by will (Wright, Tenures, p 207)

(*r*) As to copyholds, see 1 Vict c 26 s 3, Shelf Copyholds, 52

(*s*) S 3

(*t*) 4 Cruise, Dig, 4th ed, p 330

(*u*) Co Litt 1

as importing an estate purely allodial (for we have already seen that such an estate did not, in fact, exist in this country), but because it implies a simple inheritance, clear of any condition, limitation, or restriction to any particular heirs, and descendible to heirs general, whether male or female, lineal or collateral (*x*) In illustration of this incident of an estate in fee-simple, we find it laid down (*y*) that "if a man makes a feoffment on condition that the feoffee shall not alien to any, the condition is void, because where a man is enfeoffed of land or tenements, he has power to alien them to any person by the law, for, if such condition should be good, then the condition would oust him of the whole power which the law gives him, which would be against reason, and therefore such condition is void" A testator devised land to A and his heirs for ever, but, in case A died without heirs, then to C (a stranger in blood to A) and his heirs, and, in case A offered to mortgage or suffer a fine or recovery upon the whole or any part thereof, then to the said C and his heirs It was held that A took an estate in fee, with an executory devise over, to take effect upon the happening of conditions which were void in law, and that a purchaser in fee from A had a good title against all persons claiming under the will (*z*) So, if a man, before the statute *De Donis*, had made a gift to one and the heirs of his body, after issue born the donee had, by the common law, *potestatem alienandi*, and, therefore, if the donor had added a condition, that, after issue the donee should not alien, the condition would have been repugnant and void And, by like reasoning, if, after the statute, a man had made a gift in tail, on condition that the tenant in tail should not suffer a common recovery, such condition would have been void for, by the gift in tail the tenant had an absolute power given to suffer a recovery, and so to bar the entail (*a*) And here we may remark, that the distinction which exists between real and personal property is further illustrative of the present subject, for, with respect to personalty, it is laid down, that, where an estate tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall

(*x*) Wright, Tenures, p 147

(*y*) *Mildmay's Case* 6 Rep 40 a, at 41 a, Co Litt 206 b, see *Re Rosher*, 26 Ch D 801, *Re Elliot* [1896] 2 Ch 353

(*z*) *Ware* v *Cann*, 10 B & C 433

(*a*) *Mildmay's Case*, 6 Rep 40 a at 41 a arg *Taylor* v *Horde*, 1 Burr 60, at 84, *Corbet's Case*, 1 Rep 83 b, *Portington's Case*, 10 Rep 35 b

be permitted on such a limitation, for this, if allowed, would tend to a perpetuity, as the devisee, or grantee in tail of a chattel has no method of barring the entail, wherefore the law vests in him at once the entire dominion of goods, being analogous to the fee-simple which a tenant in tail may acquire in real estate (*b*)

We may, in connection with this subject, likewise refer to Sir W Blackstone's celebrated judgment in *Perrin* v *Blake* (*c*), where a distinction is drawn between those rules of law which are to be considered as the fundamental rules of the property of this kingdom (*d*), and which cannot be transgressed by any intention of a testator, however clearly expressed, and those rules of a more arbitrary, technical, and artificial kind, which the intention of a testator may control Amongst rules appertaining to the former class, Sir W Blackstone mentioned these —(1) every tenant in fee-simple or fee-tail shall have the power of alienating his estates by the several modes adapted to their respective interests, and (2) no disposition shall be allowed which, in its consequence, tends to a perpetuity (*e*)

Restraint upon perpetuities by devise

Not only will our Courts oppose the creation of a perpetuity by deed, but they will likewise frustrate the attempt to create it by will, and, therefore, "upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted" (*f*) The rule is accordingly well established that, although an estate may be rendered inalienable during the existence of a life or of any number of lives in being, and twenty-one years after, or, possibly, even for nine months beyond the twenty-one years, in case the person ultimately entitled to the estate should, at the time of its accruing to him, be an infant *in ventre sa mere* (*g*),

(*b*) 2 Blac Com 398

(*c*) Hargrave s Tracts, fol 500 As to this judgment, see *per* Ld Macnaghten in *Van Grutten* v *Foxwell*, [1897] A C 658, at pp 674 676

(*d*) See, also, *Egerton* v *Brownlow*, 4 H L Cas 1, *passim*

(*e*) Mr Butler's note, Co Litt 376 b (1)

(*f*) Judgm , *Cadell* v *Palmer* 10 Bing 140, at p 142 See *Ware* v *Cann* 10 B & C 433

(*g*) In an executory devise the period of gestation may be reckoned both at the beginning and the end of the twenty one years thus, if land is devised with remainder over in case A s son die under twenty one and A dies leaving a son *in ventre sa mère* then if the son marries in his twenty first year, and dies leaving his widow *enceinte*, the estate vests, nevertheless in the infant *in ventre sa mère*, and does not go over See *per* Lord Eldon in *Thellusson* v *Woodford*, 11 Ves 112, at pp 149, 150

yet that all attempts to postpone the enjoyment of the fee for a longer period are void (*h*) Moreover, an estate cannot be limited to an unborn person for life followed by an estate to any child of such unborn person (*i*)

Trusts for accumulation

With respect to trusts for accumulation, we may observe that restrictions, beyond those of the common law, mentioned above, are imposed upon them by an Act (*k*), commonly called "Thellusson Act," which was passed in 1880 in consequence of the will of Mr Thellusson and the establishment of its validity in *Thellusson* v *Woodford* (*l*)

By this Act, no settlement of realty or personalty may, as a rule, be made in such a manner that its profits be accumulated for any longer term than one only of these periods, viz, (1) the settlor's life, (2) twenty-one years from his death, (3) the minority of any person living, or *in ventre sa mere*, at the time of the settlor's death, (4) the minority of any person who, by the settlement, would for the time being, if of full age, be entitled to the profits directed to be accumulated And the Act provides that every direction to accumulate for a longer term shall be void, and that the profits shall, so long as they shall be directed to be accumulated contrary to its provisions, go to such person or persons as would have been entitled thereto if such excessive accumulation had not been directed But the Act does not extend to provisions for the payment of debts, or for raising portions for children, or touching the produce of timber or wood upon lands The Accumulations Act, 1892 (*m*), further, as a rule, prohibits the settlement of property in such a manner that its profits shall be accumulated, for the purchase of land only, for a longer period than during the minority or respective minorities of any person or persons who, under the uses or trusts of the settlement, would for the time being, if of full age, be entitled to receive the profits directed to be accumulated

(*h*) *Cadell* v *Palmer* 10 Bing 140 See *Dungannon* v *Smith*, 12 Cl & F 546 (distinguished in *Christie* v *Gosling* L R 1 H L 279, at p 292—as to which see *Portman* v *Portman*, [1922] 2 A C 473—followed in *Atkinson Re* [1916] 1 Ch 91) *Spencer* v *Marlborough* 3 Bro P C 232 As to covenants to reconvey, see *L & S W Ry Co* v *Gomm* 20 Ch D 562

(*i*) See *Whitby* v *Mitchell*, 42 Ch D 494, 44 Id 85, *Clarke's Settlement, Re*, [1916] 1 Ch 467 at pp 478, 479

(*k*) The Accumulations Act, 1800 (39 & 40 Geo 3 c 98)

(*l*) 4 Ves 227, 11 Id 112, in which case Mr Hargrave's argument respecting perpetuities is worthy of perusal

(*m*) 55 & 56 Vict c 58

Exception to rule

Feme covert

It will be evident, from the preceding remarks, that the rule against perpetuities is observed by Courts both of law and of equity In consequence, however, of the peculiar jurisdiction which Courts of equity exercise, to protect the interests of married women, the right of alienation has, in one case, with a view to their benefit, been restricted, and that restriction thus imposed may be regarded as an exception to the operation of the maxim in favour of alienation It is now fully established that, where property is conveyed to the separate use of a married woman in fee, with a clause in restraint of anticipation during coverture, such clause is valid, for equity, having in this instance created a particular kind of estate, will reserve to itself the power of modifying that estate in such manner as the Court may think fit, and will so regulate its enjoyment as to effect the purpose for which the estate was originally created (*n*)

Tullett v *Armstrong*

The law upon this subject was settled in *Tullett* v *Armstrong* (*o*), and *Scarborough* v *Borman* (*p*), where Lord Cottenham, after an elaborate review of the authorities, held that a gift to the sole and separate use of a woman, whether married or unmarried, with a clause against anticipation, was good against an after-acquired husband, and in subsequent cases this decision has been fully recognised and followed (*q*)

The reason of the rule thus established was afterwards stated by his Lordship in these words "When first, by the law of this country, property was settled to the separate use of the wife, equity considered the wife as a *feme sole*, to the extent of having a dominion over the property But then it was found that that, though useful and operative, so far as securing to her a dominion over the property so devoted to her support, was open to this difficulty—that she, being considered as a *feme sole*, was of course at liberty to dispose of it as a *feme sole* might have disposed of it, and that, of course, exposing her to the influence of her husband, was found to destroy the object of giving her a separate property, therefore, to meet that, a provision was adopted of prohibiting the anticipation of the income of the

(*n*) See *per* Ld Lyndhurst in *Baggett* v *Meux*, 1 Phil 627

(*o*) 4 My & Cr 377, at p 390 See *Wright* v *Wright*, 2 J & H 647, at p 652

(*p*) 4 My & Cr 378

(*q*) *Baggett* v *Meux* *supra*, and see the Married Women s Property Act, 1882 (45 & 46 Vict c 75), s 19

property, so that she had no dominion over the property till the payments actually became due" (*r*)

Having thus observed that our law favours the alienation of real property, or to use the words of Lord Mansfield, that "the sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable" and having seen that "the utility of the end was thought to justify any means to attain it" (*s*), it remains to add that the same policy obtains with reference to personalty, and, in support of this remark, may be adduced the well-known rule of the law merchant, that for the encouragement of commerce, the right of survivorship, which is ordinarily incident to a joint tenancy, does not exist amongst trading partners *jus accrescendi inter mercatores pro beneficio commercii locum non habet* (*t*) a rule which evidently favours alienation, by rendering the capital invested by the partners in their trade applicable to the purposes of their partnership, and available to the creditors of the firm (*u*)

Alienation of personalty favoured

Jus accrescendi inter mercatores non habet

We have already observed that there cannot be an estate tail in personalty (*x*), nor can a perpetuity be created therein Indeed, where the subject-matter of a grant is a personal chattel, it is impossible so to tie up the use and enjoyment of it as to create in the donee a life estate which he may not alien (*y*) It is true, however, that this object may be attained indirectly, in a manner consistent with the rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a particular event, or on a particular act being done, for in that case the donee takes by the limitation a certain estate, of which the event or act is the measure, and upon the happening of the event or the doing of the act, a new and distinct estate accrues to another person If, for instance, a testator desires to give an annuity without the power of anticipation, he can only do so by declaring

(*r*) *Per* Ld Cottenham in *Rennie* v *Ritchie*, 12 Cl & F 204, at p 234 See also *Hood Barrs* v *Heriot*, [1896] A C 174

(*s*) *Per* Ld Mansfield in *Taylor* v *Horde*, 1 Burr 60 at p 115

(*t*) Co Litt 182 a Brownl 99, Noy, Max 9th ed 79, 1 Beawes Lex Merc 6th ed 42

(*u*) The reader should consult on this subject the Partnership Act 1890 (53 & 54 Vict c 39)

(*x*) As to heir looms, see the maxim *accessorium sequitur principale post* As to annexing personal to real estate, the latter being devised in strict settlement see 2 Jarm , Wills, 6th ed , p 692

(*y*) So, too, a condition cannot be attached by the vendor to goods so as to affect subsequent purchasers with notice (*Taddy & Co* v *Sterious & Co* [1904] 1 Ch 354, *McGruther* v *Pitcher*, [1904] 2 Ch 306)

that the act of alienation shall determine the interest of the legatee, and create a new interest in another (*z*)

Limitation of interest

Property may also be given to a party to be enjoyed by him until he become bankrupt, with a proviso that upon the happening of that event the property shall go over to another party A person cannot, however, create an absolute interest in property and, at the same time, deprive the party to whom that interest is given of those incidents and of that right of alienation which belong, according to the elementary principles of the common law, to the ownership of the estate Where, therefore, a testator directed his trustees to pay an annuity to his brother until he should attempt to charge it, or some other person should claim it, and then to apply it for his maintenance, it was held that, on the insolvency of the annuitant, his assignees became entitled to the annuity (*a*)

The distinction between a proviso or condition subsequent, and a limitation above exemplified, may be further explained in the words of Lord Eldon, who says 'There is no doubt that property may be given to a man until he shall become bankrupt It is equally clear, generally speaking, that, if property is given to a man for his life, the donor cannot take away the incidents to a life estate, and a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a *proviso* that he shall not sell or alien it If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited ' (*b*)

Settled Land Act, 1882

An important extension of the maxim that the law favours alienation is to be found in the Settled Land Act, 1882 (*c*), which confers upon the tenant for life of settled land power to sell the fee-simple without the consent of the other parties interested under the settlement The Act expressly provides that this power shall not be capable of assignment or release, and it renders void any contract by the tenant for life not to exercise the power, or any provision in the settlement prohibiting its

(*z*) See *Carter* v *Carter*, 3 K & J 617, *Wilkinson* v *Wilkinson*, 3 Swan 515, *Rochford* v *Hackman*, 9 Ha 475, at p 480

(*a*) See *Younghusband* v *Gisborne*, 1 Colly 400

(*b*) *Brandon* v *Robinson*, 18 Ves 429, at pp 433, 434 See *Re Dugdale*, 38 Ch D 176 at p 181

(*c*) 45 & 46 Vict c 38

exercise (*d*) In exercising the power the tenant for life acts as trustee for all parties interested under the settlement (*e*)

CUJUS EST DARE EJUS EST DISPONERE (*Wing Max* 53) —*The bestower of a gift has a right to regulate its disposal* (*f*)

Derivation of rule

It will be evident, from a perusal of the preceding pages, that this general rule must now be received with considerable qualification It does, in act, set forth the principle on which the old feudal system of feoffment depended, *tenor est qui legem dat feudo* (*g*)—it is the tenor of the feudal grant which regulates its effect and extent and the maxim itself is, in another form, still applicable to modern grants—*modus legem dat donationi* (*h*) —the bargainor of an estate may, since the land moves from him, annex such conditions as he pleases to the estate bargained (*i*), provided that they are not illegal, repugnant, or impossible Moreover, it is always necessary that the grantor should expressly limit and declare the continuance and quantity of the estate which he means to confer, for, by a bare grant of lands, the grantee takes only an estate for life, a feoffment being still considered as a gift, which is not to be extended beyond the express limitation or manifest intention of the feoffor (*k*) As, moreover, the owner may, subject to certain beneficial restrictions, impose conditions at his pleasure upon the feoffee, so he may likewise, by insertion of special covenants in a conveyance or demise, reserve to himself rights of easement and other privileges in the land so conveyed or demised, and thus surrender the enjoyment of it only partially, and not absolutely, to the feoffee or tenant "It is not," as remarked by Lord Brougham (*l*), "at all inconsistent with the nature of property, that certain things should be reserved to the reversioners all the while the term continues It is only something taken out of the demise—some exception to the temporary surrender of the enjoyment it is only that they retain more or less partially

Reservation in demise of land

(*d*) See ss 50, 51
(*e*) S 53
(*f*) Bell, Dict & Dig of Scots Law, 242
(*g*) Craig, Jus Feud , 3rd ed 66
(*h*) Co Litt 19 a
(*i*) *Cromwell's Case*, 2 Rep 69 a, at 71 b
(*k*) Wright, Tenures, 151, 152
(*l*) In *Keppell* v *Bailey*, 2 My & K 517, at pp 536, 537

the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end "

It must not, however, therefore be inferred that "incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner" (*m*) "No man," remarks Lord St Leonards, in *Egerton* v *Brownlow* (*n*), "can attach any condition to his property which is against the public good," nor can he "alter the usual line of descent by a creation of his own A man cannot give an estate in fee-simple to a person and his heirs on the part of his mother Why? Because the law has already said how a fee-simple estate should descend" (*o*)

It is further to be observed that it is not in the power of an owner of land to create rights not connected with its use or enjoyment, and to annex them to it, nor can he subject the land to a new species of burden, so as to bind it in the hands of an assignee, thus, in the well-known case of *Ackroyd* v *Smith* (*p*) the plaintiff and his mortgagee had granted to the defendants' predecessors in title, their heirs and assigns, certain premises, together with the right of passing and repassing for all purposes along a certain road It was held that as the right was to use the road for all purposes, it was not a right incidental to the enjoyment of the premises granted, and, therefore, was not appurtenant to them, and was not assignable, and that the defendants who justified their user of the road under the grant as assignees must be treated as trespassers

Landlord and tenant

"The general principle," says Ashhurst, J , "is clear, that the landlord having the *jus disponendi* may annex whatever conditions he pleases to his grant, provided they be not illegal or unreasonable" It is, for instance, "reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate, and, therefore, a covenant not to assign is legal" (*q*), and ejectment will lie on breach of such a covenant

On this principle, likewise, an agreement by defendant to

(*m*) *Per* Ld Brougham in *Keppell* v *Bailey*, 2 My & K 517, at p 535, *Ackroyd* v *Smith*, 10 C B 164, *Bailey* v *Stephens*, 12 C B N S 91 *Ellis* v *Mayor of Bridgnorth*, 15 C B N S 52, at p 78, *Tulk* v *Moxhay* 2 Phil 774, *Hall* v *Tupper*, 2 H & C 121, at p 128, *per* Cresswell, J , and Watson, B , in *Rowbotham* v *Wilson*, 8 E & B 123

(*n*) *Egerton* v *Brownlow*, 4 H L Cas 1, at pp 241, 242

(*o*) See also *Salisbury* v *Gladstone*, 9 H L Cas 692

(*p*) 10 C B 164

(*q*) *Roe* d *Hunter* v *Galliers*, 2 T R 133, at pp 137, 138

allow plaintiff, with whom he cohabited, an annuity for life, provided she should continue single, was held to be valid, for this was only an original gift, with a condition annexed, and *cujus est dare ejus est disponere* Moreover, the grant of the annuity was not an inducement to the plaintiff to continue the cohabitation, it was rather an inducement to separate (*r*)

Another remarkable illustration of the *jus disponendi* presents itself in that strict compliance with the wishes of the grantor, which was formerly (*s*) regarded as essential to the due execution of a power (*t*)

ASSIGNATUS UTITUR JURE AUCTORIS (*Halk Max*, p 14) —
An assignee is clothed with the rights of his principal (*u*)

It is laid down as a leading rule concerning alienations and forfeitures, that *quod meum est sine facto meo vel defectu meo amitti, vel in alium transferri, non potest* (*x*), where *factum* may be translated "alienation," and *defectus* "forfeiture" (*y*), and it seems desirable to preface our remarks as to the rights and liabilities which pass by the transfer of property, by stating this elementary principle, that where property in land or chattels has once been effectively and indefeasibly acquired, the right of property can only be lost by some act amounting to alienation or forfeiture by the owner or his representatives

An "assignee" is one who, by such act as aforesaid, or by Who is an assignee

(*r*) *Gibson* v *Dickie*, 3 M & S 463, cited arg in *Parker* v *Rolls* 14 C B 691, at p 697

(*s*) By the Wills Act, 1837 (7 Will 4 and 1 Vict c 26), s 10, every will executed as prescribed by that Act is now a valid execution of a power of appointment by will, although other solemnities prescribed by the instrument creating the power may not have been observed It should be noted that an appointment made by a will, unattested, and therefore invalid according to English law, but valid according to the law of a foreign country in which the testator is domiciled, is a valid execution of a power to appoint by will personalty in this country (*Simpson* v *Church Miss Soc* [1916] 1 Ch 502, *Wilkinson's Settlement, Re*, [1917] 1 Ch 620)

(*t*) *Rutland* v *Doe* d *Wythe*, 12 M & W 355, at pp 357, 373, 378 same case, 10 Cl & F 419, *Doe* d *Wyndham* v *Burrough* 6 Q B 229, *Doe* d *Blomfield* v *Eyre*, 3 C B 557

(*u*) "*Auctores*" *dicuntur a quibus jus in nos transit* Brisson ad verb "*Auctor*"

(*x*) This maxim is well illustrated by *Vyner* v *Mersey Docks Board*, 14 C B N S 753

(*y*) 1 Prest, Abs Tit 147, 318 The kindred maxims are, *Quod semel meum est amplius meum esse non potest*, Co Litt 49 b, *Duo non possunt in solido unam rem possidere*, Co Litt 368 a See 1 Prest, Abs Tit 318, 2 Id 86, 286, *French Guiana*, 2 Dod 151, at p 157, *Munday* v *Berry*, 2 Curt 72, at p 76

the operation of law, as in the event of death, possesses a thing or enjoys a benefit, the main distinction between an *assignee* (*z*) and a *deputy* being, that the former occupies in his own right, whereas the latter occupies in the right of another (*a*) A familiar instance of a transfer by the owner's act occurs in the assignment of a lease by deed, and of a transfer by operation of law, in the case of the heir of an intestate, who is an assignee in law of his ancestor (*b*) Further, the term "assigns" (*c*) includes the assignee of an assignee *in perpetuum* (*d*), provided the interest of the person originally entitled is transmitted on each successive devolution of the estate or thing assigned, for instance, the executor of A 's executor is the assignee of A , but not so the executor of A 's administrator, or the administrator of A 's executor, who is in no sense the representative of A , and to whom, therefore, the unadministered residue of A 's estate will not pass

In order to place in a clear light the general bearing of the maxim *assignatus utitur jure auctoris*, we will briefly notice, first, the quantity, and, secondly, the quality or nature, of the interest in property which can be assigned by the owner to another party And it is a well-known general rule, imported into our own from the civil law, that no man can transfer a greater right or interest than he himself possesses *nemo plus juris ad alium transferre potest quam ipse haberet* (*e*) The owner, for example, of a base or determinable fee can do no more than transfer to another his own estate, or some interest of inferior degree created out of it and if there be two joint tenants of land, a grant or a lease by one operates only on his own moiety (*f*) In like manner, where the grantor originally possessed only a temporary or revocable right in the thing granted, and this right becomes extinguished by efflux of time or by revocation, the assignee's title ceases to be valid, according to the rule *resoluto jure concedentis resolvitur jus concessum* (*g*)

What amount of interest can be assigned

(*z*) See *Bromage* v *Lloyd*, 1 Exch 32, *Bishop* v *Curtis*, 18 Q B 878, *Lysaght* v *Bryant*, 9 C B 46

(*a*) Perkin's Prof Bk , s 100, Dyer, 6

(*b*) *Spencer s Case*, 5 Rep 16

(*c*) As to the meaning of the word "assigns in a covenant, see *Baily* v *De Crespigny*, L R 4 Q B 180, at p 186 See also *Metcalfe* v *Westaway*, 17 C B N S 658 (followed in *Hammond* v *Prentice Bros* [1920] 1 Ch 201) An underlease of the whole term amounts to an assignment (*Beardman* v *Wilson*, L R 4 C P 57)

(*d*) Co Litt 384 b

(*e*) D 50, 17, 54, Wing Max , p 56

(*f*) 8 Prest , Abs Tit 25, 222

(*g*) Mackeld , Civ Law, 179

We find it laid down, however, that the maxim above mentioned, which is one of the leading rules as to titles, or the equivalent maxim, *non dat qui non habet*, did not, before the Real Property Act, 1845 (8 & 9 Vict c 106), apply to wrongful conveyances or tortious acts (*h*) For instance, before that Act, if a tenant for years made a feoffment, this feoffment vested in the feoffee a defeasible estate of freehold, for, according to the ancient doctrine, every person having possession of land, however slender or tortious his possession might be, was, nevertheless (unless, indeed, he were the mere bailiff of the party having title), considered to be in of the seisin in fee, so as to be able by livery to transfer it to another, and, consequently, if, in the case above supposed, the feoffee had, after the conveyance, levied a fine, such fine would, at the end of five years from the expiration of the term, have barred the lessor (*i*) But now, by s 4 of the above Act (*k*), a feoffment "shall not have any tortious operation"

In connection with copyhold law also, there is an exception to the elementary rule above noticed for the lord of a manor, having only a particular interest therein as tenant for life, may grant by copy for an estate which may continue longer than his own estate in the manor, or for an estate in reversion, which may not come into possession during the existence of his own estate the special principle, on which the grants of a lord *pro tempore* stand good after his estate has ceased, being that the grantee's estate is not derived out of the lord's only, but stands on the custom (*l*)

Rule holds generally in mercantile transactions

In mercantile transactions, as well as in those connected with real property, the general rule undoubtedly is, that a person cannot transfer to another a right which he does not himself possess The law does not "enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title" (*m*)

(*h*) 3 Prest, Abs Tit 25, Id 244

(*i*) See Mr Butler s note (1), Co Litt 330 b, *Machell* v *Clarke*, 2 Ravm Ld 778, 1 Cruise, Dig, 4th ed 80

(*k*) See Shelford, Real Prop Stats, 6th ed 595

(*l*) Shelford, Copyholds, 20

(*m*) *Per* Ld Cranworth in *Dixon* v *Bovill*, 3 Macq 1, at p 16, see *Crouch* v *Credit Foncier*, L R 8 Q B 374, at p 381, as to which case, see 1 Sm L C 12th ed, pp 544 *et seq*

Of the rule above stated, a familiar instance, noticed by M Pothier, is that, where prescription has begun to run against a creditor, it will continue to run as against his heir, executors, or assigns, for the latter succeed only to the rights of their principal, and cannot stand in a better position than he did *nemo plus juris in alium transferre potest quam ipse habet* (*n*) However, in considering hereafter the maxim *caveat emptor* (*o*), we shall have occasion to notice several cases which are directly opposed in principle to the rule, for two very important exceptions to the rule *nemo dat quod non habet* (*p*) relate, the one to sales in market overt, and the other to the transfer of negotiable instruments Here we shall content ourselves with briefly pointing out how at the present day a seller of goods may lose his right of stoppage *in transitu* through the bill of lading coming to the hands of a sub-buyer (*q*)

Transfer of bill of lading

As a general rule, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods may stop them *in transitu* he may resume possession of them so long as they are in course of transit, and retain them until payment of the price (*r*), and this right is usually not affected by any sub-sale of the goods which the buyer may have made without the seller's assent, but the sub-sale, even if for cash paid down, takes effect subject to the original seller's right of stoppage (*s*) If, however, the seller has indorsed and delivered to the buyer the bill of lading, or any other document of title to the goods, and the buyer has indorsed and delivered it to his sub-buyer, then the sub-buyer, provided he has taken the document in good faith, as well as for valuable consideration (*t*), is entitled to the goods, free from any right in the original seller to stop them, and thus his position is better than that of the original buyer (*u*) Moreover, although the property in the goods does not pass to a buyer who, having received the

(*n*) 2 Pothier, Oblig 263 This maxim was applied by Parke, B , in *Awde* v *Dixon*, 6 Exch 869, at p 872

(*o*) *Post*, Chapter IX

(*p*) *Per* Willes, J , in *Whistler* v *Forster*, 14 C B N S 248, at p 257

(*q*) As to the law relating to the passing of the property in the goods by the indorsement and delivery of the bill of lading, see *Sewell* v *Burdick*, 10 App Cas 74, *Bristol Bank* v *Midl Ry Co* , [1891] 2 Q B 653

(*r*) S 44 of the Sale of Goods Act, 1893 (56 & 57 Vict c 71) (declaring the common law)

(*s*) Ibid s 47, see *Kemp* v *Falk*, 7 App Cas 573, at p 582

(*t*) See *Leask* v *Scott*, 2 Q B D 376

(*u*) Sale of Goods Act, 1893, s 47 (declaring the common law) *Lickbarrow* v *Mason*, 1 Sm L C , 12th ed , p 726

bill of lading together with the seller's draft upon him for the price of the goods, wrongfully retains the bill of lading without honouring the draft (*x*) yet the seller's right of stoppage may now be defeated by such buyer wrongfully transferring the bill of lading to his sub-buyer, for the sub-buyer acquires a good title to the goods by taking the bill of lading in good faith and without notice of the rights of the original seller in respect of the goods (*y*) The legislature has thus altered the common law which made a transfer of a bill of lading ineffectual if the transferor was not himself the owner of the goods (*z*)

Amount of interest taken by assignee

Having thus adverted to the quantity of interest assignable, with reference more especially to the grantor, we must next observe that, as a general rule, the assignee of property takes it subject to all the obligations or liabilities (*a*), and clothed with all the rights which attached to it in the hands of the assignor (*b*), and this is in accordance with the maxim of the civil law, *qui in jus dominiumve alterius succedit jure ejus uti debet* (*c*) We have already given one instance illustrative of this rule, viz , where an heir or executor becomes vested with the right to property against which the Statute of Limitations has begun to run

Assignee of a chose in action may sue for it in his own name

We may here remark that, although formerly at law there was a distinction between the transfer of a chose in action and the transfer of the right to sue for the same, the importance of that distinction has largely ceased since the Judicature Act, 1873, whereby an absolute assignment, by writing, under the hand of the assignor, of any debt, or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action,

(*x*) Sale of Goods Act, 1893, s 19 (3), *Shepherd* v *Harrison*, L R 5 H L 116, at p 133

(*y*) Sale of Goods Act, 1893, s 25 (2), *Cahn* v *Pockett's Co*, [1899] 1 Q B 643

(*z*) See *Gurney* v *Behrend*, 3 E & B 622, at pp 633, 634, *Glyn* v *E & W India Docks Co*, 7 App Cas 591

(*a*) See *White* v *Crisp*, 10 Exch 312, *Newfoundland Government* v *Newf Ry Co*, 13 App Cas 199

(*b*) As to this rule, see *Mangles* v *Dixon*, 3 H L Cas 702, cited *Higgs* v *Assam Tea Co* L R 4 Ex 387, at p 396, *Rodger* v *Comptoir d'Escompte*, L R 2 P C 393, at p 405, *Dickson* v *Swansea Vale R Co*, L R 4 Q B 44 at p 48 If a man gives a licence and then parts with the property over which the privilege is to be exercised, the licence is gone, *Colman* v *Foster*, 1 H & N 37, at p 40

(*c*) D 50, 17, 177, pr For instance, fee simple estates are subject in the hands of the heir or devisee, to debts of all kinds contracted by the deceased

is effectual in law (subject to all equities entitled to priority over the right of the assignee) to pass and transfer the legal right to such debt or chose in action, and all legal and other remedies for the same (*d*)

Without attempting to enumerate the various rights which are assignable, either by the express act of the party, or by the operation of law, we may observe, generally, that the maxim, *assignatus utitur jure auctoris*, is subject to many restrictions (*e*) besides those to which we have alluded For instance, at common law, the assignee of the reversion upon a lease of lands could not, according to the better opinion, sue upon the covenants contained in the lease (*f*), and, though the law has been altered in his favour by the statute 32 Hen 8, c 34, s 1, and the Conveyancing Act, 1881 (44 & 45 Vict c 41, s 10), yet those statutes enable him to sue only upon such covenants (*g*) as touch and concern the thing demised, or have reference to the subject-matter of the lease, and not upon merely collateral covenants (*h*) Again, notwithstanding that the property of a bankrupt which vests in his trustee includes "things in action" and "every description of property" (*i*), yet rights of action in respect of torts, or even breaches of contract, resulting immediately in injuries wholly to the person or feelings of the bankrupt, do not pass to the trustee, although the bankrupt's estate may have been consequentially damaged thereby (*j*) And, as we shall hereafter see (*k*), the rule that a vested right of action is by death transferred to the personal representatives of the deceased is subject to important exceptions

The case of a pawn or pledge of a chattel should perhaps also be referred to in connection with the principle, *assignatus utitur jure auctoris*, for here the pawnor retains a property in the chattel, qualified by the right vested in the pawnee, and a sale of the chattel by the pawnor would, therefore, transfer to the buyer that qualified right only which the seller himself

(*d*) S 25, sub s 6

(*e*) See *Sandrey* v *Mschell*, 3 B & S 405 (distinguished in *Cope* v *Bennett*, [1911] 2 Ch 488), *Young* v *Hughes*, 4 H & N 76, *M Kune* v *Joynson*, 5 C B N S 218

(*f*) 1 Wms Saund (ed 1871) p 299, n (b), p 300, n (10)

(*g*) See *Cole* v *Kelly*, [1920] 2 K B 107

(*h*) See *Spencer's Case* and the notes, 1 Smith, L C , 12th ed , pp 62 *et seq*

(*i*) Bankruptcy Act, 1914 (4 & 5 Geo 5 c 59), ss 53, 167

(*j*) *Beckham* v *Drake* 2 H L Cas 579, *Rogers* v *Spence*, 12 Cl & F 700, *Rose* v *Buckett*, [1901] 2 K B 449 *Wilson* v *United Counties Bank*, [1920] A C 102 See Williams, Bankcy , 12th ed , p 247

(*k*) See the maxim, *actio personalis moritur cum persona*, *post*, Chap IX

possessed (*l*) To constitute a valid pledge, there must, however, be a delivery of the chattel, either actual or constructive, to the pawnee (*m*), and if the pawnee parts with the possession of the chattel he may lose the benefit of his security, and will do so if such parting is absolute (*n*)

Absolute and special property

Again, the well-known distinction between *absolute* and *special* property may be adverted to generally, as showing how and under what circumstances the maxim, that an assignee succeeds to the rights of his grantor, must, in a large class of cases, be understood *Absolute* property, according to Lawrence, J , is where one, having the possession of chattels, has also the exclusive right to enjoy them, which right can only be defeated by some act of his own *Special* property, on the other hand, is, where he who has the possession holds them subject to the claims of other persons (*o*) According, therefore, as the property in the grantor was absolute or subject to a special lien, so will be that transferred to his assignee *qui in jus dominiumve alterius succedit jure ejus uti debet*, and the same principle applies where a subsequent transfer of the property is made by such assignee (*p*)

We shall now proceed to consider a few other kindred maxims, which, though, perhaps, of minor importance, yet could not properly be omitted in even the most cursory notice of the law relating to the transfer of property

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CUICUNQUE ALIQUIS QUID CONCEDIT CONCEDERE VIDETUR ET ID SINE QUO RES IPSA ESSE NON POTUIT (11 *Rep* 52)—*Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect*

General rule

"When anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall

(*l*) *Franklin* v *Neate*, 13 M & W 481, cited in *Re Attenborough*, 11 Exch 461 As to the true nature of a pledge, see *per* Parke, B , in *Cheesman* v *Exall*, 6 Exch 341, at p 344 As to the right of the pledgee to sell the pledge, see *Halliday* v *Holgate*, L R 3 Ex 299

(*m*) *Per* Erle, C J , in *Martin* v *Reid*, 11 C B N S 730, at p 734

(*n*) *Meyerstein* v *Barber*, L R 2 C P 38, at p 51, *Young* v *Lambert*, L R 3 P C 142, *Ryall* v *Rolle*, 1 Atk 164, *N W Bank* v *Poynter*, [1895] A C 56, *Allester, Re*, [1922] 2 Ch 211

(*o*) *Webb* v *Fox*, 7 T R 391, at p 398 See *per* Pollock, C B , in *Lancashire Waggon Co* v *Fitzhugh*, 6 H & N 502, at p 506

(*p*) As to a sale or wrongful conversion by bailee for hire, see *Cooper* v *Willomatt*, 1 C B 672, *Bryant* v *Wardell*, 2 Exch 479, *Fenn* v *Bittleston*, 7 Exch 152, *Spackman* v *Miller*, 12 C B N S 659, at p 676

pass inclusive, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words" (*q*) Therefore, where a man, having a close surrounded with his land, grants the close, the grantor shall have a way over the land as incident to the grant (*r*), and, if the land be granted with a reservation of the close, the grantor shall have a way of necessity to the close (*r*), notwithstanding the general rule that a grantor shall not derogate from his grant and that if he intend to reserve any right over the land granted he must reserve it expressly (*s*) So, if a man lease his land and all mines therein, when there are no open mines, the lessee may dig for the minerals (*t*), by the grant of the fish in a man's pond is granted power to come upon the banks and fish for them (*u*), and where minerals are granted, the presumption is that they are to be enjoyed, and that a power to get them is also granted as a necessary incident (*x*) On the same principle, if trees be excepted in a lease, the lessor has power, as incident to the exception, to enter the land demised at any reasonable times to fell and remove the trees, and the like law holds of a demise by parol (*y*) So a rector may, as incident to his right to tithes, enter a close to carry the tithes away by the usual road (*z*), and a tenant at will, after notice from his landlord to quit, or other person entitled to emblements, shall have free entry, egress and regress, to cut and carry away the corn (*a*)

Examples

Repair of pipes

So, it has been observed that, when the use of a thing is granted, everything is granted whereby the grantee may have and enjoy such use, as, if a man give me a licence to lay pipes in his land to convey water to mine, I may enter and dig his land, in order to mend the pipes (*b*) And where it was found by special verdict that a coal-shoot and certain pipes were necessary for the convenience and beneficial use and occupation of a

(*q*) Shep Touch 89
(*r*) 1 Wms Saund 323, *Pinnington* v *Galland*, 9 Exch 1
(*s*) See *Wheeldon* v *Burrows*, 12 Ch D 31, at p 49, cited *post*, p 360
(*t*) *Saunder s Case*, 5 Rep 12 a
(*u*) Shep Touch 89
(*x*) See *per* Ld Wensleydale in *Rowbotham* v *Wilson*, 8 H L Cas 348, at p 360
(*y*) *Liford s Case* 11 Rep 52 a, *Hewitt* v *Isham*, 7 Exch 77
(*z*) *James* v *Dodds*, 2 Cr & M 266
(*a*) Litt s 68, Co Litt 56 a
(*b*) *Per* Twysden, J , in *Pomfret* v *Ricroft* 1 Saund 321, at 323, *Hodgson* v *Field*, 7 East, 613, at p 622, *Blakesley* v *Wheeldon*, 1 Hare, 180, *Goodhart* v *Hyett*, 25 Ch D 182, at p 187

messuage, and it was held that under the circumstances they passed to the lessee as part of the messuage it was further held, in accordance with the rule under consideration, that the right to go over the soil of a certain passage, in order to use the coal-shoot, and to use and repair the pipes, also passed to the lessee as a necessary incident to the demise, although not mentioned in the lease (*c*)

Exceptions necessary for mining

Again, where a deed of conveyance of land excepted and reserved out of the grant all coal mines, together with sufficient way-leave and stay-leave to and from the mines, and the liberty of sinking pits it was held that, as a right to sink pits to get the coals was reserved, all things depending on that right and necessary for its enjoyment were also reserved, and that the grantor had, as incident to the liberty to sink pits, the right to affix to the land all machinery necessary to drain the mines, and draw the coals from the pits and also that a pond to supply the engine, and an engine-house, were necessary accessories to the engine, and were lawfully made (*d*)

Statutory rights

The maxim under consideration is applicable in construing Acts of Parliament Thus, where a statute empowered one railway company to carry their line across that of another by a bridge, it was held that the former might place temporary scaffolding on the land of the latter, if that were necessary for constructing the bridge (*e*) And, generally where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, means that the right to necessary support of the thing constructed shall accompany the right to make and maintain it (*f*)

Power of corporation to make bye laws

On the same principle, the power of making bye-laws is incident to a corporation, for when the Crown creates a corporation, it grants to it, by implication, all powers necessary for carrying out the objects for which it is created, and securing a perpetuity of succession, and a discretionary power to make minor regulations, usually called bye-laws, in order to effect the objects of the charter, is necessary, and the reasonable exercise of this power is, therefore, impliedly conferred by the very act of incorporation (*g*) On the same principle also seems

(*c*) *Hinchcliffe* v *Kinnoul* 5 Bing N C 1
(*d*) *Dand* v *Kingscote*, 6 M & W 174
(*e*) *Clarence Ry Co* v *G N Ry Co*, 13 M & W 706, at p 721
(*f*) *L & N W Ry Co* v *Evans*, [1893] 1 Ch 16, at p 28
(*g*) *Per* Parke, J, in *R* v *Westwood*, 7 Bing 1, at p 20

to rest the doctrine that a grant from the Crown to the men of a particular parish for a specific purpose has the effect of incorporating them so as to carry that purpose into effect (*h*), and the rule that a corporation formed for trading purposes has an implied power to contract by parol for purposes necessary for carrying on its trade (*i*)

Rule limited to necessary incidents

Our maxim, however, must be understood as applying only to such things as are incident to the grant and directly necessary to the enjoyment of the thing granted Thus, if a man grant the fish in his pond, the grantee may not cut the banks to lay the ponds dry, for he can take the fish by nets or other engines (*k*) If a man let a house, reserving a way through it to a back-house, he may not use the way but upon request and at seasonable times(*l*) A way of necessity is also limited by the necessity which created it, and, when such necessity ceases, the right of way likewise ceases, therefore, if at any later time the party formerly entitled to such a way can, by passing over his own land, reach the place to which it led by as direct a course as that of the old way, the way ceases to exist as of necessity (*m*) Moreover, it seems that a way of necessity is not a way for all purposes, but only for that of enjoying the place in its original condition (*n*)

Wheeldon v *Burrows*

We may conclude this part of our subject by citing the following observations from the judgment of Thesiger, L J , in an important case upon the relative rights of the parties to the grant of part of a tenement —" I think that two propositions may be stated as what I may call the general rules governing cases of this kind The first is that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted

(*h*) See *Rivers* v *Adams*, 3 Ex D 361, at p 366

(*i*) *S of Ireland Colliery Co* v *Waddle*, L R 4 C P 617

(*k*) Perk , Grants, s 110, *Darcy* v *Askwith*, Hob 234, *Reniger* v *Fogossa*, Plowd 1, at 16, *per* Parke, B , in *Dand* v *Kingscote*, 6 M & W 174, at p 189

(*l*) *Tomlin* v *Fuller*, 1 Ventr 48

(*m*) *Holmes* v *Goring*, 2 Bing 76, see *Pearson* v *Spencer*, 1 B & S 571, at p 584, 3 Id 761

(*n*) *London Corporation* v *Riggs*, 13 Ch D 798

The second proposition is that, if the grantor intend to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant Those are the general rules governing cases of this kind, but the second rule is subject to certain exceptions One of these exceptions is the well-known exception which attaches to cases of what are called ways of necessity Both of the general rules I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz , that a grantor shall not derogate from his grant" (*o*)

Authority implied by law

Upon a principle similar to that which has been thus briefly considered, it is a rule that, when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command *quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud* (*p*) Thus when a statute gives a justice of the peace jurisdiction over an offence, it impliedly gives him power to apprehend forthwith (instead of merely summoning) any person charged with such offence (*q*) So, constables, whose duty it is to see the peace kept, may, when necessary, command the assistance of others (*r*) In like manner, the sheriff is authorised to take the *posse comitatus*, or power of the county, to help him in executing a writ of execution, and every one is bound to assist him when required so to do (*s*), and, by analogy, the persons named in a writ of rebellion, and charged with the execution of it, have a right, at their

(*o*) *Wheeldon* v *Burrows*, 12 Ch D 31, at p 49 See *Russell* v *Watts*, 10 App Cas 590, *Brown* v *Alabaster*, 37 Ch D 490, at p 504, *Birmingham Banking Co* v *Ross*, 38 Id 295, *Grosvenor Hotel Co* v *Hamilton*, [1894] 2 Q B 836, *Schwann* v *Cotton*, [1916] 2 Ch 459, *Hansford* v *Jago*, [1921] 1 Ch 322, *Westwood* v *Heywood*, [1921] 2 Ch 130, *White* v *Williams*, [1922] 1 K B 727 See also the Conveyancing Act, 1881 (44 & 45 Vict c 41), s 6

(*p*) See *Foljamb s Case*, 5 Rep 115 b Upon this maxim rests the authority of the master of a ship to bind the owner for all that is necessary for the purpose of conducting the navigation of the ship to a favourable termination, *per* Parke, B , in *Beldon* v *Campbell*, 6 Exch 886, at p 889, *per* Ld Blackburn in *Anderson* v *Ocean S S Co* , 10 App Cas 107, at p 116, and the maxim applies to the authority of agents generally, see *per* Ld Blackburn in *Murray* v *Scott* 9 App Cas 519, at p 546 it being a general rule that "there is an implied authority to do all those things that are necessary for the protection of the property entrusted to a person, or for fulfilling the duty which a person has to perform, ' *per* Blackburn, J , in *Allen* v *L & S W Ry Co* , L R 6 Q B 65, at p 69, *per* Lopes, L J , in *Abrahams* v *Deakin*, [1891] 1 Q B 516, at p 522

(*q*) *Bane* v *Methuen*, 2 Bing 63 See *R* v *Benn*, 6 T R 198

(*r*) Noy, Max , 9th ed , p 55

(*s*) *Foljamb s Case*, 5 Rep 115 b (cited in *Miller* v *Knox* 4 Bing N C 574, at p 583), Noy, Max , 9th ed , p 55, Judgm in *Howden* v *Standish*, 6 C B 521

discretion, to require the assistance of any of the liege subjects of the Crown to aid in the execution of the writ (*t*)

The foregoing are simple illustrations of the last-mentioned maxim, or of the synonymous expression, *quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest* (*u*), the full import of which has been thus elaborately set forth (*x*) —"Whenever anything is authorised, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something else will be supplied by necessary intendment But if, when the maxim comes to be applied adversely to the liberties or interests of others, it be found that no such impossibility exists—that the power may be legally exercised without the doing that something else, or, even going a step farther, that it is only in some particular instances, as opposed to its general operation, that the law fails in its intention unless the enforcing power be supplied—then in any such case the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply by implication as a *casus omissus*"

The mode of applying the maxim just cited may be thus exemplified The Lower House of Assembly of Dominica being a legislative assembly constituted under royal proclamation, with a view to the making of laws for the peace, welfare, and good government of the inhabitants of the colony (*y*) the question arose (*z*), whether the Assembly had the right to punish its members by committal to gaol, when guilty of contempt of the House, or of obstructing its business, in its presence and during its sittings In deciding this question adversely to the asserted right, the Judicial Committee of the Privy Council observed in substance as follows —It must be conceded that as the common law sanctions the exercise of the prerogative by which the Assembly was created, the principle of the common law embodied in the maxim, *quando lex aliquid concedit concedere videtur et illud sine quo res ipsa esse non potest*, applies to the body so created The question, therefore, is, whether the power to punish for contempts committed in its presence is necessary

(*t*) *Miller* v *Knox*, 4 Bing N C 574
(*u*) *Oath before Justices*, 12 Rep 131
(*x*) In *Fenton* v *Hampton*, 11 Moo P C 347, at p 360
(*y*) Clark, Col L 134
(*z*) In *Doyle* v *Falconer*, L R 1 P C 328

to the existence of such a body and the proper exercise of the functions which it is intended to execute It is necessary to distinguish between a power to commit for a contempt, which is a judicial power, and a power to remove an obstruction offered to the deliberations of a legislative body during its sitting, which last power is necessary for self preservation If a member of a Colonial Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed, or excluded for a time, or even expelled, but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence The right to remove for self-security is one thing, the right to inflict punishment is another The former is all that is warranted by the maxim above cited, but the latter is not its legitimate consequence To establish the privilege claimed, it must be shown to be essential to the existence of the Assembly—an incident *sine quo res ipsa esse non potest* (*a*)

Prohibition implied by law

On the other hand, *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud* (*b*) 'Whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance" (*c*) and a transaction will not be upheld which is "a mere device for carrying into effect that which the legislature has said shall not be done" (*d*) Wherever Courts of law see attempts made to conceal illegal or void transactions by fictitious documents, they "brush away the cobweb varnish, and show the transactions in their true light" (*e*) For instance, when the question is whether the Bills of Sale Acts apply, the Courts disregard the form of the documents, and look to the true nature of the transaction and the real intention of the parties (*f*), and the same rule obtains, where the question is whether the Gaming Act applies (*g*) Again, as an example of the maxim, that what "cannot be done *per directum* shall not be done *per obliquum*" (*h*), it may be mentioned that a tenant who has covenanted not to transfer

(*a*) *Doyle* v *Falconer*, L R 1 P C 328, at p 338 See *Barton* v *Taylor* 11 App Cas 197

(*b*) 2 Inst 48

(*c*) *Per* Tindal, C J in *Booth* v *Bank of England*, 7 Cl & F 509, at p 540

(*d*) *Per* Martin, B , in *Morris* v *Blackman*, 2 H & C 912, at p 918 , see also *Minty* v *Sylvester*, 84 L J K B 1982

(*e*) *Per* Wilmot, C J , in *Collins* v *Blantern*, 2 Wils K B 341 at p 349 , cf *Jones* v *Merionethshire Building Soc* , [1892] 1 Ch 173

(*f*) *Re Watson*, 25 Q B D 27 *Madell* v *Thomas*, [1891] 1 Q B 230

(*g*) *Universal Stock Exchange* v *Strachan*, [1896] A C 166, at p 173

(*h*) Co Litt 223 b

his lease, commits a fraud upon his landlord, and breaks his covenant, if an alienation be effected by his collusion under colour of a seizure of the term in execution (*i*) Of fraud itself it has been said that it is "infinite in variety, sometimes it is audacious and unblushing, sometimes it pays a sort of homage to virtue, and then it is modest and retiring, it would be honesty itself if it could only afford it But fraud is fraud all the same, and it is the fraud, not the manner of it, which calls for the interposition of the Courts" (*l*)

"Evasion" of Act

With regard to the argument that a transaction is an "evasion" of a prohibitory Act, it must be observed that the real question always is whether the transaction is or is not within the Act, although it does not follow that it is not within it, because the very words of the Act have not been violated (*m*) For clauses in statutes avoiding transactions, when the meaning is open to question, are to receive a wide or limited construction according as the one or the other will best effectuate the purpose of the statute (*n*), and statutes made against fraud may be liberally expounded to suppress the fraud (*o*) Nevertheless, what the legislature intended not to be done can be legitimately ascertained only from what it has enacted, either in express words or by reasonable and necessary implication (*p*) And in considering an Act imposing a tax, Chitty, L J , said, "the whole argument on evasion of the Act is fallacious The case either falls within the Act or it does not If it does not, there is no such thing as an evasion" (*q*) Evasion is intentionally doing something whereby a person escapes the consequences of an Act although he is brought within it (*r*)

(*i*) *Doe* d *Mitchinson* v *Carter*, 8 T R 300

(*l*) *Per* Ld Macnaghten in *Reddaway* v *Banham*, [1896] A C 199, at p 221

(*m*) See *per* Ld Cranworth in *Edwards* v *Hall*, 6 D M & G 74, at p 89

(*n*) *Re Burdett*, 20 Q B D 310, at p 314

(*o*) *Twyne s Case*, 3 Rep 80 b, 82 a

(*p*) *Per* Ld Watson in *Salomon* v *Salomon & Co* [1897] A C 22, at p 38

(*q*) In *A G* v *Beech*, [1898] 2 Q B 147, at p 157 See also *per* Ld Macnaghten in *A G*, v *Richmond & Gordon*, [1909] A C 466, at p 473

(*r*) See *per* Ld Lindley in *Bullivant* v *A G for Victoria*, [1901] A C 196, at p 207, and *per* Ld Hobhouse in *Simms* v *Registrar of Probates*, [1900] A C 323, at p 334

ACCESSORIUM NON DUCIT SED SEQUITUR SUUM PRINCIPALE (*Co Litt* 152 *a*)—*The incident shall pass by the grant of the principal, but not the principal by the grant of the incident* (*s*)

Rule derived from Roman law

Upon the maxim, *res accessoria sequitur rem principalem* (*t*), depended the doctrine of *accessio* (*u*) in the Roman law, *accessio* being that mode of acquiring property whereby the owner of the principal thing became, *ipso jure*, owner also of all that belonged to the principal as accessory to it Two extensive classes of cases accordingly fell within the operation of the doctrine 1, that in which the owner of a thing acquired a right of property in its organic products, as in the young of animals, the fruit of trees, the alluvion or deposit on land, and in some other kinds of property originating under analogous circumstances 2, that in which one thing became so closely connected with and attached to another that their separation could not be effected at all, or at least not without injury to one or other of them, for in such cases the owner of the principal thing was held to acquire also the accessory connected therewith (*x*)

Examples of rule in our law

The maxim, *accessorium non ducit sed sequitur suum principale*, is, then, derived from the Roman law, and signifies that the accessory right follows the principal (*y*), it may be illustrated by the remarks appended to the rule immediately preceding (*z*), as also by the following examples

An easement to take water from a river to fill a canal ceases when the canal no longer exists (*a*) The owner of land has, *prima facie*, a right to the title deeds, as something annexed

(*s*) Co Litt 152 a, 151 b *per* Vaughan, B , in *Harding* v *Pollock*, 6 Bing 25, at p 63, 32 R R 47

(*t*) "A principal thing (*res principalis*) is a thing which can subsist by itself, and does not exist for the sake of any other thing All that belongs to a principal thing, or is in connection with it, is called an accessory thing (*res accessoria*) (Mackeld Civ Law, 155) See *Ashworth* v *Heyworth*, L R 4 Q B 316

(*u*) "*Accessio* is the general name given" in the Roman Law "to every accessory thing, whether corporeal or incorporeal, that has been added to a principal thing from without, and has been connected with it, whether by the powers of nature or by the will of man, so that in virtue of this connection it is regarded as part and parcel of the thing The *appurtenances* to a thing are to be noticed as a peculiar kind of accession, they are things connected with another thing, with the view of serving for its perpetual use" (Mackeld Rom Law, 155, 156)

(*x*) See Mackeld Civ Law, 279, 281, I 2, 1, *De Rerum Divisione*, Brisson ad verb "*Accessorium*"

(*y*) Bell, Dict and Dig of Scots Law, p 7 See also Co Litt 389 a

(*z*) See also *Chanel* v *Robotham*, Yelv 68, *Wood* v *Bell*, 5 E & B 772 *Seath* v *Moore*, 11 App Cas 350

(*a*) *National Guaranteed Manure Co* v *Donald*, 4 H & N 8

to his estate therein, and it is accordingly laid down that, if a man seised in fee conveys land to another and his heirs, without warranty, all the title deeds belong to the purchaser, as incident to the land (*b*), though not granted by express words (*c*) In like manner, heirlooms are such goods and chattels as go by special custom to the heir along with the inheritance, and not to the executor of the last owner of the estate, they are due to the heir by custom, and not by the common law, and he shall accordingly have an action for them There are also some other things in the nature of heirlooms which likewise descend with the particular title or dignity to which they are appurtenant (*d*)

Again, rent is incident to the reversion, and, therefore, by a general grant of the reversion, the rent will pass, though, by the grant of the rent generally, the reversion will not pass, for *accessorium non ducit sed sequitur suum principale* however, by the introduction of special words, the reversion may be granted away, and the rent reserved (*e*) So, an advowson appendant to a manor is so intimately connected with it, as to pass by the grant of the manor *cum pertinentiis*, without being expressly referred to, and, therefore, if a tenant in tail of a manor with an advowson appendant suffered a recovery, it was not necessary for him to express his intention to include the advowson in the recovery, for any dealing with the manor, which is the principal, operates on the advowson, which is the accessory, whether expressly named or not It is, however, to be observed that, although the conveyance of the manor *prima facie* draws after it the advowson also, yet it is always competent for the owner to sever the advowson from the manor, by conveying the advowson away from the manor, or by conveying the manor without the advowson (*f*), and hence there is a marked distinction between the preceding cases and those in which the incident is held to be inseparably connected with the principal, so that it cannot be severed therefrom Thus it is laid down that estovers, or wood granted to be used as fuel in a particular house, shall go to him that hath the house, and that, inasmuch as a

Advowson appendant

(*b*) See *per* Tindal, C J , in *Tinniswood* v *Pattison*, 3 C B 243, at p 248, and Id , n (b)

(*c*) *Ld Buckhurst's Case*, 1 Rep 1, *Goode* v *Burton* 1 Exch 189, at pp 193 *et seq* , *Allwood* v *Heywood*, 32 L J Ex 153

(*d*) See 1 Crabb, Real Prop 11, 12

(*e*) 2 Blac Comm 176, Litt s 229, Co Litt 143 a

(*f*) Judgm in *Moseley* v *Motteux*, 10 M & W 533, at p 544, Bac Abr , " *Grants* " (I 4)

Court baron is incident to a manor, the manor cannot be granted and the Court reserved (*g*) In some cases, also, that which is parcel or of the essence of a thing passes by the grant of the thing itself, although at the time of the grant it were actually severed from it, by the grant, therefore, of a mill, the mill-stone may pass, although temporarily severed from the mill (*h*)

Severance from grant

Again, common of pasture *appendant* is the privilege belonging to the owners or occupiers of arable land holden of a manor to put upon the wastes of the manor their cattle or sheep, it is appendant to the particular farm, and passes with it, as incident to the grant (*i*) But divers things which, though continually enjoyed with other things, are only appendant thereto, do not pass by a grant of those things as, if a man has a warren in his land, and grants or demises the land, by this the warren does not pass, unless, indeed, he grant or demise the land *cum pertinentiis*, or with all the profits, privileges, &c , thereunto belonging, in which case the warren might, perhaps, pass (*k*)

Common appendant, &c

In *Ewart* v *Cochrane* (*l*), it was stated to be the law of England that when two properties are possessed by the same owner, and there has been a severance made of one part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant if there are the usual words in the conveyance

Another well-known application of the maxim under consideration is to covenants running with the land, which pass therewith, and on which the assignee of the lessee, or the heir or devisee of the covenantor is in many cases liable, according to the kindred maxim of law, *transit terra cum onere* (*m*), a maxim, the principle of which holds not merely with reference to covenants, but likewise with reference to customs annexed

(*g*) Finch, Law, 15

(*h*) Shep Touch 90 See *Wyld* v *Pickford*, 8 M & W 443 As to what shall be deemed to pass as appendant, appurtenant, or incident, see Bac Abr , " *Grants* " (I 4), *Smith* v *Ridgeway*, 4 H & C 37, 577, *Langley* v *Hammond*, L R 3 Ex 161

(*i*) Shep Touch 89, 240, Bac Abr , ' *Grants* " (I 4), Co Litt , by Thomas, vol 1 p 227

(*k*) Shep Touch 89, 1 Crabb, Real Prop 488 See *Pannell* v *Mill*, 3 C B 625, *Graham* v *Ewart*, 1 H & N 550 and 11 Exch 326 (cited in *Jeffryes* v *Evans* 19 C B N S 246, at p 266), *Lonsdale* v *Rigg*, 11 Exch 654 and 1 H & N 928

(*l*) 4 Macq 117, at p 122, see *Francis* v *Hayward*, 20 Ch D 773 and 22 Id 177

(*m*) Co Litt 231 a

to land for instance, it is laid down that the custom of gavelkind, being a custom by reason of the land, runs therewith, and is not affected by a fine or recovery had of the land, but "otherwise it is of lands in ancient demesne partible among the males, for there the custom runneth not with the land simply, but by reason of the ancient demesne and, therefore, because the nature of the land is changed, by the fine or recovery, from ancient demesne to land at the common law, the custom of parting it among the males is also gone" (*n*)

Application of rule to titles

With reference to titles, moreover, one of the leading rules is, *cessante statu primitivo cessat derivativus* (*o*)—the derived estate ceases on the determination of the original estate, and the exceptions to this rule have been said to create some of the many difficulties which present themselves in the investigation of titles (*p*) The rule itself may be illustrated by the case of a demise for years by a tenant for life, or by any person having a particular or defeasible estate, which, unless confirmed by the remainderman or reversioner, or authorised by statute, will determine on the death of the lessor, and the same principle usually applies whenever the original estate determines according to the express terms or nature of its limitation, or is defeated by a condition in consequence of the act of the party, as by the marriage of a tenant *durante viduitate*, or by the resignation of the parson who has leased the glebe lands or tithes belonging to the living (*q*)

An exception to the foregoing rule arises in cases of copyholds, where the tenant has granted a lease to another with the license of the lord, and then commits a forfeiture here the license operates as a confirmation by the lord of the term thus created, and, therefore, pending the term, the lord cannot maintain ejectment for the land (*r*)

Mercantile transactions

The law relative to contracts and mercantile transactions likewise presents many examples of the rule that the accessory follows and cannot exist without its principal, thus, where

(*n*) Finch, Law, 1, 16

(*o*) *Paine's Case*, 8 Rep 34 a

(*p*) 1 Prest, Abs Tit 245

The maxim applies only when the original estate determines by limitation or is defeated by a condition It does not apply when the owner of the estate does any act which amounts to an alienation or transfer, though such alienation or transfer produces an extinguishment of the original estate Shep Touch by Preston, 286 See *London Loan Co* v *Drake*, 6 C B N S 798, at p 810

(*q*) 1 Prest Abs Tit 197, 317, 358, 359

(*r*) *Clarke* v *Arden*, 16 C B 227

framed pictures are sent by a carrier, the frames, as well as the pictures, are within the Carriers Act, 1830, s 1 (*s*) Again, the obligation of the surety is accessory to that of the principal, and is extinguished by the release or discharge of the latter, for *quum principalis causa non consistit ne ea quidem quæ sequuntur locum habent* (*t*), and *quæ accessionum locum obtinent extinguuntur cum principales res peremptæ fuerint* (*u*) The converse, however, of the case just instanced does not hold, and the reason is that *accessorium non trahit principale* (*x*)

Principal and interest

So, likewise, interest of money is accessory to the principal, and must, in legal language, "follow its nature" (*y*), and, therefore, if the plaintiff in any action is barred from recovering the principal, he must, as a rule (*z*), be equally barred from recovering the interest (*a*) And, "If by a will the whole of the personal estate, or the residue of the personal estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must, during the period which the law allows for accumulation, be accumulated and added to the principal" (*b*), and where stock, to which the assignor was entitled in reversion upon his mother's death, was assigned with all his right, title, and interest therein, it was held that the assignment passed the bonuses which afterwards accrued during the mother's life (*c*)

Freight follows ownership of vessel

The title to freight is *prima facie* an incident of ownership, and, if a sale or transfer of shares be effected, while the ship is under a contract of affreightment, without the mention of the word freight, that will pass to the purchaser the corresponding share in the freight, notwithstanding a subsequent contract of the vendor to transfer this particular freight to another (*d*)

(*s*) *Henderson* v *L & N W Ry Co*, L R 5 Ex 90, distinguishing *Treadwin* v *G E Ry Co*, L R 3 C P 308

(*t*) D 50, 17, 129, § 1, 1 Pothier, Oblig, 413 (*u*) 2 Pothier, Oblig, 202

(*x*) 1 Pothier Oblig 477, 2 Id 147, 202

(*y*) 3 Inst 139, Finch, Law, 23

(*z*) See *Parr s Bank* v *Yates*, [1898] 2 Q B 460

(*a*) Judgm in *Clark* v *Alexander*, 8 Scott N R 147, at p 165 See *per* Ld Ellenborough in *R* v *Askew*, 3 M & S 9, at p 10, 2 Pothier, Oblig, 479 'The giving of interest is not by way of a penalty, but is merely doing the plaintiff full justice, by having his debt with all the advantages properly belonging to it It is in truth a compensation for delay' (Judgm in *Newton* v *Grand Junc Ry Co* 16 M & W 139, at p 144)

See *Hollis* v *Palmer*, 2 Bing N C 713, *Florence* v *Drayson*, 1 C B N S 584, *Florence* v *Jennings* 2 Id 454, *Forbes* v *Forbes*, 18 Beav 552

(*b*) *Per* Ld Westbury in *Bective* v *Hodgson*, 10 H L Cas 656, at p 665

(*c*) *Re Armstrong's Trusts*, 3 K & J 486, *Cooper* v *Woolfitt*, 2 H & N 122

(*d*) *Lindsay* v *Gibbs*, 22 Beav 522, see also *Rusden* v *Pope*, L R 3 Ex 269

LICET DISPOSITIO DE INTERESSE FUTURO SIT INUTILIS TAMEN FIERI POTEST DECLARATIO PRÆCEDENS QUÆ SORTIATUR EFFECTUM INTERVENIENTE NOVO ACTU (*Bac Max*, *reg* 14)—*Although the grant of a future interest is inoperative, yet it may become a declaration precedent, taking effect upon the intervention of some new act*

Rule laid down by Lord Bacon

"The law," said Lord Bacon, "doth not allow of grants except there be a foundation of an interest in the grantor, for the law will not accept of grants of titles, or of things in action which are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all, but merely future But of declarations precedent, before any interest vested, the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent" (*e*)

Grant of after acquired property

It has been observed (*f*) that Lord Bacon treats the first branch of the maxim, namely, that a disposition of after-acquired property passes nothing in law, as a legal proposition beyond dispute, and only labours to establish the second branch, namely, that such disposition may be considered as a declaration precedent which derives effect from some new act of the party after the property is acquired The same general rule is laid down by all the other writers of authority "It is," says Perkins (*g*), "a common learning in the law that a man cannot grant or charge that which he hath not" Again, it has been said that, if a man grant me all the wool of his sheep, meaning thereby the wool of the sheep which he then has, the grant is good (*h*), but that he cannot grant me all the wool which shall grow upon the sheep that he shall buy hereafter (*i*)

Rule in equity

Lord Bacon's maxim relates, however, only to the acquisition of a legal title "At law, property, non-existing, but to be acquired at a future time, is not assignable, but in equity it is At law, although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless

(*e*) Bac Max, reg 14

(*f*) Judgm in *Lunn* v *Thornton* 1 C B 379, at p 386

(*g*) Tit "*Grants*," s 65, see also Vin Abr, "*Grants*" (H 6), Noy, Max, 9th ed 162, Com Dig, "*Grant*" (D)

(*h*) Perk, tit "*Grants*," s 90, see *per* Pollock, C B, in *Petch* v *Tutin*, 15 M & W 110, at p 116

(*i*) *Grantham* v *Horley*, Hob 132, see Shep Touch by Preston, 241

possession is actually taken, but, in equity the moment the property comes into existence the agreement operates upon it" (*k*) Accordingly, if a man purports to assign property of which he is not the owner, the assignment, although it does not operate to pass the legal interest in the property, may yet operate as a contract by him to convey it upon his becoming the owner, and if the contract be for value, equity, treating as done that which ought to be done, fastens upon the property as soon as he has acquired it, and the contract to assign becomes in equity an assignment (*l*) Such assignment, however, is an assignment only of the equitable interest, and consequently, until the assignee has also acquired the legal interest, his position is precarious, for the equitable interest will be defeated if the legal interest be acquired by a third person for value and without notice of the equitable interest (*m*) The difference between legal and equitable interests has not been swept away by the Judicature Acts the Courts administer both law and equity, but a conveyance void at common law has not become valid as a conveyance at common law (*n*)

Possession

As a rule, therefore, an assignment or contract for value of future property without possession creates an equitable title only, but if possession is actually taken of the property when it comes into existence, then a legal interest is acquired" (*o*) It seems, however, that the possession, to confer the legal title, must be given by the assignor, or be taken under his authority, for the purpose of carrying the former assignment into effect (*p*)

Bill of sale of future property

Under the Bills of Sale Act (1878) Amendment Act, 1882, s 5 (*q*), the rule is that a bill of sale made by way of security for the payment of money is void, if it purport to assign after-acquired property To this rule, however, there are certain exceptions relating to substituted fixtures, plant and trade machinery (*r*) but only where the bill is in the form prescribed by s 9 of the Act (*s*)

(*k*) *Per* Ld Chelmsford in *Holroyd* v *Marshall*, 10 H L Cas 191, at p 219
(*l*) *Collyer* v *Isaacs*, 19 Ch D 342, *Re Clarke* 36 Id 348, *Tailby* v *Official Receiver*, 13 App Cas 523 *Re Turcan* 40 Ch D 5 See also *Re Lind*, [1915] 2 Ch 345, *Imperial, &c Mills* v *Quebec Bank*, 83 L J P C 67, *Nat Prov Bank of Eng* v *United Elect Theatres* [1916] 1 Ch 132
(*m*) *Joseph* v *Lyons*, 15 Q B D 280, *Hallas* v *Robinson*, 15 Q B D 288
(*n*) *Per* Cotton L J , in *Joseph* v *Lyons*, 15 Q B D 280, at pp 285 286
(*o*) *Morris* v *Delobbel Flipo* [1892] 2 Ch 352, at p 360
(*p*) *Lunn* v *Thornton*, 1 C B 379, at p 387, *Congreve* v *Evetts*, 10 Exch 298, at p 308, *Carr* v *Allatt*, 27 L J Ex 385 (*q*) 45 & 46 Vict c 43
(*r*) S 6, see *London &c , Co* v *Creasey*, [1897] 1 Q B 768
(*s*) *Thomas* v *Kelly*, 13 App Cas 506

Contract to sell future goods

By the Sale of Goods Act, 1893, the goods forming the subject of a contract of sale may be future goods, *i e*, goods to be manufactured or acquired by the seller after the making of the contract, and the Act provides that where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods (*t*) An agreement to sell future goods has always been allowed by our law (*u*)

Disposition by will

Property to which a testator becomes entitled after the execution of his will may pass under it for a will is an instrument of a peculiar nature, speaking and taking effect as if it had been executed immediately before the testator's death, unless a contrary intention appears by the will (*v*), and two maxims relating to wills are *ambulatoria est voluntas defuncti usque ad vitæ supremum exitum* (*y*), and *omne testamentum morte consummatum est* (*z*)

(*t*) See now the Sale of Goods Act, 1893 (56 & 57 Vict c 71), s 5
(*u*) *Hibblewhite* v *M'Morine*, 5 M & W 462
(*x*) Wills Act, 1837 (7 Will 4 & 1 Vict c 26), s 24
(*y*) D 34, 4, 4, 4 Rep 61
(*z*) Co Litt 322 b

CHAPTER VII

RULES RELATING TO MARRIAGE AND DESCENT

It has been thought convenient to insert a selection of rules relating to Marriage and Descent immediately after those which concern the legal rights and liabilities attaching to property in general

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CONSENSUS, NON CONCUBITUS, FACIT MATRIMONIUM (*Co Litt* 33 *a*)—*It is the consent of the parties, not their cohabitation, which constitutes a valid marriage*

Marriage how constituted

Marriage, as understood in Christendom, is the voluntary union for life of one man and one woman to the exclusion of all others (*a*) It is constituted by the *conjunctio animorum* or *present* consent of the parties expressed under such circumstances as the law requires, so that, as soon as such consent has been given, each of the parties, although they do not consummate the marriage *conjunctione corporum*, nevertheless possesses all the legal rights of husband or wife

The above maxim has been adopted from the civil law (*b*) by the common lawyers who, indeed, borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws (*c*) By the latter, as well as by the earlier ecclesiastical law (*d*), marriage was a mere *consensual* contract, only differing from other contracts of this class in being indissoluble even by the consent of the contracting parties it was always deemed to be "a contract executed without any part performance", so that the maxim

(*a*) *Per* Ld Penzance in *Hyde* v *Hyde*, L R 1 P & D 130 at p 133 see *Re Bethell*, 38 Ch D 220, *Brinkley* v *A G* 15 P D 76

(*b*) *Nuptias non concubitus sed consensus facit*, D 50, 17, 30

(*c*) 1 Blac Comm 434 See 2 Voet Com Pandect, lib 23 tit 2

(*d*) The contract, though made without the intervention of a priest, amounted to a perfect marriage by the canon law until modified by the decree of the Council of Trent See *per* Ld Campbell in *Beamish* v *Beamish*, 9 H L Cas 274, at p 335

was undisputed, *consensus, non concubitus, facit nuptias vel matrimonium* (*e*)

English law of marriage

By the law of England (*f*), also, marriage is considered in the light of a contract, to which, with some exceptions, the ordinary principles which govern contracts in general must be applied, and the leading principle is that embodied in the above maxim, that marriage can only be constituted by the consent of the parties *concubitus* may take place for the mere gratification of present appetite, but marriage requires an agreement of the parties looking to the *consortium vitæ* (*g*)

It must be treated, however, as an established proposition that, by our common law, marriage could not be constituted by a mere civil contract, though followed by *concubitus* Long after the abolition by statute (*h*) of all proceedings in ecclesiastical courts to compel the celebration of a marriage *in facie ecclesiæ* by reason of a civil contract of matrimony *per verba de præsenti* or *per verba de futuro*, the effect at common law of the civil contract was very fully considered (*i*), and it was then decided in the House of Lords (*k*), in accordance with the unanimous opinion of the judges that, although a present and perfect consent, expressed *per verba de præsenti*, 'was sufficient to render a contract of marriage indissoluble between the parties themselves, and to afford to either of them, by application to the spiritual court, the power of compelling the solemnisation of an actual marriage' yet, such contract "never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders" (*l*)

(*e*) *Per* Ld Brougham in *R* v *Millis*, 10 Cl & F 534, at p 719 See also Ld Stowell's celebrated judgment in *Dalrymple* v *Dalrymple* (by Dodson), p 10 (*a*), where many authorities respecting this maxim are collected See also the remarks upon *Dalrymple* v *Dalrymple* at p 679 of 10 Cl & F and, *per* Cresswell, J in *Brook* v *Brook* 27 L J Ch 401 at p 411 *Field's Marriage Annulling Bill* 2 H L Cas 48 well illustrates the maxim

(*f*) The following cases may be referred to upon the law of Scotland respecting marriages *per verba de præsenti*: *Yelverton* v *Longworth* 4 Macq 743, *Dalrymple* v *Dalrymple* 2 Hagg Cons 54 *Hamilton* v *Hamilton*, 9 Cl & F 327, *Steuart* v *Menzies* 8 Id 909 *Bell* v *Graham* 13 Moo P C 242 *Dysart Peerage Case*, 6 App Cas 489

(*g*) *Per* Ld Stowell in *Dalrymple* v *Dalrymple* 2 Hagg Cons 54, at pp 62, 63

(*h*) By 26 Geo 2, c 33 s 13 repealed but re enacted by the Marriage Act, 1823, 4 Geo 4, c 76 s 27

(*i*) In *R* v *Millis* 10 Cl & Fin 534

(*k*) The lords being equally divided in opinion, the rule, *semper præsumitur pro negante*, was applied

(*l*) *Per* Tindal C J, in *R* v *Millis* 10 Cl & F 534, at p 655, see also *Catherwood* v *Caslon*, 13 M & W 261, *Beamish* v *Beamish*, 9 H L Cas 274

In *R* v *Millis* (*l*), where this was decided, the following remarks, apposite to the maxim under our notice, were made by Tindal, C J, in delivering the opinion of the judges "It will appear, no doubt,' said his lordship, upon referring to the different authorities, that at various periods of our history there have been decisions as to the nature and description of the religious forms and ceremonies necessary for the completion of a perfect marriage, which cannot be reconciled together, but there will be found no authority to contravene the general position, that at all times, by the common law of England, it was essential to the constitution of a full and complete marriage, that there must be some religious solemnity, that both modes of obligation should exist together, the civil and religious, that, besides the civil contract, that is, the contract *per verba de præsenti*, which has always remained the same, there has at all times been also *a religious ceremony*, which has not always remained the same, but has varied from time to time, according to the variation of the laws of the Church, with respect to which ceremony, it is to be observed, that, whatever at any time has been held by the law of the Church to be a sufficient religious ceremony of marriage, the same has at all times satisfied the common law of England in that respect" For instance, before the Marriage Act, 1753 (*m*), the Church held that a marriage celebrated by a minister in holy orders, but not in a church, or by such minister in a church, but without publication of banns or licence, was irregular, but was sufficient, nevertheless, to constitute the religious part of the obligation, and that the marriage was valid notwithstanding such irregularity, and the law of the land followed the spiritual court in that respect, and held such marriage to be valid 'But it will not be found in any period of our history, either that the Church of England has held the religious celebration sufficient to constitute a valid marriage, unless it was performed in the presence of an ordained minister, or that the common law has held a marriage complete without such celebration' (*n*)

Remarks of Tindal, C J, in *Reg* v *Millis*, on the requisites of a valid marriage at common law

In support of these opinions, the Chief Justice referred to

There is a strong legal presumption in favour of marriage *Piers* v *Piers* 2 H L Cas 331, *R* v *Manwaring*, Dearsl & B 132 *Lauderdale Peerage Case*, 10 App Cas 692 In *Shedden* v *Patrick*, L R 1 Sc & Div 470, the presumption of a marriage arising from cohabitation and acknowledgment, was held to be rebutted

(*m*) 26 Geo 2, c 33

(*n*) *Per* Tindal, C J in *R* v *Millis*, 10 Cl & F 534, at pp 655, 656

no place, nor can it have in any in which the person speaking knows of the existence of the parent, and intends that the devise to the child shall take effect during the life of the parent It would appear that the question proper to be asked in each such case would be, 'Did the testator use the word 'heir' in the strict legal sense, or in any other sense?'' and if the answer should be that he used the term, not in the legal and technical, but in some popular sense, the sense thus ascertained should be carried out (*y*)

Respecting the subject here touched upon, detailed information must be sought for in treatises more technical than this

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HÆREDITAS NUNQUAM ASCENDIT (*Glanville, lib 7, c 1*)—*The right of inheritance never lineally ascends*

Rule, how applied

The above was an express rule of the feudal law, and remained an invariable maxim (*z*) until the Inheritance Act, 1833 (*a*), which effected so great a change in the law of inheritance The rule was thus stated and illustrated by Littleton (*b*) If there be father and son, and the father has a brother, who is, therefore, uncle to the son, and the son purchase land in fee-simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, although the latter is nearer in blood, because it is a maxim in law that the inheritance may lineally descend, but not ascend Yet if the son in this case die without issue, and his uncle enter into the land as heir to the son, and afterwards the uncle die without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to the son, for he should rather come to the land by collateral descent than by lineal ascent

It was, moreover, a necessary consequence of this rule coupled with the maxim, *seisina facit stipitem*, that, if, in the instance above put, the uncle did not enter into the land, the father could not inherit it, because a man claiming as heir in fee-simple by descent must make himself heir to him who was last seised of the actual freehold and inheritance, and if the

(*y*) *Per* Ld Cottenham, Id , at pp 60, 61
(*z*) 2 Com by Broom & Hadley, 378, 3 Cruise, Dig , 4th ed 331
(*a*) 3 & 4 Will 4, c 106
(*b*) S 3

uncle, therefore, did not enter, he would have had but a freehold in law, and no actual freehold, and the last person seised of the actual freehold was the son, to whom the father could not make himself heir (*c*)

The maxim, *hæreditas nunquam ascendit*, therefore, applied only to exclude the ancestors in a direct line, for the inheritance might ascend *indirectly*, as in the preceding example, from the son to the uncle (*d*)

The Inheritance Act, 1833

The above rule, however, was altered with respect to descents on deaths occurring since 1833, it being enacted by s 6 of the Inheritance Act, 1833 (*a*), that every lineal ancestor shall be capable of being heir to any of his issue, and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue

But by s 7 it is provided that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed, and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed

Lineal descent preferred

And here we may conveniently advert to a well-known maxim of our law, which is thus expressed *linea recta semper præfertur transversali* (*e*)—the right line shall always be preferred to the collateral It is a rule of descent that the lineal descendants *in infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living (*f*)

(*a*) See note (*a*), p 336
(*c*) Co Litt 11 b
(*d*) Bracton, lib 2, c 29
(*e*) Co Litt 10 b, Fleta, lib 6, c 1
(*f*) 3 Cruise, Dig, 4th ed 383

Hence it is, that the son or grandchild, whether son or daughter, of the eldest son succeeds before the younger son, and the son or grandchild of the eldest brother before the younger brother, and so, through all the degrees of succession by the right of representation the right of proximity is transferred from the root to the branches, and gives them the same preference as the next and worthiest of blood (*g*)

Exclusion of the half blood

Another rule immediately connected with the preceding, was that which related to the exclusion of the half blood, but which, originally, it would seem, extended only to exclude a *frater uterinus* from inheriting land descended *a patre frater fratri uterino non succedet in hæreditate paterna* (*h*) This rule, however, although expressed with considerable limitation in the maxim just cited, had this more extended signification—that the heir, in order to take by descent, need not be the nearest kinsman absolutely but, although a distant kinsman of the whole blood, he should nevertheless be admitted to the total exclusion of a much nearer kinsman of the half blood and, further, that the estate should escheat to the lord, rather than the half blood should inherit (*i*)

It has, however, been observed by Mr Preston that the mere circumstance that a person was of the half blood to the person last seised, would not have excluded him from taking as heir, if he were of the whole blood to those ancestors through whom the descent was to be derived by *representation* thus, if two first cousins, D and E, had intermarried, and had issue a son, F, and D had married again, and had issue, G, and F died seised, G could not have taken as half brother of F, but he might as maternal cousin to him (*k*), for *quando duo jura in una persona concurrunt æquum est ac si essent in diversis* (*l*)

The Inheritance Act, 1833

The law on this subject, however, was entirely altered and materially improved by s 9 of the Inheritance Act, 1833, which enables the half blood to inherit next after any relation in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor where a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole

(*g*) Hale, Hist, 6th ed 322, 323, 3 Cruise, Dig, 4th ed 333
(*h*) Fort de Laud Leg Ang, by Amos, p 15
(*i*) *Per* Kindersley, V C, in *Re Don's Estate*, 27 L J Ch 98, at p 102
(*k*) 2 Prest Abs tit 447
(*l*) Ibid 449 The maxim supra is exemplified by *Jones* v *Davies*, 7 H & N 507

blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother

Descent of the Crown

We may add that the rule excluding the half blood did not apply to the descent of the Crown Therefore, if a king had issue a son and a daughter by one wife, and a son by another wife, and died, on the death of the eldest son without issue, the younger son was entitled to the Crown, to the exclusion of the daughter For instance, the Crown actually did descend from King Edward VI to Queen Mary, and from her to Queen Elizabeth, who were respectively of the half blood to each other Nor did the rule apply to estates tail (*m*)

PERSONA CONJUNCTA FQUIPARATUR INTERESSF PROPRIO (*Bac Max , reg* 18)—*The interest of a connection is sometimes regarded in law as that of the individual himself*

Rule laid down by Lord Bacon

In the words of the civil law, *jura sanguinis nullo jure civili dirimi possunt* (*n*), the law, according to Lord Bacon, hath so much respect for nature and conjunction of blood, that in divers cases it compares and matches nearness of blood with consideration of profit and interest, and, in some cases, allows of it more strongly Therefore, if a man covenant in consideration of blood, to stand seised to the use of his brother or son, or near kinsman, a use is well raised by his covenant without transmutation of possession (*o*)

The above maxim, as to *persona conjuncta*, is likewise, in some cases, applicable in determining the liability of an infant on contracts, for what cannot strictly be considered as "necessaries" within the ordinary meaning of that term (*p*) Thus, as observed by Lord Bacon, "if a man under the years of twenty-one, contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliments or erudition" The like legal principle has been extended so as to render an infant widow liable upon her contract for the

(*m*) 1 Com by Broom & Hadley, 228, Chit Pre Crown, 10, Litt ss 14, 15, 3 Cruise, Dig , 4th ed 386 See also Hume's Hist of England, vol 4, pp 242, 265

(*n*) D 50, 17, 8, Bac Max , reg 11

(*o*) Bac Max , reg 18

(*p*) As to which see *Ryder* v *Wombwell*, L R 4 Ex 32

funeral of her husband, who had left no property to be administered (*q*)

Qualification of rule

The maxim under consideration does not, however, apply so as to render a parent liable on the contract of the infant child, even where such contract is for "necessaries," unless there be some evidence that the parent has either sanctioned or ratified the contract It, said Lord Abinger, C B (*r*), a father does any specific act from which it may reasonably be inferred that he has authorised his son to contract a debt, he may be liable in respect of the debt so contracted, but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person, and it would bring the law into great uncertainty if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices" "It is," observed Parke, B , in the same case, "a clear principle of law, that a father is not under any legal obligation to pay his son's debts, except, indeed, by proceedings under the 43 Eliz (*s*), by which he may, under certain circumstances, be compelled to support his children according to his ability, but the mere moral obligation to do so cannot impose upon him any legal liability" (*t*)

Evidence of wife against husband, &c

Again, we read, "It hath been resolved by the justices that a wife cannot be produced either against or for her husband, *quia sunt duæ animæ in carne una*, and it might be a cause of implacable discord and dissension between the husband and the wife, and a means of great inconvenience" (*u*) At common

(*q*) *Chapple* v *Cooper* 13 M & W 252, at pp 259, 260

(*r*) In *Mortimore* v *Wright* 6 M & W 482, at p 487, see *Shelton* v *Springett*, 11 C B 452 Compare *Ambrose* v *Kerrison*, 10 C B 776 (followed in *Bradshaw* v *Beard*, 12 C B N S 344), *Read* v *Legard*, 6 Exch 636, and *Rice* v *Shepherd*, 12 C B N S 332, *Richardson* v *Dubois*, L R 5 Q B 51 See *Bazeley* v *Forder*, L R 3 Q B 559, as showing in peculiar circumstances the liability of the husband in respect of his wife

(*s*) See *Grinnell* v *Wells*, 7 M & Gr 1033, *Ruttinger* v *Temple*, 4 B & S 491

(*t*) For Courts of Law "are to decide according to the *legal obligations* of parties," *per* Alderson, B , in *Turner* v *Mason*, 14 M & W 112, at p 117

(*u*) Co Litt 6 b Under the Married Women's Property Act, 1882 (45 & 46 Vict c 75), s 12, a married woman has, subject to certain qualifications, the same remedies by way of criminal proceedings against her husband for the security of her separate property as though she were a *feme sole* See *R* v *King*, [1914] W N 63, see also *Hulton* v *Hulton*, [1917] 1 K B 813

law, however, the above rule did not apply where a personal injury had been committed by the husband against the wife, or *vice versa* (*x*) And the rule in question has been in great part abrogated by the legislature

By the Evidence Amendment Act, 1853 (*y*), the husband or wife became a competent and compellable witness for or against the wife or husband, except in a criminal proceeding or proceeding instituted in consequence of adultery By the Evidence Further Amendment Act, 1869 (*z*), the husband or wife of a party to a proceeding instituted in consequence of adultery became a competent witness therein And by the Criminal Evidence Act, 1898 (*a*), the husband or wife of a person charged with an offence became a competent witness for the defence (*b*), and also in certain specific cases (*c*), may be called as witness for the prosecution without the consent of the person charged But such witness, if called under the above Act of 1853 or 1898, cannot be compelled to disclose communications made to him or her by the wife or husband during the marriage (*d*)

Under the Criminal Justice Administration Act, 1914, (*e*) s 28 (3) "the wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or defence, and without the consent of the person charged" Neither the wife (*f*) nor, it would seem, the husband, of a prisoner is a compellable witness against him or her under either s 4 of the Act of 1898, or, it would seem (*g*), s 28 (3) of the Act of 1914

See also p 766, *post*

In the sense then above explained, and with the restrictions above suggested, must be understood the maxim illustrated by Lord Bacon, and with which we conclude our list of rules relative to marriage and descent *Persona conjuncta aequiparatur interesse proprio*

(*x*) *Lord Audley's Case*, 3 St Tr 402, at p 413
(*y*) 16 & 17 Vict c 83
(*z*) 32 & 33 Vict c 68
(*a*) 61 & 62 Vict c 36
(*b*) S 1
(*c*) S 4, and schedule See also the Evidence Act, 1877 (40 & 41 Vict c 14)
(*d*) 16 & 17 Vict c 83, s 3, 61 & 62 Vict c 36, s 1 (d)
(*e*) 4 & 5 Geo 5, c 28
(*f*) *Leach* v *R* [1912] A C 305
(*g*) See *Leach* v *R*, *supra*, and compare the two enactments in question

CHAPTER VIII

THE INTERPRETATION OF DEEDS AND WRITTEN INSTRUMENTS

In this chapter an attempt is made to give a general view of such maxims as are of most practical utility in construing deeds and written instruments, and some remarks are occasionally added, showing how these rules apply to wills and statutes As the decided cases on the subject are very numerous, and as in a work like the present it would be undesirable, and indeed impossible, to refer to any considerable portion of them, only those cases are cited which elucidate most clearly the meaning, extent, and qualifications of the various maxims The importance of fixed rules of interpretation is manifest, and not less manifest is the importance of a knowledge of those rules In construing deeds and wills, the language of which, owing to the use of inaccurate terms, frequently falls short of, or altogether misrepresents, the intentions of the parties, such rules are necessary in order to insure just and uniform decisions, and they are equally so where it becomes the duty of a Court of law to unravel those intricacies and ambiguities which occur in statutes, and which result from ideas not sufficiently precise, from views too little comprehensive, or from the unavoidable imperfections of language (*a*) In each case, where difficulty arises, peculiar principles and methods of interpretation are applied, reference being always had to the general scope and intention of the instrument, the nature of the transaction, and the legal rights and situation of the parties interested The rules of interpretation separately considered in this chapter are —1, that an instrument shall be construed liberally and according to the intention of the parties, 2, that the whole context shall be considered, 3, that the meaning of a word may often be known from the context, 4, that no man shall derogate from his own grant, 5, that a latent ambiguity may, but a patent ambiguity cannot, be explained by extrinsic evidence,

(*a*) See Ld Teignmouth's Life of Sir W Jones, at p 261

6, that where there is no ambiguity, the natural construction shall prevail, 7, that an instrument or expression is sufficiently certain which can be made so, 8, that surplusage may be rejected, 9, that a false description is often immaterial, 10, that general words may be restrained by reference to the subject-matter, 11, that the special mention of one thing may be understood as excluding another, 12, that the expression of what is implied is inoperative, 13, that a clause referred to must be understood as incorporated with that referring to it, 14, that relative words refer to the next antecedent, 15, that that mode of exposition is best which is founded on a reference to contemporaneous facts and circumstances, 16, that he who too minutely regards the form of expression takes but a superficial and, therefore, probably an erroneous view of the meaning of an instrument

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BENIGNÆ FACIENDÆ SUNT INTERPRETATIONES PROPTER SIMPLICITATEM LAICORUM UT RES MAGIS VALEAT QUAM PEREAT (*Co Litt* 36 *a*), ET VERBA INTENTIONI, NON E CONTRA, DEBENT INSERVIRE (*Fox's Case*, 8 *Rep* 93*b*, *at* 94*a*)—*A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties*

The two rules of most general application in construing a written instrument are—1st, that it shall, if possible, be so interpreted *ut res magis valeat quam pereat* (*b*), and 2ndly, that such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties

(*b*) See *per* Erle, C J, in *Cheney* v *Courtois*, 13 C B N S 634, at p 640, *Broom* v *Batchelor*, 1 H & N 255 (cited in *Heffield* v *Meadows*, L R 4 C P 595, at p 600), *Steele* v *Hoe*, 14 Q B 431, at p 445, *Ford* v *Beech*, 11 Q B 852, at pp 866, 868, 870, *Oldershaw* v *King*, 2 H & N 517, *Mare* v *Charles*, 5 E & B 978 (approved in *Penrose* v *Martyr*, E B & E 499, at p 503), *Stacey* v *Wallis*, 28 T L R 209, *Glamorgan Coal Co* v *Glamorganshire J S Committee*, [1915] 1 K B 471, at pp 487, 488

"All contracts should, if possible, be construed *ut res magis valeat quam pereat*" (*per* Byles, J, in *Shoreditch Vestry* v *Hughes*, 17 C B N S 137, at p 162) The maxim was applied in *R* v *Broadhempston*, 1 E & E 154, at p 163, and in *Pugh* v *Stringfield*, 4 C B N S 364, at p 370 See *Blackwell* v *England*, 8 E & B 541, at p 549

"If a plea admits of two constructions, one of which gives a sensible effect to the whole, and the other makes a portion of it idle and insensible, the Court is bound to adopt the former construction" (*per* Williams, J, in *Peter* v *Daniel*, 5 C B 568, at p 579)

These maxims are, indeed, in some cases restricted by the operation of technical rules, which, for the sake of uniformity, ascribe definite meanings to particular expressions, and, in other cases, they receive, when applied to particular instruments, certain qualifications, which are imposed for wise and beneficial purposes, but, notwithstanding these restrictions and qualifications, the above maxims are undoubtedly the most important and comprehensive which can be used for determining the true construction of written instruments

General principles of construction of deeds

It is then laid down repeatedly by the old reporters and legal writers, that in construing a deed, every part of it must be made, if possible, to take effect, and every word must be made to operate in some shape or other (*c*) The construction, likewise, must be such as will preserve rather than destroy (*d*), it must be reasonable, and agreeable to common understanding (*e*), it must also be favourable, and as near the minds and apparent intents of the parties as the rules of law will admit (*f*), and, as observed by Lord Hale, the judges ought to be curious and subtle to invent reasons and means to make acts effectual according to the just intent of the parties (*g*), they will not, therefore, cavil about the propriety of words when the intent of the parties appears, but will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words (*h*)

It may, indeed, chance that, on executing an agreement under seal, the parties failed to contemplate the happening of some particular event or the existence of some particular state of facts at a future period (*i*), and all the Court can do in such a case is to ascertain the meaning of the words actually used, and, in construing the deed, they will adopt the established rule of construction, "to read the words in their ordinary and grammatical sense, and to give them effect, unless such a construction would lead to some absurdity or inconvenience (*k*),

(*c*) Shep Touch 84, Plowd 156

(*d*) *Per* Ld Brougham in *Langston* v *Langston*, 2 Cl & F 194, at p 243 (cited arg, *Baker* v *Tucker*, 3 H L Cas 106, at p 116)

(*e*) See *Hewet* v *Painter*, 1 Bulst 174, *London* v *Southwell College*, Hob 303

(*f*) *Windham* v *Windham*, 1 Anders 60, Jenk Cent 260

(*g*) *Crossing* v *Scudamore*, 2 Lev 9, *per* Ld Hobart, Hob 277 (cited in *Wilkinson* v *Tranmarr*, Willes, 682, at p 684), *Moseley* v *Motteux*, 10 M & W 533

(*h*) See *Throgmorton* v *Tracy*, Plowd 145, at 159, 160, 162

(*i*) See e judgm in *Lloyd* v *Gwibert*, L R 1 Q B 115, at p 120

(*k*) The e element of inconvenience is not to be considered if the construction of the docume nt is clear *Bottomley's Case*, 16 Ch D 681, at p 686

or would be plainly repugnant to the intention of the parties to be collected from other parts of the deed ' (*l*) For "the golden rule of construction,' to which we shall presently revert, "is that words are to be construed according to their natural meaning, unless such a construction would either render them senseless or would be opposed to the general scope and intent of the instrument, or unless there be some very cogent reason of convenience in favour of a different interpretation ' (*m*)

Deeds shall be made operative, if possible

Deeds, then, shall be so construed as to operate according to the intention of the parties, if by law they may and if they cannot in one form, they shall operate in that which by law will effectuate the intention *quando res non valet ut ago, valeat quantum valere potest* (*n*) For in these later times, the judges have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it (*o*)

Roe d *Wilkinson* v *Tranmarr*

Thus, where A, in consideration of natural love and of £100, by deeds of lease and release, granted, released, and confirmed his lands after his own death, to his brother B in tail, with remainder to C, the son of another brother of A, in fee, and he covenanted and granted that the lands should, after his death, be held by B and the heirs of his body, or by C and his heirs, according to the true intent of the deed, it was held, that, although the deed could not operate as a release, because it attempted to convey a freehold *in futuro*, yet it was good as a covenant to stand seised (*p*) So, if the King's charter will bear a double construction, one which will carry the grant into effect, the other which will make it inopera-

(*l*) *Per* Parke, B, in *Bland* v *Crouley*, 6 Exch 522, at p 529

(*m*) *Per* Bramwell, B in *Fowell* v *Tranter*, 3 H & C 458, at p 461

(*n*) *Per* Ld Mansfield in *Goodtitle* v *Bailey*, Cowp 597, at p 600, cited *Roe* d *Berkeley* v *Archbp of York* 6 East, 86, at p 105, and in *King* v *Melling*, 1 Ventr 214, at p 216 See also the instances mentioned in *Gibson* v *Minet*, 1 Black H, 567, at pp 614, 620

(*o*) *Osman* v *Sheaf*, 3 Lev 370, *per* Willes, C J, in *Smith* v *Packhurst*, 3 Atk 135 (cited in *Cholmondely* v *Clinton*, 2 B & Ald 625, at p 637), *Tarleton* v *Stansforth*, 5 T R 695, *per* Maule, J, in *Borradaile* v *Hunter*, 5 Scott, N R 418, at pp 431, 432, 3 Prest Abstr Tit 21, 22, 1 Id 313

(*p*) *Roe* d *Wilkinson* v *Tranmarr*, Willes 682 See 1 Prest Abstr Tit 313, *Gardiner* v *Breedon*, 1 Rep 76 a, *Perry* v *Watts*, 4 Scott, N R 366, *Doe* d *Daniell* v *Woodroffe*, 10 M & W 668 15 Id 769 and 2 H L Cas 811

' The general rule,' also, "is that a covenant not to sue when it does not affect other parties, and is so intended, may be pleaded as a release ' (*per* Byles, J, in *Ray* v *Jones* 19 C B N S 416, at p 423) A deed of bargain and sale void for want of enrolment operated as a grant of the reversion (*Haggerston* v *Hanbury*, 5 B & C 101, *Adams* v *Steer*, Cro Jac 210)

tive, the former is to be adopted (*q*) And generally, "if words have a double intendment, and the one standeth with law, and the other is against law, they are to be taken in the sense which is agreeable to law" (*r*)

In accordance with the same principle of construction, where divers persons join in a deed, and some are able to make such deed, and some are not able, this shall be said to be his deed alone that is able (*s*), and if a deed be made to one that is incapable and another that is capable, it shall enure only to the latter (*t*) So, if mortgagor and mortgagee join in a lease, this enures as the lease of the mortgagee, and the confirmation of the mortgagor (*x*), and a joint lease by tenant for life and remainderman operates during the former's life as his demise, confirmed by the remainderman, and afterwards as the demise of the remainderman (*y*)

Rule as to deeds further considered

The preceding examples suffice to show that where a deed cannot operate in the precise manner or to the full extent intended by the parties, it shall, nevertheless, be made as far as possible to effectuate their intention Acting, moreover, on a kindred principle, the Court will endeavour to affix such a meaning to words of obscure or doubtful import occurring in a deed, as may best carry out the plain and manifest intention of the parties, as collected from the four corners of the instrument—with these qualifications, however, that the intent of the parties shall never be carried into effect contrary to the rules of law, and that, as a general rule, the Court will not introduce into a deed words which are not to be found there (*z*), nor strike out of a deed words which are there, in order to make the sense different (*a*) The following illustrations of the above propositions may advantageously be noticed, and many others of equal importance will, doubtless, occur to the reader

(*q*) *Per* Tindal, C J , in *Rutter* v *Chapman*, 8 M & W 1, at p 102

(*r*) Shep Touch 80, adopted by Martin, B , in *Fussell* v *Daniel*, 10 Exch 581, at p 597, Co Litt 42 a, 183, Nov, Max , 9th ed 211

(*s*) Shep Touch 81 Finch, L 60

(*t*) Shep Touch 82

(*x*) *Doe* d *Barney* v *Adams*, 2 Cr & J 232, *per* Ld Lyndhurst, C B , in *Smith* v *Pocklington*, 1 Cr & J 445 But a mortgagor may now have leasing powers under the Conveyancing Act, 1881, s 18

(*y*) *Treport s Case*, 6 Rep 14 b

(*z*) See *per* Willes, C J , in *Parkhurst* v *Smith*, Willes, 327, at p 332 (cited by Alexander, C B , in *Colmore* v *Tyndall*, 2 Y & J 605, at p 618), *per* Ld Brougham in *Langston* v *Langston*, 2 Cl & F 194, at p 243, *Pannell* v *Mill*, 3 C B 625, at p 637

(*a*) *White* v *Burnby*, 16 L J Q B 156, *secus* as to mere surplusage—see *post*

Instrument of demise

In cases excluded from the operation of s 3 of the Real Property Act, 1845 (*b*), the question whether a particular instrument should be construed as a lease or as an agreement for a lease must be answered by considering the intention of the parties, as collected from the instrument itself, and any words which suffice to explain the intent of the parties, that the one should divest himself of the possession, and the other come into it for such a determinate time, whether they run in the form of a licence, covenant, or agreement, will of themselves be held, in construction of law, to amount to a lease for years as effectually as if the most proper and pertinent words had been used for that purpose (*c*)

Construction of covenants

The rules applicable and cases decided with reference to the construction of covenants will also be found to furnish strong instances of the anxiety which our Courts evince to effectuate the *real intention* (*d*) of the parties to a deed or agreement (*e*), for it is not necessary, in order to charge a party with a covenant, that there should be express words of covenant or agreement, but it is enough if the intention of the parties to create a covenant be apparent (*f*) Where, therefore, words of recital (*g*) or reference manifest a clear intention that the parties shall do certain acts, the Courts will, from these words, infer a covenant to do such acts, and will sustain actions of covenant for their non-performance as effectually as if the instruments had contained expressed covenants to perform them (*h*) In brief, 'no particular form of words is neces-

(*b*) 8 & 9 Vict c 106 See *Rollason* v *Leon*, 7 H & N 73, *Tidey* v *Mollett* 16 C B N S 298 See also *Burton* v *Reevell*, 16 M & W 307, *Bond* v *Rosling*, 1 B & S 371

(*c*) Bac Abr *Leases* (K), and 2 Shep Touch, by Preston, 272, cited in *Doe* d *Parsley* v *Day*, 2 Q B 147, at pp 152 *et seq*, *Alderman* v *Neate*, 4 M & W 704

(*d*) Such intention may however be frustrated by the operation of a positive and technical rule of law 'A technical rule is one which is established by authority and precedent, which does not depend upon reasoning or argument, but is a fixed established rule to be acted upon, and only discussed as regards its application—in truth is the law' Such a rule is that where a deed is made *inter partes*—no one who is not expressed to be a party can sue upon a covenant contained in it (*Chesterfield Co* v *Hawkins*, 3 H & C 677, at p 691, cited in *Gurrin* v *Kopera*, Id, 694, at p 699)

(*e*) See *Doe* d *Rogers* v *Price*, 8 C B 894

(*f*) *Per* Tindal, C J, in *Courtney* v *Taylor*, 7 Scott, N R 749, at p 765 *Wood* v *Copper miners' Co*, 7 C B 906, *per* Parke, B, in *Rigby* v *G W Ry Co*, 14 M & W 811, at p 815, *James* v *Cochrane*, 7 Exch 170, at p 177, and 8 Id 556, *Farrall* v *Hilditch*, 5 C B N S 840 See *Bealey* v *Stuart*, 7 H & N 753, at p 759, *Re Haden*, [1898] 2 Ch 220

(*g*) See *Lay* v *Mottram*, 19 C B N S 479

(*h*) Judgm, *Aspdin* v *Austin*, 5 Q B 671, at p 683 (cited in *Dunn* v *Sayles*,

sary to form a covenant, but wherever the Court can collect from the instrument an engagement on the one side to do or not to do something, it amounts to a covenant, whether it is in the recital or in any other part of the instrument" (*i*)

Joint or several covenant or bond

In like manner, where the language of a covenant is such that the covenant may be construed either as joint or as several, it shall be taken, at common law, to be joint or several, according to the interest of the covenantees Where, however, the covenant is in its terms expressly and positively joint, it must be construed as a joint covenant in compliance with the declared intention of the parties (*k*)

Dependent or independent covenants

In like manner, the rule has been established by a long series of decisions, that the question, whether covenants are dependent or independent of each other, is to be determined by the intention of the parties as it appears on the face of the instrument, and by the application of common sense to each particular case to the intention, when once discovered, all technical forms of expression must give way (*l*) Where, therefore, a question arose whether certain covenants in marriage articles were dependent or not, Lord Cottenham observed "If the provisions are clearly expressed, and there is nothing to enable the Court to put upon them a construction different from that which the words import, no doubt the words must prevail but if the provisions and expressions be contradictory, and if

Id 692, and in *Churchward* v *R*, L R 1 Q B 191, at p 208) *Williams* v *Burrell*, 1 C B 402, at p 429, where the distinction between express covenants in law is pointed out, *per* Crompton, J, in *Worthington* v *Sudlow*, 2 B & S 508, at p 516

(*i*) *Per* Parke, B, in *G N Ry Co* v *Harrison* 12 C B 576 at p 609 see judgm, *Rashleigh* v *S E Ry Co*, 10 C B 612 at p 632 as to which case see *Knight* v *Gravesend Waterworks Co*, 2 H & N 6, at pp 10, 11

(*k*) *Bradburne* v *Botfield*, 14 M & W 559, at pp 564 572, *Sorsbie* v *Park*, 12 M & W 146, *White* v *Tyndall*, 13 A C 263, at p 272, *Palmer* v *Mallett* 36 Ch D 411 See also *Haddon* v *Ayres*, 1 E & E 118 *Pugh* v *Stringfield* 5 C B N S 2, *per* Maule, J, in *Beer* v *Beer* 12 C B 60, at p 78 (citing *Wetherell* v *Langston*, 1 Exch 634), *Hopkinson* v *Lee*, 6 Q B 964, *Foley* v *Addenbrooke*, 4 Q B 197, at p 207 (followed in *Thompson* v *Hakewill*, 19 C B N S 713, at p 728), *Mills* v *Ladbroke*, 7 Scott, N R 1005 at p 1023, *per* Parke, B, in *Wootton* v *Steffenon*, 12 M & W 129, at p 134 *Harrold* v *Whitaker*, 11 Q B 147, at p 163 *Wakefield* v *Brown*, 9 Q B 209 (followed in *Magnay* v *Edwards*, 13 C B 479)

(*l*) Judgm, *Stavers* v *Curling*, 3 Bing N C 365, at p 368, *Bayls* v *Le Gros*, 4 C B N S 537, *Lond Gas Light Co* v *Chelsea Vestry*, 8 Id 215, *Sibthorp* v *Brunel*, 3 Exch 826, at p 828, *Hemans* v *Picciotto*, 1 C B N S 646 See *Mackintosh* v *Midl Cos Ry Co*, 14 M & W 548

The answer to the question, what is, or what is not a condition precedent, depends not on merely technical words, but on the plain intention of the parties to be deduced from the whole instrument (*Roberts* v *Brett* 11 H L Cas 337, at p 354)

there be grounds appearing upon the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention " (*m*)

" The notes to *Pordage* v *Cole* (*n*) may usefully be referred to when construing a particular clause in a contract for the purpose of ascertaining whether the breach of that part of the contract entitles the other contracting party to put an end to it, or whether it only entitles him to damages If the clause or stipulation goes to the root of the contract between the parties, the contract may be determined, if it goes only to part of the consideration on both sides, the sole remedy is by way of damages

General rule as to construing an agreement

The same sense, we may in the next place observe, is to be put upon the words of a contract in an instrument under seal as would be put upon the same words in an instrument not under seal that is to say, the same intention must be collected from the same words, whether the particular contract in which they occur be special or not (*o*)

In the case, then, of a contract or agreement, whether by deed or parol, the Courts are bound so to construe it, *ut res magis valeat quam pereat*—that it may be made to operate rather than be inefficient, and, in order to effect this, the words used shall have a reasonable intendment and construction (*p*) Thus, where A guaranteed to B the payment of all bills of exchange drawn by B on C and accepted by C, and the payment of any balance that might be due from C to B, the Court decided that the guarantee extended to future as well as past transactions, for if the words " might be due " were to be limited to past transactions the guarantee would be void for want of consideration, but every document ought to be construed, if possible, so as to make it operative It should be noticed with reference to this case that Bramwell, B, differed from the

(*m*) *Lloyd* v *Lloyd*, 2 My & Cr 192, at p 202

(*n*) 1 Wms Saund 548, see *Jonassohn* v *Young*, 4 B & S 296 In the notes to *Pordage* v *Cole* are specified various cases in which Courts have done great violence to the strict letter of covenants for the purpose of carrying into effect what was considered to be the real intention of the parties See *Marsden* v *Moore*, 4 H & N 500, at p 504, where *Pordage* v *Cole* is cited and distinguished

(*o*) *Per* Ld Ellenborough, in *Seddon* v *Senate*, 13 East, 63, at p 74

(*p*) Com Dig *Pleader* " (C 25), Bac, Works, vol 4, p 25, Noy, Max, 9th ed, p 50

majority of the Court upon the ground that the words *prima facie* referred to past transactions, and that the maxim is inapplicable where there are extrinsic circumstances in relation to which the words used are in their primary sense intelligible (*q*) Words of art, which, in the understanding of conveyancers, have a peculiar technical meaning, shall not be scanned and construed with a conveyancer's acuteness, if, by so doing, one part of the instrument is made inconsistent with another, and the whole is incongruous and unintelligible, but the Court will understand the words used in their popular sense, and will interpret the language of the parties *secundum subjectam materiem*, referring particular expressions to the particular subject-matter of the agreement, so that full and complete force may be given to the whole (*r*)

Charterparty

Whether, for example, a particular clause in a charterparty shall be held to be a condition, upon the non-performance of which by the one party the other is at liberty to abandon the contract, and consider it at an end—or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages—must depend, in each particular case, upon the intention of the parties to be collected from the terms of the agreement itself, and from the subject-matter to which it relates, it cannot depend on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract (*s*) In such a case, therefore, the rule applies, *in conventionibus contrahentium voluntas potius quam verba spectari placuit* in the construction of contracts the intention of the parties, rather than the words actually used, should be considered (*t*)

(*q*) *Broom* v *Batchelor*, 1 H & N 255

(*r*) *Hallewall* v *Morrell*, 1 Scott, N R 309, *Hill* v *Grange*, Plowd 164, at p 170 (cited Arg, in *R* v *W Riding JJ*, 2 Q B 505, at p 509, *per* Willes, C J, in *Parkhurst* v *Smith*, Willes, 327, at p 332, *Heseltine* v *Siggers*, 1 Exch 856 If an instrument is capable of two constructions, that one shall be preferred which will make the instrument operate rightfully (*Faussett* v *Carpenter*, 2 Dow & Cl 232)

As to construing an award, see *Law* v *Blackburrow*, 14 C B 77, *Mays* v *Cannell*, 15 C B 107, and cases there cited

(*s*) *Bentsen* v *Taylor*, [1893] 2 Q B 274, as to which see *Hartley* v *Hymans*, [1920] 3 K B 475, at p 492, see also *Behn* v *Burness*, 3 B & S 751, *Glaholm* v *Hays*, 2 Scott, N R 471, at p 482, *Ollive* v *Booker*, 1 Exch 416, at p 423, *Seeger* v *Duthie*, 8 C B N S 45, *Oliver* v *Fielden*, 4 Exch 135, at p 138, and *Croockewit* v *Fletcher*, 1 H & N 893, at p 911, *Gattorno* v *Adams*, 12 C B N S 560, *per* Ld Ellenborough, in *Ritchie* v *Atkinson*, 10 East, 295, at p 306, *Furze* v *Sharwood*, 2 Q B 388, at p 415 See *White* v *Beeton*, 7 H & N 42

(*t*) *Dimech* v *Corlett*, 12 Moo P C 199, at p 228

Meaning of words

Subject, however, to the preceding remarks, Courts will apply the ordinary rules of construction in interpreting instruments, and will construe words according to their strict and primary acceptation, unless, from the immediate context or from the intention of the parties apparent on the face of the instrument, the words appear to have been used in a different sense, or unless, in their strict sense, they are incapable of being carried into effect It must, moreover, be observed that the meaning of a particular word may be shown by parol evidence to be different in some specified place, trade, or business, from its proper and ordinary acceptation (*x*)

Patents, construction of

With respect to patents, it was long ago observed by Lord Eldon, that they are to be considered as bargains between the inventor and the public, to be judged of on the principles of good faith, by making a fair disclosure of the invention, and to be construed as other bargains (*y*) Moreover, although formerly there seems to have been a practice, with both judges and juries, to destroy the patent right even of beneficial patents, by exercising great astuteness in taking objections as to the title of the patent, and particularly as to the specification, whereby many valuable patent rights were destroyed, yet, more recently, the Courts have not been so strict in taking objections to the specification, but have rather endeavoured to deal fairly both with the patentee and the public, willing to give to the patentee, on his part, the reward of a valuable patent, but taking care to secure to the public, on the other hand, the benefit of the proviso, requiring a specification, which is introduced into the patent for their advantage, so that the right to the patent may be fairly and properly expressed in the specification (*z*) Accordingly, in construing a specification, the whole instrument must be taken together, and a fair and reasonable

(*x*) See *per* Pollock, C B, in *Mallan* v *May*, 13 M & W 511, *Lewis* v *Marshall* 8 Scott, N R 477, at p 494, *per* Parke, B, in *Clift* v *Schwabe*, 3 C B 469, at p 470, *per* Ld Cranworth, C, in *Grey* v *Pearson*, 6 H L Cas 61, at p 78, *post*, Chap X

(*y*) *Per* Alderson, B, in *Neilson* v *Harford*, Webs Pat Cas 331 at p 341 Norman on Patents, 78, 79 The mode of construing a patent as between the patentee and the Crown will be stated hereafter

(*z*) *Per* Parke, B, *Neilson* v *Harford*, Webs Pat Cas 310, *per* Alderson, B, in *Morgan* v *Seaward*, Id 170, at p 173, who observed "It is the duty of a party who takes out a patent to specify what his invention really is, and although it is the bounden duty of a jury to protect him in the fair exercise of his patent right, it is of great importance to the public, and by law it is absolutely necessary, that the patentee should state in his specification, not only the nature of his invention, but how that invention may be carried into effect'

interpretation be given to the words used (*a*), the words being construed according to their ordinary and proper meaning, unless there be something in the context to give them a different meaning, or unless the facts properly in evidence, and with reference to which the patent must be construed, show that a different interpretation ought to be made (*b*) It has been laid down that the test of the sufficiency of a specification is whether it would enable an ordinary workman, exercising the actual knowledge common to the trade, to make the machine (*c*)

Extrinsic evidence to explain specification

Where evidence was tendered of the various patents in existence at the time when the patent in question was granted, for the purpose of so construing the specification as to exclude from its operation prior patents, and thereby to make it valid it was held that such evidence could not be used for that purpose, although it was admissible to explain words of art to be found in the specification, and that words used in a patent must be construed, like the words of any other instrument, in their natural sense, regard being had to the fact that the document is not addressed to the world at large, but to a particular class possessing a certain amount of knowledge on the subject (*d*)

Policy of insurance

The following remarks of Lord Ellenborough, with reference to a policy of insurance, here also occur to mind as generally applicable 'The same rule of construction," said that learned Judge, "which applies to all other instruments, applies equally to this instrument of a policy of insurance, viz , that it is to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter —as by the known usage of trade, or the like—acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense" (*e*) And again, "the contract

(*a*) *Beard* v *Egerton*, 8 C B 165

(*b*) Judgm , *Elliott* v *Turner*, 2 C B 446, at p 461 As to construing a specification which contains terms of art, see *Betts* v *Menzies* 10 H L Cas 117

(*c*) *Plimpton* v *Malcolmson*, 3 Ch D 531, see *Morgan* v *Seaward*, Webs Pat Cas 170, at p 174, *Weqmann* v *Corcoran*, 13 Ch D 65

(*d*) *Clark* v *Adie*, 2 App Cas 423

(*e*) *Robertson* v *French*, 4 East, 130, at pp 135, 136 (cited by Ld Tenterden in *Hunter* v *Leathley*, 10 B & C 858 at p 871, and by Bowen, L J , in *Hart* v *Standard Mar Ins Co* , 22 Q B D 499, at p 501)

of insurance," it has been said, "though a mercantile instrument, is to be construed according to the same rules as all other written contracts, namely, the intention of the parties, which is to be gathered from the words of the instrument, interpreted together with the surrounding circumstances If the words of the instrument are clear in themselves, the instrument must be construed accordingly, but if they are susceptible of more meanings than one, then the judge must inform himself by the aid of the jury and the surrounding circumstances which bear on the contract" (*f*)

Rules to be observed in construing a will

In construing a will, it has been said that the intention of the testator is the polar star by which the Court should be guided, provided no rule of law is thereby infringed (*g*) 'It is the duty of those who have to expound a will, if they can, *ex fumo dare lucem*" (*h*) In other words, the first thing for consideration always is, what was the testator's intention at the time he made the will, and then the law carries that intention into effect as nearly as it can, according to certain settled technical rules (*i*)

"Touching the general rules to be observed for the true construction of wills," said Dodderidge, J ,—'*in testamentis plenius testatoris intentionem scrutamur* But yet this is to be observed with these two limitations 1st, his intent ought to be agreeable to the rules of law 2ndly, his intent ought to be collected out of the words of the will As to this it may be demanded, how shall this be known? To this it may be thus answered first, to search out what was the scope of his will,

(*f*) *Per* Erle, C J in *Carr* v *Montefiore*, 5 B & S 408, at p 428

(*g*) *Per* Ld Kenyon in *Watson* v *Foxon*, 2 East, 36, at p 42, *per* Willes, C J , in *Doe* d *Morris* v *Underdown*, Willes, 293, at p 296, *per* Buller, J , in *Smith* v *Coffin*, 2 Black Hy , 444, at p 450, cases cited, Arg , *Ley* v *Ley*, 3 Scott N R 161, at p 168, *Doe* d *Davies* v *Davies*, 4 M & W 599, at p 607 *Doe* d *Tremewen* v *Permewen*, 11 A & E 131 (applied in *Re Finlay's Est*, [1913] 1 I R 143), *per* Parke, B , in *Grover* v *Burningham*, 5 Exch 184, at p 191, *Martin* v *Lee*, 14 Moo P C 142

(*h*) *Per* Shadwell, V C in *De Beauvoir* v *De Beauvoir*, 15 L J Ch 305 at p 308

(*i*) Judgm , *Doe* d *Scott* v *Roach*, 5 M & S 482, at p 490 *Hodgson* v *Ambrose* 1 Dougl (K B) 337, at p 341, *Festing* v *Allen*, 12 M & W 279, *Alexander* v *Alexander*, 16 C B 59, *Doe* d *Bills* v *Hopkinson*, 5 Q B 223, *Doe* d *Stevenson* v *Glover*, 1 C B 448, at p 459, *Astor, In re*, 90 L J Ch 499

"The general rule in interpreting a will and codicil is that the whole of the will takes effect, except in so far as it is inconsistent with the codicil" (*Per* Pollock, C B , in *Robertson* v *Powell*, 2 H & C 762, at pp 766—767, citing *Doe* d *Hearle* v *Hicks*, 1 Cl & F 20), *Richardson* v *Power*, 19 C B N S 780, at p 799

secondly, to make such a construction, so that all the words of the will may stand, for to add anything to the words of the will, or, in the construction made, to relinquish and leave out any of the words, is *maledicta glossa* But every string ought to give its sound" (*k*)

In a case involving important interests (*l*), the following were laid down as the leading and fundamental rules for construing a will In the first place, "while the intention of the testator ought to be our only guide to the interpretation of his will, yet it must be his intention as collected from the words employed by himself in his will (*m*), no surmise or conjecture of any object which the testator may be supposed to have had in view can be allowed to have any weight in the construction of his will, unless such object can be collected from the plain language of the will itself"

With the rule thus stated, we may compare the language of Lord Cottenham in *Harduicke* v *Douglas* (*n*) "It is not, according to my impression of the rule upon which the Courts have acted, consistent with the principles of construction to set aside the effect of clear and unambiguous words because there is reason to suppose that they do not produce the effect which the testator intended they should produce If there be any ambiguity, then of course it is the duty of all Courts to put that construction upon the words which seems best to carry the intention into effect, but if there be no ambiguity, however unfortunate it may be that the intention of the testator shall fail, there is no right in any Court of justice to say those words shall not have their plain and unambiguous meaning"

In the second place, it is a necessary rule, in investigating the intention of a testator, not only that the words of the will alone should be regarded in order to determine the effect of

(*k*) In *Blamford* v *Blamford*, 3 Bulst 98, at p 103 See *Parker* v *Tootal*, 11 H L Cas 143

(*l*) *Scarborough* v *Doe* d *Savile*, 3 A & E 962 (cited in *Morrice* v *Lang ham*, 8 M & W 194, at p 200)

(*m*) In *Doe* d *Sams* v *Garlick*, 14 M & W 698, at p 701, Parke, B, observed that difficulties have arisen from confounding the testator s *intention* with his *meaning* "*Intention* may mean what the testator intended to have done, whereas the only question in the construction of wills is on the *meaning of the words* ' In *Grover* v *Burningham*, 5 Exch 184, at p 194, Rolfe, B, also observed, We are to ascertain by construing the will *non quod volust sed quod dixit*, or rather we are to ascertain *quod volust* by interpreting *quod dixit* ' And see, *per* Ld Wensleydale in *Grey* v *Pearson*, 6 H L Cas 61, at 106, *Slingsby* v *Grainger*, 7 Id 273, at p 284

(*n*) 7 Clark & F 795, at p 815 See also *Quicke* v *Leach*, 13 M & W 218

the devise, but that the legal consequences which may follow from the nature and qualities of the estate when once collected from the words of the will itself, should be altogether disregarded (*o*) Thus, in determining whether the testator's intention was to devise an estate tail or only an estate for life, it is not a sound mode of reasoning to import into the consideration of the question that, if the estate is held to be an estate tail, the devisee will have power to defeat the testator's intention by barring the entail, for the Court will not assume that the testator was ignorant of the legal consequence of the disposition which he has made (*p*) A person ought to direct his meaning according to the law, and not seek to mould the law according to his meaning, for if a man were assured that, whatever words he used, his meaning only would be considered, he would be very careless about his choice of words, and the attempt to explain his meaning in each case would give rise to infinite confusion (*q*)

Hence, although it is the duty of the Court to ascertain and carry into effect the intention of the party, yet there are, in many cases, fixed and settled rules by which that intention is determined, and to such rules wise judges have thought proper to adhere, in opposition to their own private opinions as to the party's probable intention (*r*) The object, indeed, of all such technical rules is to create certainty, and to prevent litigation, by enabling persons who are conversant with these subjects to give correct advice, which would be impossible if the law were uncertain and liable to fluctuation in each particular case (*s*)

Rule against perpetuities

In accordance with the above remarks, Parke, B, in an important case respecting the rule against perpetuities, said — "We must first ascertain the intention of the testator, or more properly the meaning of his words, in the clause under consideration, and then endeavour to give effect to them so far as the rules of law will permit Our first duty is to construe the will, and this we must do exactly in the same way as if the

(*o*) *Scarborough* v *Doe* d *Savile*, 3 A & E 897, at p 963 At the same time the fact that the language, if strictly construed, will lead to a consequence inconsistent with the presumable intention, is not to be left out of view, especially if other considerations lead to the same result (*Quicke* v *Leach*, 13 M & W 218, at p 228)

(*p*) *Scarborough* v *Doe* d *Savile*, 3 A & E 897, at pp 963, 964, *per* Parke, B, in *Morrice* v *Langham*, 8 M & W 194, at p 207

(*q*) Plowd 162

(*r*) See *per* Alexander, C B, in *Denn* d *Nowell* v *Roake*, 6 Bing 475, at p 478, Judgm in *A G* v *Malkin*, 2 Phill 64, at p 68

(*s*) *Per* Pollock, C B, in *Doe* d *Sams* v *Garlick*, 14 M & W 698, at p 707

rule against perpetuity had never been established, or were repealed when the will was made, not varying the construction in order to avoid the effect of that rule, but interpreting the words of the testator wholly without reference to it" (*t*) The rule in *Shelley's Case* (*u*)—by which, where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs in fee or in tail, the word "heirs" is construed as a word of limitation—is a familiar instance of an arbitrary and technical rule of construction, the authority of which is acknowledged by the Courts, although its application may tend to defeat the intention of the testator But where a testator devised freehold land to trustees in trust for his son William 'during his life and afterwards for his heir-at-law absolutely," it was held that the devise was not within the rule in *Shelley's Case*, but was within the exception in *Archer's Case* (*v*), so that William took only an equitable estate for life, while his heir-at-law took an equitable estate in fee-simple (*w*)

Rule in *Shelley's Case*

So, in construing a power to lease contained in a will, it "becomes necessary to look to the language of the testator in the creation of the power itself, and to ascertain his intention by considering the true meaning of the language which he has used, giving to it its natural signification according to the ordinary rules of interpretation, giving effect, if possible, to every part of the clause, and if any part of it be ambiguous, interpreting it by reference to the context, to the general intent of the will, and, if necessary, to the surrounding circumstances" (*x*)

Construction of power

Not only are there fixed and established rules by which the Courts will, in certain cases, be guided in determining the legal effect of a will, but there are likewise certain technical expressions, the established legal interpretation of which differs from the meaning attributed to them in popular language, and, consequently, a will in which such expressions occur may, in

Technical expressions

(*t*) *Per* Parke, B, in *Dungannon* v *Smith*, 12 Cl & F 546, at p 599, *per* Ld Macnaghten in *Edwards* v *Edwards*, [1909] A C 275

(*u*) 1 Rep 104 a, see *Van Grutten* v *Foxwell*, [1897] A C 658

(*v*) 1 Rep 66 b

(*w*) *Re Hussey*, [1921] 1 Ch 566

(*x*) *Per* Kelly, C B, in *Jegon* v *Vivian*, L R 2 C P 422, at p 427 'Facts extrinsic to the will must be ascertained for the Court in the usual manner, either by admission of the parties or by a jury When they have been ascertained, the operation of construction is to be performed by the Court' (*Webber* v *Stanley*, 16 C B N S 698, at p 752)

some cases, be made to operate in a manner different from that contemplated by the testator (*y*) the duty of the Court being to give effect to *all* the words of the will, if that can be done without violating any part of it, and also to construe technical words in their proper sense, where they can be so understood consistently with the context (*z*)

The following observations of Knight Bruce, V.-C., although they refer to the particular circumstances of the case immediately under his consideration, show clearly the general principles which guide the Court in assigning a meaning to technical expressions "Both reason and authority, I apprehend," said the learned Judge, "support the proposition that the defendants are entitled to ask the Court to read and consider the whole of the instrument in which the clause stands, and, in reading and considering it, to bear in mind the state of the testator's family, as at the time when he made the codicil he knew it to be, and if the result of so reading and considering the whole document with that recollection is to convince the Court, from its contents, that the testator intended to use the words in their ordinary and popular sense, and not in their legal and technical sense, as distinguishable from their ordinary and popular sense, to give effect to that conviction by deciding accordingly" (*a*)

"Children"

The following instance may serve to illustrate the above remarks (*b*) —The term "children" in a will *prima facie* means, in accordance with its strict technical sense in law, legitimate children, and, if there is nothing more in the will,

(*y*) See 2 Powell on Devises by Jarman, 3rd ed 564 *et seq* *Doe* d *Blessard* v *Simpson*, 3 Scott, N R 774 (cited by Byles, J, in *Richards* v *Davies* 13 C B N S 69, at p 87, and distinguished in *Hardcastle* v *Dennison*, 10 Id 606)

(*z*) *Doe* d *Cape* v *Walker*, 2 Scott, N R 334, *Touns* v *Wentworth*, 11 Moo P C 526, at p 543, *per* Martin, B, in *Biddulph* v *Lees*, E B & E 289, at p 317, *per* Alderson, B, in *Lees* v *Mosley*, 1 Y & Coll Exch 589, at p 606 (cited Arg, *Greenwood* v *Rothwell*, 6 Scott, N R 670, at p 672) See also, Arg, *Festing* v *Allen*, 12 M & W 279, at p 286 *Jack* v *M'Intyre*, 12 Cl & F 151, at p 158, *Jenkins* v *Hughes*, 8 H L Cas 571

Where the testator appears to have been very illiterate, 'the rules of grammar and the usual meaning of technical language may be disregarded in construing his will' (*per* Ld Campbell in *Hall* v *Warren*, 9 H L Cas 420, at p 427)

Generally, as to the duty of the Court in construing a will containing technical words, see, further, *per* Ld Westbury in *Young* v *Robertson*, 4 Macq 314, at p 325 (distinguished in *Richardson* v *Power*, 19 C B N S 780, at p 798), *Ralston* v *Hamilton*, 4 Macq 397, *Jenkins* v *Hughes*, 8 H L Cas 571

(*a*) *Early* v *Benbow*, 2 Coll 342, at p 353

(*b*) As to the meaning of unmarried, see *Clarke* v *Colls*, 9 H L Cas 601, as to that of 'eldest male lineal descendant, see *Thellusson* v *Rendlesham*, 7 Id 429, and as to that of next eldest brother,' see *Crofts* v *Beamish*, [1905] 2 I R 349

the fact that the person whose children are referred to has illegitimate children does not entitle the illegitimate children to take But there are two classes of cases in which the above interpretation is departed from One is where it is impossible from the circumstances of the parties, that any legitimate children could take under the bequest, for instance, if the bequest be to the children of a deceased person who has left none but illegitimate children, the maxim *ut res magis valeat* is applied The other is where upon the face of the will itself, and upon a just construction of the words used in it, there is an expression of the testator's intention to use the term "children" according to a meaning which will apply to and include illegitimate children (*c*)

In like manner, where a bequest is made to the "children" or "issue" of A, the whole context of the will must be considered, in order to ascertain the proper effect to be attributed to the word "children" or "issue" It may be, that the word "children" must be enlarged and construed to mean "issue" generally, or the word "issue" restricted so as to mean "children," and each case must depend on the peculiar expressions used, and the structure of the sentences (*d*) When, however, the context is doubtful, the Court, so far as it can, will prefer that construction which will most benefit the testator s family generally, on the supposition that such a construction must most nearly correspond with his intention (*e*)

Lastly, in determining whether an estate-tail or only a life estate passes under the words of a will, the same general rule of interpretation above considered is applicable, and has thus been forcibly stated by Lord Brougham "I take the principle of construction, as consonant to reason and established by authority, to be this—that, where by plain words, in themselves liable to no doubt, an estate-tail is given, you are not to allow such estate to be altered and cut down to a life estate, unless there are other words which plainly show the testator to have used the

(*c*) *Per* Ld Cairns in *Hill* v *Crook*, L R 6 H L 265, at p 282 (applied in *Re Bleckly*, [1921] 1 Ch 450), see cases collected in *Re Deakin*, [1894] 3 Ch 565

(*d*) Where in a devise there is a gift over on general failure of 'issue," the word 'issue' means 'heirs of the body,' unless from the context it clearly appear that the testator intended to give it a different meaning (*Roddy* v *Fitzgerald*, 6 H L Cas 823, *Bowen* v *Lewis*, 9 App Cas 890) See *Bradley* v *Cartwright*, L R 2 C P 511, *Eastwood* v *Avison*, L R 4 Ex 141, *per* Ld Chelmsford in *Williams* v *Lewis*, 6 H L Cas 1013, at p 1021

(*e*) *Per* Ld Langdale in *Farrant* v *Nichols*, 9 Beav 327, at pp 329, 330, *Slater* v *Dangerfield*, 15 M & W 263, *Richards* v *Davies*, 13 C B N S 69

former as words of purchase contrary to their natural and ordinary sense, or unless in the rest of the provisions there be some plain indication of a general intent inconsistent with an estate-tail being given by the words in question, and which general intent can only be fulfilled by sacrificing the particular provisions, and regarding the expressions as words of purchase Thus, if there is a gift first to A and the heirs of his body, and then, in continuation, the testator, referring to what he had said, plainly tells us, that he used the words, 'heirs of the body' to denote A 's first and other sons, then, clearly, the first taker would only take a life estate So, again, if a limitation is made afterwards, and is clearly the main object of the will, which never can take effect unless an estate for life be given instead of an estate-tail here, again, the first words become qualified, and bend to the general intent of the testator, and are no longer regarded as words of limitation, which, if standing by themselves, they would have been" (*f*)

"Heirs of the body"

To the general maxims of construction applicable to wills, viz, *Benigne faciendæ sunt interpretationes et verba intentioni debent inservire*, the doctrine of cy-pres is referable (*g*) According to this doctrine (which proceeds upon the principle of carrying into effect as far and as nearly as possible the intention of the testator), if there be a general and also a particular intention apparent on the will, and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention (*h*) Thus, where lands were devised to the second son of W (who at the testator's death had no son), for such son's life, and after his death, or in case he should inherit his paternal estate by the death of his elder brother, then to his second son and his heirs male, with remainder to the third and other sons of W successively in tail male it was held that the lands vested in the second son of W (when born) by executory devise for an estate in tail male, determinable on the accession of the paternal estate (*i*) So,

Doctrine of cy près

(*f*) *Fetherston* v *Fetherston*, 3 Cl & F 67, at pp 75, 76, *per* Ld Brougham in *Thornhill* v *Hall*, 2 Id 86

(*g*) See *per* Ld St Leonards in *East* v *Twyford*, 4 H L Cas 517, at p 556

(*h*) *Per* Buller, J, in *Robinson* v *Hardcastle*, 2 T R 241, at p 254, Shep Touch 87 The rule as to cy près is stated by Ld St Leonards in *Monypenny* v *Dering*, 2 De G M & G 145, at p 173 See *per* Ld Kenyon in *Brudenell* v *Elwes*, 1 East 442, at p 451

(*i*) *Nicholl* v *Nicholl*, 2 Black W 1159 See, however, *Monypenny* v *Dering*, 2 M & Gr 145

in the case of a condition precedent annexed to a legacy, with which a literal compliance becomes impossible from unavoidable circumstances, and without any default of the legatee, or where a bequest is made for charitable purposes, with which a literal compliance becomes inexpedient or impracticable, in such cases a court of equity will apply the doctrine of cy-près, and will endeavour substantially, and as nearly as possible, to carry into effect the intention of the testator (*k*)

Cy près when inapplicable

It is to be observed that the doctrine of cy-près does not apply to limitations of personal estate, nor of a mixed fund (*l*) It is also inapplicable where an attempt is made to limit a succession of life estates to the issue of an unborn person either for a definite or indefinite series of generations, and also where the limitation to the children of the unborn person gives them an estate in fee simple (*m*)

Summary of preceding remarks

The remarks above made, and authorities referred to, serve to give a general view of the mode of applying to the interpretation of wills those comprehensive maxims which we have been endeavouring to illustrate and explain, and which are, indeed, comprised in the well-known saying *ultima voluntas testatoris est perimplenda secundum veram intentionem suam* (*n*)

We shall, therefore, sum up this part of our subject with observing that the only safe course to pursue in construing a will is to look carefully for the testator's intention as it is to be derived from the words used by him within the whole of the will, regardless alike of any general surmise or conjecture from without the will, as of any legal consequences annexed to the estate itself, when such estate is discovered within the will (*o*), bearing in mind, however, that where technical rules have become established, such rules must be followed, although opposed to the testator's presumable and probable intention—that where technical expressions occur they must receive their legal meaning, unless, from a perusal of the entire instrument, it be evident that the testator employed them in their popular

(*k*) 1 Story, Eq Jurisp, 12th ed 1169—1180, where this doctrine is considered, 1 Jarm Wills, 6th ed pp 233 *et seq*, *Ironmongers Co* v *A G*, 10 Cl & F 908, *Mills* v *Farmer*, 19 Ves Jur 483, *Re White*, [1893] 2 Ch 41 The entire doctrine of equity with regard to trusts, and especially trusts raised by precatory words, will occur to the reader as fraught with illustrations of the maxims commented on in the text

(*l*) *Boughton* v *James*, 1 Coll 26, at p 44, and 1 H L Cas 406

(*m*) 1 Jarman on Wills, 6th ed, p 288

(*n*) Co Litt 322 b

(*o*) Judgm in *Scarborough* v *Doe* d *Savile*, 3 A & E 897, at 964

signification—that words which have no technical meaning shall be understood in their usual and ordinary sense, if the context do not manifestly point to any other (*p*)—that where the particular intention of the testator cannot literally be performed, effect may, in some cases, be given to the general intention, in order that his wishes may be carried out as nearly as possible, and *ut res magis valeat quam pereat*, and lastly, that where, by acting on one interpretation of the words used, it would make the testator act capriciously without any intelligible motive, contrary to the ordinary mode in which men generally act in similar cases, then, if the language admits of two constructions, that construction may properly be adopted which avoids those anomalies, even though that construction be not the most obvious or the most grammatically accurate But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which may be considered capricious or even harsh and unreasonable (*q*)

Analogous principles of the Roman law

It may not be uninteresting further to remark that the rules laid down in the Roman law upon the subject under consideration, are almost identical with those above stated, as recognised by our own jurists at the present day Where, for instance, ambiguous expressions occurred, the rule was, that the intention of him who used them should especially be regarded *in ambiguis orationibus maxime sententia spectanda est ejus qui eas protulisset* (*r*), a rule which we learn was confined to the interpretation of wills wherein one person only speaks, and was not applicable to agreements generally, in which the intention of both the contracting parties was necessarily to be considered (*s*), and accordingly in another passage in the Digest, we find the same rule so expressly qualified *cum in testamento ambigue aut etiam perperam scriptum est benigne interpretari et secundum id quod credibile est cogitatum credendum est* (*t*) where an ambiguous, or even an erroneous expression occurs in a will, it should be construed liberally, and in accordance with the testator's probable meaning In like manner we find it stated that a departure from the literal meaning of the words

(*p*) The question as to what will pass under the word portrait in a will is elaborately discussed in *Leeds* v *Amherst* 13 Sim 459

(*q*) *Abbott* v *Middleton*, 7 H L Cas 68, at p 89, *Bathurst* v *Stanley*, 4 Ch D 251, and (*sub nom Bathurst* v *Errington*) 2 App Cas 698

(*r*) D 50, 17, 96

(*s*) Wood, Inst 107

(*t*) D 34 5, 24 see Brisson, ad verb '*Perperam*', Pothier ad Pand (ed 1819), vol 3, p 46, where examples of this rule are collected

used is not justifiable, unless it be clear that the testator himself intended something different therefrom *non aliter a significatione verborum recedi oportet quam cum manifestum est aliud sensisse testatorem* (*u*), and, lastly, we find the general principle of interpretation to which we have already adverted thus concisely worded *in testamentis plenius voluntates testantium interpretantur* (*x*), that is to say, a will shall receive a more liberal construction than its strict meaning, if alone considered, would permit (*y*)

Construction of statutes

The construction of a statute, like the operation of a devise, depends upon the apparent intention of the maker, to be collected either from the particular provision or the general context, though not from any general inferences drawn merely from the nature of the objects dealt with by the statute (*z*) Acts of Parliament and wills alike ought to be construed according to the intention of the parties who made them (*a*), and the preceding remarks as to the construction of deeds and wills will, therefore, generally hold good with reference to the construction of statutes, the great object being to discover the true intention of the legislature, and where that intention can be indubitably ascertained, the Courts are bound to give it effect, whatever may be their opinion of its wisdom or folly (*b*), "acting upon the rule as to giving effect to all the words of the statute, a rule universally applicable to all writings, and which ought not to be departed from, except upon very clear and strong grounds" (*c*)

(*u*) D 32, 69 pr , applied by Knight Bruce, L J , in *Hart* v *Tulk* 2 De G M & G 300, at p 313

(*x*) D 50, 17, 12

(*y*) Cujac *ad loc* , cited 3 Pothier ad Pand 46

(*z*) *Fordyce* v *Bridges*, 1 H L Cas 1 Where a *casus omissus* occurred in a statute, the doctrine of cy près was applied in *Smith* v *Wedderburne* 16 M & W 104 See *Salheld* v *Johnson*, 2 C B 749, at p 757

(*a*) "It is said, that a will is to be favourably construed, because the testator is *inops consilii* This," observed Ld Tenterden, "we cannot say of the legislature, but we may say that it is *magnas inter opes inops* ', (*Surtees* v *Ellison*, 9 B & C 750, at pp 752, 753)

See the remarks of Wood, V C , as to determining whether a mandatory enactment is to be considered directory only, or obligatory with an implied nullification for disobedience, in *Liverpool Borough Bank* v *Turner*, 29 L J Ch 827, and 30 Id 379 (approved in *Ward* v *Beck*, 13 C B N S 668, at pp 675—676)

(*b*) See the analogous remarks of Ld Brougham, with reference more particularly to the common law, in *R* v *Millis*, 10 Cl & F 534, at p 749, also, *per* Vaughan, J , in *Doe* d *Spilsbury* v *Burdett*, 9 A & E 936, at p 980, Judgm in *Fellowes* v *Clay*, 4 Q B 313, at p 349, *per* Alexander, C B , in *York* (*Dean of*) v *Middleburg*, 2 Yo & J 196, at p 215

(*c*) *Isberg* v *Bowden*, 8 Exch 852, at p 860

"The general rule," as observed by Byles, J (*d*), "for the construction of Acts of Parliament is, that the words are to be read in their popular, natural, and ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction, because of some inconvenience which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such large sense"

And again—"In construing an Act of Parliament, when the intention of the legislature is not clear, we must adhere to the natural import of the words, but when it is clear what the legislature intended, we are bound to give effect to it notwithstanding some apparent deficiency in the language used" (*e*)

Hence, although the general proposition be undisputed that "an affirmative statute giving a new right, does not of itself and of necessity destroy a previously existing right," it will nevertheless have such effect, "if the apparent intention of the legislature is that the two rights should not exist together" (*f*)

Construction of penal statutes

A remedial statute, therefore, shall be liberally construed, so as to include cases which are within the mischief which the statute was intended to remedy (*g*), whilst, on the other hand, where the intention of the legislature is doubtful, the inclination of the Court will always be against that construction which imposes a burthen (*h*), tax (*i*), or duty (*k*), on the subject It has been designated as a "great rule" in the construction of

(*d*) In *Birks* v *Allison*, 13 C B N S 12, at p 23

(*e*) *Per* Pollock, C B, in *Huxham* v *Wheeler*, 3 H & C 75, at p 80 See also *Rothes* v *Kirkcaldy Commrs*, 7 App Cas 694, at p 702

(*f*) *Per* Ld Cranworth in *O Flaherty* v *M Dowell*, 6 H L Cas 142, at p 157 See *Ex p Warrington*, 3 De G M & G 159, *New Windsor Corp* v *Taylor*, [1899] A C 41 (*g*) See *Twyne's Case*, 3 Rep 80 b

(*h*) *Per* Ld Brougham in *Stockton & Darlington Ry Co* v *Barrett*, 11 Cl & F 590, at p 607, *per* Parke, B, in *Ryder* v *Mills*, 3 Exch 853, at p 869, and in *Wroughton* v *Turtle*, 11 M & W 561, at p 567 'All acts which restrain the common law ought themselves to be restrained by exposition" (*per* Ld Eldon in *Ash* v *Abdy*, 3 Swanst 664) Mere permissive words shall not abridge a common law right (*Ex p Clayton*, 1 Russ & My 372, *per* Erle, C J in *Caswell* v *Cook*, 11 C B N S 637, at 652)

(*i*) *Per* Parke, B, in *Re Micklethwaist*, 11 Exch 452, at p 456, and in *A G* v *Bradbury*, 7 Id 97, at p 116 (citing *Denn* d *Mansfold* v *Diamond*, 4 B & C 243), *Mayor of London* v *Parkinson*, 10 C B 228, Judgm in *Vauxhall Bridge Co* v *Sawyer*, 6 Exch 504 at p 509 See also *A G* v *Wilts Dairies*, 91 L J K B 897

(*k*) Judgm, *Chandos* v *Inl Rev Commrs*, 6 Exch 464, at p 479, *per* Wilde, C J, in *Rushbrook* v *Hood* 5 C B 131, at p 135 See *per* Bramwell, B, in *Foley* v *Fletcher*, 3 H & N 769, at pp 781—782

"Acts of Parliament, however, imposing stamp duties ought to be construed

fiscal law, "that they are not to be extended by any laboured construction, but that you must adhere to the strict rule of interpretation, and if a person who is subjected to a duty in a particular character or by virtue of a particular description no longer fills that character, or answers that description, the duty no longer attaches upon him and cannot be levied" (*l*) A penalty, moreover, must be imposed by clear words (*m*) The words of a penal statute (*n*) shall be restrained for the benefit of him against whom the penalty is inflicted, and the language of the statute must be strictly looked at in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within it" (*o*)

"The principle," remarked Lord Abinger, "adopted by Lord Tenterden (*p*), that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject, and I hope will always remain so" (*q*)

This rule, however, which is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department, must not be so applied as to narrow the words of the statute to the exclusion of cases

according to the plain and ordinary meaning of the words used (Judgm in *Foley* v *Inl Rev Commrs*, L R 3 Ex 263, at p 268)

If a statute imposing a toll contain also exemptions from it in favour of the Crown and of the public, any clause so exempting from toll is to have a fair, reasonable, and not strict construction," (*per* Byles J, in *Toomer* v *Reeves*, L R 3 C P 62, at p 66)

(*l*) *Per* Ld Westbury in *Dickson* v *R*, 11 H L Cas 175, at p 184

(*m*) *Per* Alderson, B, in *Woolley* v *Kay*, 1 H & N 307, at p 309, Judgm in *Ryder* v *Mills*, 3 Exch 853, at pp 869 *et seq*, *Coe* v *Lawrance*, 1 E & B 516, at p 520, *Archer* v *James*, 2 B & S 61, 103

(*n*) In *A G* v *Sillem*, 2 H & C 431, the method of construing a penal statute was much considered, and there (Id at p 530) Bramwell, B, said, The law that governs this case is a written law, an Act of Parliament, which we must apply according to the true meaning of the words used in it We must not extend it to anything not within the natural meaning of those words but within the mischief or supposed mischief intended to be prevented, nor must we refuse to apply it to what is within that natural meaning, because not, or supposed not to be, within the mischief see also *per* Pollock, C B, Id at p 509 'I suppose 'within the equity means the same thing as within the mischief' of the statute, said Byles, J, in *Shuttleworth* v *Le Fleming*, 19 C B N S 687, at p 708

(*o*) *Per* Field, J, in *Graff* v *Evans* 8 Q B D 373

(*p*) See *Proctor* v *Manwaring*, 3 B & Ald 145

(*q*) *Henderson* v *Sherborne*, 2 M & W 236, see judgm in *Fletcher* v *Calthrop*, 6 Q B 880, at p 887 (cited and adopted in *Murray* v *R*, 7 Q B 700, at p 707)

which those words in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend (*r*)

Preamble

We may add, in connection with this part of the subject, that although the enacting words of a statute are not necessarily to be limited or controlled by the words of the preamble, but in many instances go beyond it, yet, on a sound construction of every Act of Parliament, the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the Act, and the preamble affords a good clue to discover what that object was (*s*) "The only rule," it has been said, "for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound the words in their natural and ordinary sense The words themselves alone do, in such case, best declare the intention of the lawgiver But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause for making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (*t*), is a 'key to open the minds of the makers of the Act, and the mischiefs which they intended to redress'" (*u*)

(*r*) See *per* Pollock, C B, in *Myers* v *Baker*, 3 H & N 802, at p 812

(*s*) *Per* Ld Tenterden in *Halton* v *Cave*, 1 B & Ad 538 at p 558, judgm in *Salkeld* v *Johnson*, 2 Exch 256 at p 283, and cases there cited, *per* Kelly, C B, in *Winn* v *Mossman*, L R 4 Ex 292, at p 300, *Carr* v *Roy Exch Ass Co*, 1 B & S 956, *per* Maule, J, in *Edwards* v *Hodges*, 15 C B 477 at p 484 (citing *Copeman* v *Gallant*, 1 P Wms 314), *per* Coleridge, J, in *Pocock* v *Pickering*, 18 Q B 789, at pp 797, 798, Co Litt, 79 a, *per* Buller J, *Crespigny* v *Wittenoom*, 4 T R 790, cases cited in *Whitmore* v *Robertson*, 6 M & W 463, at p 472, *Stockton & D Ry Co* v *Barrett*, 11 Cl & F 590

(*t*) As quoted in *Stowel* v *Zouch*, Plowd 353, at p 369

(*u*) Cited by Tindal, C J, delivering the opinion of the Judges in *The Sussex Peerage*, 11 Cl & F 85, at p 143 See also as to the office of the preamble, *per* Buller, J, in *R* v *Robinson*, 2 East, P C 1113 (cited in *R* v *Johnson*, 29 St Tr 82, at p 303)

Formerly the *title* of a statute was no part of the law, and in strictness ought not to be taken into consideration at all' (Judgm in *Salkeld* v *Johnson*, 2 Exch 256, at p 283) See *per* Willes, J, in *Claydon* v *Green*, L R 3 C P 522 But it seems that it is now part of the Act (*Fielding* v *Morley Corp*, [1899] 1 Ch 1, at p 4, *per* Lindley, M R)

The marginal note to a section in the copy printed by the King's printer forms no part of the statute itself, and does not bind as explaining or construing the section (*Claydon* v *Green*, L R 3 C P 511, at p 522, followed in *Sutton* v *Sutton*, 22 Ch D 511), except, possibly in the case of some local and personal Acts (*Re Woking U C*, [1914] 1 Ch 300, at p 322, *per* Phillimore, L J)

Headings and recitals

The heading of a portion of a statute may, it seems, be referred to to determine the sense of any doubtful expression in a section ranged under it (*x*), and a recital of an Act of Parliament, stating its object, has been held to limit general words in the enacting part to the object as declared in the recital (*y*)

The "golden rule"

The golden rule for construing wills, statutes, and, in fact, all written instruments has been thus stated "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further" (*z*) The latter part of this "golden rule" must, however, be applied with much caution "If," remarked Jervis, C J, "the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it lead, in our view of the case, to an absurdity or manifest injustice Words may be modified or varied where their import is doubtful or obscure But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning" (*a*)

Meaning of words

It may then safely be stated as an established rule of construction, that an Act of Parliament should be read according to the ordinary and grammatical sense of the words (*b*), unless, being so read, it would be absurd or inconsistent with the declared intention of the legislature, to be collected from the rest of the Act (*c*), or unless a uniform series of decisions has

(*x*) *Hammersmith Ry Co* v *Brand*, L R 4 H L Cas 171 See *E Counties Ry Co* v *Marriage*, 9 H L Cas 32

(*y*) *Howard* v *Shrewsbury*, L R 17 Eq 378

(*z*) *Grey* v *Pearson*, 6 H L Cas 61, at p 106, *Caledonian Ry Co* v *N British Ry Co*, 6 App Cas 114, at p 131

(*a*) *Abley* v *Dale*, 11 C B 378 at p 391 See *Woodward* v *Watts*, 2 E & B 452, at p 457

(*b*) "It is a good rule, in the construction of Acts of Parliament, that the Judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words" (*per* Cresswell, J, in *Biffin* v *Yorke*, 6 Scott, N R 235), see *Richards* v *M'Bride* 8 Q B D 119 See also judgm in *R* v *Hall*, 1 B & C 123 (cited in *Flounders* v *Donner*, 2 C B 63, at p 66, and in *The Lion*, L R 2 P C 530), *Stracey* v *Nelson*, 12 M & W 535, at p 541

(*c*) Judgm in *Smith* v *Bell*, 10 M & W 378, at p 389, *Turner* v *Sheffield Ry Co*, Id 425, at p 434, *Steward* v *Greaves*, Id 711, at p 719, *per* Alder

already established a particular construction (*d*), or unless terms of art are used which have a fixed technical signification as, for instance, the expression "heirs of the body," which conveys to lawyers a precise idea, as comprising in a legal sense only certain lineal descendants, and this expression shall, therefore, be construed according to its known meaning (*e*)

It is also a rule of the civil law adopted by Lord Bacon, which was evidently dictated by common sense, and is in accordance with the spirit of the maxim which we have been considering, that, where obscurities, ambiguities, or faults of expression render the meaning of an enactment doubtful, that interpretation shall be preferred which is most consonant to equity, especially where it is in conformity with the general design of the legislature *In ambigua voce legis ea potius accipienda est significatio qua vitio caret, præsertim cum etiam voluntas legis ex hoc colligi possit* (*f*) And if the Act is ambiguous, and upon one construction the balance of hardship or inconvenience seems to be strongly against the public, the balance of inconvenience may be considered in determining the question of construction (*g*)

EX ANTECEDENTIBUS ET CONSEQUENTIBUS FIT OPTIMA INTERPRETATIO (2 *Inst* 173)—*A passage is best interpreted by reference to what precedes and what follows it*

Rule

It is an important rule of construction, that the meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus*, that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done (*h*), or, in other words, the construction must be made upon the entire instrument, and not merely upon disjointed parts

son, B, in *A G* v *Lockwood*, 9 M & W 378, at p 398, judgm, *Hyde* v *Johnson*, 2 Bing N C 776, at p 780

(*d*) *Per* Parke, B, in *Doe* d *Ellis* v *Owens*, 10 M & W 514, at p 521, *per* Ld Brougham, C, in *Waterford Peerage*, 6 Cl & F 133, at p 172

(*e*) 2 Dwarr Stats 702, *Poole* v *Poole*, 3 B & P 620

(*f*) D 1, 3, 19, Bac Max, reg 3

(*g*) *Dixon* v *Caledonian, &c, Co 's*, 5 App Cas 820, at p 827

(*h*) *Per* Ld Ellenborough in *Barton* v *Fitzgerald*, 15 East, 530, at p 541, Shep Touch 87, *per* Hobart, C J, in *Trenchard* v *Hoskins*, Winch, 91, at p 93 See *Micklethwait* v *Micklethwait*, 4 C B N S 790, at p 862

of it (*i*), the whole context must be considered, in endeavouring to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause (*k*) In short, the law will judge of a deed, or other instrument, consisting of divers parts or clauses, by looking at the whole, and will give to each part its proper office, so as to ascertain and carry out the intention of the parties (*l*)

Examples

Thus, in the case of a bond with a condition, the latter may be read and taken into consideration, in order to explain the obligatory part of the instrument (*m*) So, in construing an agreement in the form of a bond in which a surety becomes liable for the fulfilment of an agent's duties therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, and controlled by reference to the prior clauses specifying the extent of the agency (*n*) On the same principle, the recital in a deed or agreement may be looked at in order to ascertain the meaning of the parties, and is often highly important for that purpose (*o*) and the general words of a subsequent distinct clause or stipulation may often be explained or qualified by the matter recited (*p*) Where, indeed, "the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed ' But where, on the other hand, "those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words" (*q*) So, covenants are to be construed according to the obvious intention of the parties, as collected from the whole context of the instrument containing them, and according to the reasonable sense of the words, and, in conformity with the rule above laid

(*i*) Judgm in *Doe* d *Meyrick* v *Meyrick*, 2 Cr & J 223, at p 230, *Maitland* v *Mackinnon*, 1 H & C 607

(*k*) *Coles* v *Hulme*, 8 B & C 568, *per* Ld Hobart in *Clanrickard's Case*, Hob 273, at p 275 (cited in *Gale* v *Reed*, 8 East, 80, at p 89)

(*l*) See Hob 275 *Doe* d *Bute* v *Guest*, 15 M & W 160

(*m*) *Coles* v *Hulme*, 8 B & C 568, and cases there cited at p 574, n (*a*)

(*n*) *Napier* v *Bruce*, 8 Cl & F 470

(*o*) Shep Touch 75, *Cholmondeley* v *Clinton*, 2 B & Ald 625, and 4 Bligh, 1

(*p*) *Payler* v *Homersham*, 4 M & S 423 (cited in *Harrison* v *Blackburn*, 17 C B N S 678, at p 691), *Symons* v *Johnson*, 3 B & Ad 17 at p 180, *Boyes* v *Bluck*, 13 C B 652, *Solly* v *Forbes*, 2 B & B 38, *Carleton* v *Spencer*, 3 Q B 693 *Sampson* v *Easterby*, 9 B & C 505 (affirmed in 1 Cr & J 106), *Price* v *Barker*, 4 E & B 760, at p 777, *Henderson* v *Stobart*, 5 Exch 99

(*q*) Judgm in *Walsh* v *Trevanion*, 15 Q B 733, at p 751 See *Re Moon*, 17 Q B D 275, at p 286

down, a covenant in large and general terms has frequently been narrowed and restrained (*r*), where there has appeared something to connect it with a restrictive covenant, or where there have been words in the covenant itself amounting to a qualification (*s*) and it has, indeed, been said, in accordance with the above rule, that, "however general the words of a covenant may be, if standing alone, yet, if from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will admit the operation of the general words" (*t*)

It is, moreover, as a general proposition, immaterial in what part of a deed any particular covenant is inserted (*u*), for the construction of a deed does not depend on the order of the covenants, or upon the precise terms of them, but regard must be had to the object, and the whole scope of the instrument (*v*) For instance, in the lease of a colliery, two lessees covenanted "jointly and severally in manner following," and then followed various covenants as to working the colliery, after which was a covenant, that the moneys appearing to be due should be accounted for and paid by the lessees, not saying, 'and each of them" it was held, that the general words at the beginning of the covenants by the lessees extended to all the subsequent covenants throughout the deed on the part of the lessees, there not being anything in the nature of the subject to restrain the operation of those words to the former part only of the lease (*x*)

Upon the same principle it is a sound rule of construction that where a word has a clear and definite meaning when used in one part of a deed, will or other document, but has not when used in another, the presumption is that the word is intended to have the same meaning in the latter as in the former part (*y*)

(*r*) *Per* Ld Ellenborough in *Iggulden* v *May*, 7 East, 237, at p 241, *Case of Mines*, Plowd 310, at 329, *Cage* v *Paxlin*, 1 Leon 116, *Broughton* v *Conway*, Moo (K B) 58, *Gale* v *Reed*, 8 East, 80 at p 89, *Sicklemore* v *Thistleton*, 6 M & S 9 (cited *Jowett* v *Spencer*, 15 M & W 662), *Hesse* v *Stevenson*, 3 B & P 565 See *Doe* d *Spencer* v *Godwin*, 4 M & S 265

(*s*) Judgm in *Smith* v *Compton*, 3 B & Ad 189, at p 200

(*t*) Judgm in *Hesse* v *Stevenson*, 3 B & P 565, at p 574 See the maxim as to *verba generalia*, p 415, *post*

(*u*) *Per* Buller, J, in *Northumberland* v *Errington*, 5 T R 522, at 526

(*v*) *Per* Wilde, C J, in *Richards* v *Bluck*, 6 C B 437, at p 441

(*x*) *Northumberland* v *Errington* 5 T R 522, *Copland* v *Laport*, 3 A & E 517

(*y*) *In re Birks*, [1900] 1 Ch 417

Again, words may be transposed, if it be necessary to do so in order to give effect to the evident intent of the parties (*z*), as, if a lease for years be made in February, rendering a yearly rent payable at Michaelmas and Lady-day during the term, the law will make a transposition of the feasts, and read it thus, "at Lady-day and Michaelmas," in order that the rent may be paid yearly during the term And so it is in the case of an annuity (*a*) And, although courts of law have no power to alter the words, or to insert words which are not in the deed, yet they ought to construe the words in a manner most agreeable to the meaning of the grantor, and may reject any words that are merely insensible (*b*) Likewise, if there be two clauses or parts of a deed (*c*) repugnant the one to the other, the former shall be received, and the latter rejected, unless there be some special reason to the contrary (*d*), for instance, in a grant, if words of restriction are added which are repugnant to the grant, the restrictive words must be rejected (*e*)

It seems, however, to be a true rule, that this rejection of repugnant matter can be made only in those cases where there is a full and intelligible contract left to operate after the repugnant matter is excluded, otherwise, the whole contract, or such parts of it as are defective, will be pronounced void for uncertainty (*f*) And as already observed, "if a deed can operate two ways, one consistent with the intent, and the other repugnant to it, the Courts will be ever astute so to construe it, as to give effect to the intent," and the construction must be made on the entire deed (*g*)

A marriage settlement recited that it was the intention of the parties to settle an annuity of £1,000 per annum on the

(*z*) *Parkhurst* v *Smith*, Willes, 327, at p 332

(*a*) Co Litt 217 b

(*b*) *Per* Willes, C J , in *Parkhurst* v *Smith*, *supra*, as reported, 3 Atk 135, at p 136

(*c*) *Secus* of a will, see p 371 *post*

(*d*) Shep Touch 88, *Cother* v *Merrick*, Hardr 89, at p 94, *Walker* v *Giles*, 6 C B 662 (cited *Re Royal Liver Soc* , L R 5 Ex 78, at p 80)

(*e*) *Stukeley* v *Butler*, Hob 168, at p 172, *Mills* v *Wright*, 1 Freem 247

(*f*) *Arden* v *Darcy*, 2 Anderson, 93, at p 103 In *Doe* d *Wyndham* v *Carew*, 2 Q B 317, a proviso in a lease was held to be "insensible " In *Youde* v *Jones*, 13 M & W 534, an exception introduced into a deed of appointment under a power was held to be repugnant and void See, also, *Furnivall* v *Coombes*, 6 Scott, N R 522 (cited in *Kelner* v *Baxter*, L R 2 C P 186, followed in *Watling* v *Lewis*, [1911] 1 Ch 414), *White* v *Hancock*, 2 C B 880 In *Scott* v *Avery*, 8 Exch 487, and 5 H L Cas 811, various authorities having reference to repugnant stipulations in contracts are cited

(*g*) *Per* Turner, V C , in *Squire* v *Ford*, 9 Hare, 47, at p 57

intended wife, in case she should survive her husband In the body of the deed the words used were "£1,000 sterling lawful money of Ireland" It was held that the words "of Ireland" must be excluded, for the expression could have no meaning, unless some of the words were rejected, and it is a rule of law, that, if the first words used would give a meaning, the latter words must be excluded (*h*) So, we read that, if one makes a lease for ten years "at the will of the lessor," this is a good lease for ten years certain, and the last words are void for the repugnancy (*i*) And without multiplying examples to a like effect, the result of the authorities seems to be that "when a court of law can clearly collect from the language within the four corners of a deed or instrument in writing the real intention of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned" (*j*)

Interpretation of wills

Where, however, two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, that which is posterior in position prevails, the subsequent words being considered to denote a subsequent intention *cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est* (*k*) It is well settled that where there are two repugnant clauses in a will, and there is nothing else in the will to show what the testator really meant (*l*), the last clause prevails, as being most indicative of the intent (*m*), and this results from the general rule of construction, for, unless the principle were recognised of adopting one clause and rejecting the other, both would be necessarily void, each having the effect of neutralising and frustrating the other (*n*) Therefore, if a testator, in one part of his will, gives to a person an estate of inheritance in land, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means that person to take a life-interest only, the prior gift is restricted accordingly (*o*) The maxim last men-

(*h*) *Cope* v *Cope*, 15 Sim 118

(*i*) Bac Abr, Leases and Terms for Years, L 3, cited and distinguished in *Morton* v *Woods*, L R 4 Q B 293, at p 305

(*j*) *Per* Kelly, C B, in *Gwyn* v *Neath Canal Co*, L R 3 Ex 209, at p 215

(*k*) Co Litt 112 b

(*l*) *Doe* d *Leicester* v *Biggs*, 2 Taunt 109, at p 113

(*m*) *Paramour* v *Yardley*, Plowd 539, at p 541

(*n*) 1 Jarm, Wills, 6th ed, p 565 Words and passages in a will, which cannot be reconciled with the general context, may be rejected, Id, p 575

(*o*) Ibid p 568 See, also, *Doe* d *Murch* v *Marchant*, 7 Scott, N R 644

tioned must, however, in its application, be restricted by, and made subservient to, that general principle, which requires that the testator's intention shall, if possible, be ascertained and carried into effect (*p*)

Interpretation of statutes

Lastly, it is an established rule, in construing a statute that the intention of the law-giver and the meaning of the law are to be ascertained by viewing the whole and every part of the Act (*q*) One part of a statute must be so construed by another, that the whole may, if possible, stand (*r*), and that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant, and it is a sound general principle, in the exposition of statutes, that less regard is to be paid to the words used than to the policy which dictated the Act, as, if land be vested in the King and his heirs by Act of Parliament, saving the right of A , and A has at that time a lease of it for three years, in this case A shall hold it for his term of three years, and afterwards it shall go to the King for this interpretation furnishes matter for every clause to work and operate upon (*s*)

Every word should take effect

Also, if any section be intricate, obscure, or doubtful the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another (*t*) This, as Sir E Coke observed, is the most natural and genuine method of expounding a statute (*u*), and it is, therefore, a true principle, that *verba posteriora propter certitudinem addita ad priora quæ certitudine indigent sunt referenda* (*x*)—reference should be made to a subsequent section in order to explain a previous clause of which the meaning is doubtful

(*p*) *Morrall* v *Sutton*, 1 Phill Ch 533 at pp 545, 546 See *Greenwood* v *Sutcliffe*, 14 C B 226, at p 235 (a), *Plenty* v *West*, 6 C B 201, at p 219

(*q*) See *per* Ld Herschell in *Colquhoun* v *Brooks*, 14 App Cas 493, at p 506

(*r*) Thus in *Fitzgerald's Case*, L R 5 Ex 21, at p 33, Pigott, B , referring to the Election Commissioners Act, 1852 (15 & 16 Vict c 57), said, 'We must deal with the Act in the ordinary way, that is, put on it a reasonable construction, and if the words are ambiguous we must interpret it *ut res magis valeat quam pereat*

Where the proviso of an Act of Parliament is directly repugnant to the purview (that is to say, the part of the Act which the proviso purports to qualify), the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers (*A G* v *Chelsea Waterworks Co*, Fitzgib 195)

(*s*) 1 Bl Com 89, Bac Abr , "*Statute* (I 2) Arg in *Hine* v *Reynolds*, 2 Scott, N R 394, at p 419

(*t*) *Stowell* v *Zouch*, Plowd 365 *Doe* d *Byuaters* v *Brandling*, 7 B & C 643

(*u*) Co Litt 381 a

(*x*) Wing Max , p 167 See *Hix* v *Fleetwood*, 4 Leon 248

We may add, too that, "where an Act has received a judicial construction putting a certain meaning on its words, and the legislature in a subsequent Act *in pari materia* uses the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew had been put upon the same words before, and unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise" (*y*) For instance, in *Greaves* v *Tofield* (*z*), a landowner by deed charged his land with a life annuity which was never registered under the Judgments Act, 1855 (18 & 19 Vict c 15), s 12, he subsequently mortgaged the property to a third person, who took with notice of the annuity it was held that, as that section was in terms similar to the clauses in the Registry Acts which had been decided not to make an unregistered conveyance void as against a subsequent purchaser who had notice, the legislature must be taken to have used the words in the later Act in the sense given to them by those decisions, and that the annuities, therefore, were valid as against the mortgagee

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NOSCITUR A SOCIIS (*per Lord Hale as cited by Lord Kenyon in Hay* v *Coventry*, 3 *T R* 83, *at* 87) —*The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it* (*a*)

Grammatical rules

It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodum sensu* (*b*)—the coupling of words

(*y*) Judgm in *Mersey Docks* v *Cameron*, 11 H L Cas 443, at pp 480—481 See *R* v *Poor Law Commrs* (*St Pancras*) 6 A & E 1 at p 7, *per* Coleridge, J See, also, *per* Parke, B, in *Perry* v *Skinner*, 2 M & W 471, at p 476, *per* Ld Selborne in *Municipal Building Soc* v *Kent*, 9 App Cas 260, at p 269

(*z*) 14 Ch D 563 But where the mortgagor is a company registered under the Companies Acts, s 93 of the Companies (Consolidation) Act, 1908, avoids an unregistered mortgage as against a subsequent registered incumbrancer taking his own security with express notice of the prior mortgage (*Re Monolithic Building Co*, [1915] 1 Ch 643 (C A))

(*a*) This it was observed, in reference to *King* v *Melling*, 1 Vent 225, was a rule adopted by Ld Hale, and was no pedantic or inconsiderate expression when falling from him, but was intended to convey, in short terms, the grounds upon which he formed his judgments' (*per* Ld Kenyon, C J, in *Hay* v *Coventry*, 3 T R 83, at 87 see *Doe* d *Orpe* v *Frost*, 1 B & C 638, at p 644, and *Doe* d *Stewart* v *Sheffield*, 13 East, 526, at p 531) See, also, *Bishop* v *Elliott*, 11 Exch 113, and 10 Jd 496, at p 519 (which offers an apt illustration of the above maxim), *Burt* v *Haslett*, 18 C B 162 and 893

(*b*) Bac Works, vol 4 p 26, cited in *Jonmenjoy* v *Watson*, 9 App Cas 561, at p 569

together shows that they are to be understood in the same sense And, where the meaning of a particular word is doubtful or obscure, or where a particular expression when taken singly is inoperative, the intention of the party who used it may frequently be ascertained by looking at adjoining words, or at expressions occurring in other parts of the same instrument, for *quæ non valeant singula juncta juvant* (*c*) - words which are ineffective when taken singly operate when taken conjointly one provision of a deed, or other instrument, must be construed by the bearing it will have upon another (*d*).

It is not proposed to give many examples of the application of the maxim *noscitur a sociis*, nor to enter at length into a consideration of the numerous cases which might be cited to illustrate it it may, in truth, be said to be comprised in those principles which universally obtain, that courts of law and equity will, in construing a written instrument, endeavour to discover and give effect to the intention of the party, and, with a view to so doing, will examine carefully every portion of the instrument The maxim is, moreover, applicable, like other rules of grammar, whenever a construction has to be put upon a will, statute, or agreement and although difficulty frequently arises in applying it, yet this results from the particular words used, and from the particular facts existing in each individual case, so that one decision, as to the inference of a person's meaning and intention, can be considered as an express authority to guide a subsequent decision only where the circumstances are similar and the words are wholly or nearly identical

Policy of insurance

The following instance of the application of the maxim, *noscitur a sociis*, to a mercantile instrument may be mentioned on account of its importance, and will suffice to show how the principle which it expresses has been employed for the benefit of commerce The general words inserted in a maritime policy of insurance after the enumeration of particular perils are as follow —"and of all perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c , or any part thereof" These words, it has been observed, must be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to

(*c*) *Reynell* v *Sackfield*, 2 Bulstr 132

(*d*) Arg in *Galley* v *Barrington*, 2 Bing 387, at p 391, *per* Ld Kenyon in *Evans* v *Stevens*, 4 T R 224, at p 227

many cases not distinctly covered by the special words they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of the instrument, and this will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated, and occasioned by similar causes, that is to say, the meaning of the general words may be ascertained by referring to the preceding special words (*e*)

In applying this rule, however, it must be remembered that general words following particular expressions may be so used as to exclude the strict application of the maxim Where by a charterparty the parties exempted each other from all liability arising from "frosts, floods, strikes and any other unavoidable accidents or hindrances *of what kind soever* beyond their control, delaying the lading of the cargo," it was held that the use of the words "of what kind soever" excluded the rule of *ejusdem generis*, and that the charterers were not liable for delay in loading caused by a block of other ships at the loading port (*f*)

Maxim applies in the exposition of wills

That the exposition of every will must be founded on the whole instrument, and be made *ex antecedentibus et consequentibus*, is, observed Lord Ellenborough, one of the most prominent canons of testamentary construction, and therefore, in this department of legal investigation, the maxim *noscitur a sociis* is necessarily of frequent practical application yet where between the parts there is no connection by grammatical construction, or by some reference, express or implied, and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied his phrase or expressed himself imperfectly, the Court cannot go into one part of a will to determine the meaning of another, perfect in itself, and without ambiguity, and not militating with any other provision respecting the same subject-matter,

(*e*) See judgm in *Cullen* v *Butler*, 5 M & S 465, *Thames & Mersey M I Co* v *Hamilton*, 12 App Cas 484, at p 495 *The Knight St Michael*, [1898] P 30, at p 35 In *Borradaile* v *Hunter*, 5 M & Gr 639, at p 667, this maxim was applied by Tindal, C J (*diss* from the rest of the Court), to explain a proviso in a policy of life insurance In *Clift* v *Schwabe*, 3 C B 437, the same maxim was likewise applied in similar circumstances, see, also, *Dormay* v *Borradaile*, 5 C B 380

(*f*) *Larsen* v *Sylvester & Co*, [1908] A C 295, see, also, *Thorman* v *Dowgate S S Co*, [1910] 1 K B 410

notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction For instance, if a man devise his lands generally, after payment of his debts and legacies, his trust (*g*) estates will not pass, for, in such case *noscitur a socus* what the lands are which he intended to pass by such devise it is clear he could only mean lands which he could pass subject to the payment of his debts and legacies But, from a testator having given to persons standing in a certain degree of kinship to him a fee-simple in certain lands, no conclusion which can be relied on can be drawn, that his intention was to give to other persons standing in the same rank of proximity the same interest in other lands, and where, moreover, the words of the two devises are different, the more natural conclusion is, that, as the testator's expressions varied, they were altered because his intention in both cases was not the same (*h*)

Distinction between the conjunctive and disjunctive illustrated

In addition to the preceding remarks, a few instances may here be referred to, illustrating the distinction between the *conjunctive* and the *disjunctive* which it is so essential to observe in construing a will

A leasehold estate was devised after the death of A , to B for life, remainder to his child or children by any woman whom he should marry, upon condition that, in case B should die, "an infant, unmarried, and without issue," the premises should go over to other persons It was held that the devise over depended upon one contingency, viz , B 's dying an infant, attended with two qualifications, viz , his dying without leaving a wife surviving him, and his dying childless, and that the devise over could take effect only in case B died in his minority, leaving neither wife nor child, and it was observed by Lord Ellenborough that, if the condition had been, "if he dies an infant, *or* unmarried, *or* without issue," that is to say, in the disjunctive throughout, the rule would have applied, *in disjunctivis sufficit alteram partem esse veram* (*i*), and, consequently,

(*g*) *Roe* d *Reade* v *Reade*, 8 T R 188

(*h*) Judgm in *Right* d *Compton* v *Compton*, 9 East, 267, at pp 272, 273, *Goodright* d *Drewry* v *Barron*, 11 East, 220, at p 223, *Hay* v *Coventry*, 3 T R 83, *per* Coltman, J , in *Knight* v *Selby*, 3 Scott, N R 409, at p 417, Arg in *Doe* d *Roake* v *Nowell*, 1 M & S 327, at p 333 See *Sanderson* v *Dobson*, 1 Exch 141, *per* Byles, J , in *Jegon* v *Vivian*, L R 1 C P 9, at p 24, *Doe* d *Haw* v *Earles*, 15 M & W 450 See, also, *Vandeleur* v *Vandeleur*, 3 Cl & F 82, at p 98, where the maxim is differently applied

(*i*) Co Litt 225 a, *Bishop of Salisbury's Case*, 10 Rep 58 b, at 59 a, Wing Max , p 13, D 50, 17, 110, § 3

that if B had died in his infancy, leaving children, the estate would have gone over to B 's father and his children, to the prejudice of B 's own issue (*j*) According to the same rule of grammar, also, where a condition inserted in a deed consists of two parts in the conjunctive, both must be performed, but otherwise where the condition is in the disjunctive, and where a condition or limitation is both in the conjunctive and disjunctive, the latter shall be taken to refer to the whole, as, if a lease be made to husband and wife for the term of twenty-one years, "if the husband *and* wife *or* any child between them shall so long live," and the wife dies without issue, the lease shall, nevertheless, continue during the life of the husband, because the above condition shall be construed throughout in the disjunctive (*k*)

The disjunctive is also read as conjunctive, except in devises which create an estate tail, where an estate is limited to A and his heirs, but if A should die under the age of twenty-one or without issue then over The principle is stated to be that where the dying under twenty-one is associated with the event of the devisee leaving an object who would take an interest derivatively through him, the copulative (or conjunctive) construction is to prevail (*l*) Therefore if A dies under twenty-one leaving issue the gift over fails, and also if A attains the age of twenty-one, but dies without issue, the gift over fails, since both events must happen, *i e* , A dying under twenty-one *and* leaving no issue, before the gift over can take effect

In the construction of statutes, likewise, the rule *noscitur a sociis* is frequently applied, the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter (*m*) Especially must it be remembered that the sense and meaning of the law Statutes.

(*j*) *Doe* d *Everett* v *Cooke*, 7 East, 269, at p 272, *Johnson* v *Simcock*, 7 H & N 344 and 6 Id 6 As to changing the copulative into the disjunctive, see 1 Jarman on Wills, 6th ed , pp 601 *et seq* , *Mortimer* v *Hartley*, 6 Exch 47, 6 C B 819, and 3 De G & S 316

(*k*) Co Litt 225 a, Shep Touch 138, 139 See, also, *Burgess* v *Bracher*, 2 Raym , Ld , 1366

(*l*) 1 Jarman on Wills, 6th ed , p 604

(*m*) *Per* Coleridge, J , *Cooper* v *Harding*, 7 Q B 928, at p 941, Judgm in *Stephens* v *Taprell*, 2 Curt 458, at p 465, *per* Channell, B , in *Pearson* v *Hull L B of Health*, 3 H & C 921, at p 944 The maxim was applied to construe a statute in *Hardy* v *Tingey*, 5 Exch 294, at p 298, and to ascertain the meaning of libellous words in *Wakley* v *Cooke*, 4 Exch 511, at p 519

can be collected only by comparing one part with another and by viewing all the parts together as one whole, and not one part only by itself—"*nemo enim aliquam partem recte intelligere possit antequam totum iterum atque iterum perlegerit*" (*n*)

General words in a statute, how controlled

The following illustrations will show how general words in a statute may be more or less limited by the particular words which precede them By the statute 7 & 8 Geo 4, c lxxv, s 37, a penalty was imposed upon any person not being a freeman of the Watermen's Company, who should navigate any wherry, lighter, or other craft upon the Thames within certain limits It was held upon the principle of the maxim *noscitur a sociis*, that a steam tug of eighty seven tons burden engaged in moving another vessel was not a craft within the meaning of the statute (*o*)

Again, under the Vagrancy Act, 1824 (5 Geo 4, c 83), s 4, it is an offence to use any subtle craft, means, or device by palmistry, or otherwise, to deceive and impose on any of His Majesty's subjects The defendant having attempted to impose upon persons by falsely pretending to have the supernatural faculty of obtaining answers and raps from the spirits of the dead, was held properly convicted of the offence specified in the statute, the words "or otherwise" not being limited to any precise class or genus of deception, but simply limited to such deceptions as were similar in character to palmistry (*p*) Here the general words were not limited to things *ejusdem generis* with the specified offence, but to things like in their nature to that offence (*q*)

We shall conclude these remarks with observing, that the three rules or canons of construction with which we have commenced this chapter are intimately connected together,—that they must always be kept in view collectively when the practitioner applies himself to the interpretation of a doubtful instrument

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(*n*) *Lincoln College Case*, 3 Rep 58 b, at 59 b

(*o*) *Reed* v *Ingham*, 3 E & B 889

(*p*) *Monck* v *Hilton*, 2 Ex D 268

(*q*) For some important observations on the doctrine of *ejusdem generis*, see *Anderson* v *Anderson*, [1895] 1 Q B 749 See, also, *Powell* v *Kempton Park Co*, [1897] 2 Q B 242, at pp 257, 261, 266, and [1899] A C 143, *Re Stockport Schools*, [1898] 2 Ch 687, *Bolam* v *Allgood*, 110 L T 8

VERBA CHARTARUM FORTIUS ACCIPIUNTUR CONTRA PROFERENTEM (*Co Litt* 36 *a*)—*The words of an instrument shall be taken most strongly against the party employing them*

This maxim ought to be applied only where other rules of construction fail (*r*), and, indeed, in *Taylor* v *St Helen's Corporation* (*s*), Jessel, M R, is reported to have said "I do not see how, according to the now established rules of construction as settled by the House of Lords in the well-known case of *Grey* v *Pearson* (*t*), followed by *Roddy* v *Fitzgerald* (*u*) and *Abbott* v *Middleton* (*x*), the maxim can be considered as having any force at the present day The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction If we can thus find out its meaning, we do not want the maxim If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled" The maxim, however, has been judicially recognised (*y*) since the above observations were made upon it, and perhaps it may be paraphrased thus—that, as between the grantor and grantee, or between the maker of an instrument and the holder, if the words of the grant or instrument are of doubtful import, that construction shall be placed upon them which is most favourable to the grantee or holder

Deed poll

The rule has been held to apply more strongly to a deed-poll (*z*) than to an indenture, because in the former case the words are those of the grantor only (*a*) But though a deed-poll is to be construed against the grantor, the Court will not add words to it, nor give it a meaning contradictory to its language (*b*)

Grant, &c

If, then, a tenant in fee simple grants to anyone an estate for life generally, this shall be construed to mean an estate for

(*r*) Judgm in *Lindus* v *Melrose*, 3 H & N 177, at p 182
(*s*) 6 Ch D 264, 280
(*t*) 6 H L Cas 61
(*u*) 6 H L Cas 823
(*x*) 7 H L Cas 68
(*y*) *E g*, in *Burton* v *English*, 12 Q B D 218, at p 220, *per* Brett, M R, see also *Birrell* v *Dryer*, 9 App Cas 345, at p 350
(*z*) See now the Real Property Act, 1845 (8 & 9 Vict c 106), s 5
(*a*) Arg *Browning* v *Beston*, Plowd 131, at p 134, Shep Touch, b, Preston, 88, n (81)
(*b*) *Per* Williams, J, in *Doe* d *Myatt* v *St Helens Ry Co*, 2 Q B 365, at p 373

the life of the grantee, because an estate for a man's own life is higher than for the life of another (*c*) But if tenant for life leases to another for life, without specifying for whose life, this shall be taken to be a lease for the lessor's own life, for, at common law, this is the greatest estate which it is in his power to grant (*d*) And, as a general rule, it appears clear, that, if a doubt arise as to the construction of a lease between the lessor and lessee, the lease must be construed most beneficially for the lessee (*e*)

Simple contracts

In like manner, if two tenants in common grant a rent of 10*s*, this is several, and the grantee shall have 10*s* from each, but if they make a lease, and reserve 10*s*, they shall have only 10*s* between them (*f*) So it is a true canon of construction that, where there is any reasonable degree of doubt as to the meaning of an exception in a lease, the words of the exception, being the words of the lessor, are to be taken most favourably for the lessee, and against the lessor (*g*), and where a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and he shall take it in that way which shall be most to his advantage (*h*) But it seems that in such a case the instrument, if pleaded, should be stated according to its legal effect, in that way in which it is intended to have it operate (*i*)

According to the principle above laid down, it was held that leasehold lands passed by the conveyance of the freehold, "and all lands or meadows to the said messuage or mill belonging, or used, occupied, and enjoyed, or deemed, taken, or accepted as part thereof" This, said Lord Loughborough, being a case arising on a deed, is to be distinguished from cases of a like nature which have arisen on wills In general, where there is a question on the construction of a will, neither party has done anything to preclude himself from the favour of the Court But, in the present instance, the legal maxim applies, that a deed shall be construed most strongly against the grantor (*k*)

(*c*) Co Litt 42 a, *Throgmorton* v *Tracy*, Plowd 145, at p 156, Shep Touch 88 (*d*) Finch, Law, 55, 56 See, also, Id 60

(*e*) *Dann* v *Spurrier*, 3 B & P 399, at p 403, where various authorities are cited See also *Wolveridge* v *Steward*, 1 Cr & M 644, at p 657

(*f*) Finch, Law, 68, *Brouning* v *Beston*, Plowd 131, at p 140, Co Litt 197 a, 267 b

(*g*) *Per* Bayley, J, in *Bullen* v *Denning*, 5 B & C 842, at p 847

(*h*) Shep Touch 88, cited in *Miller* v *Green*, 8 Bing 92, at p 106

(*i*) 2 Smith, L C, 12th ed p 511

(*k*) *Doe* d *Davies* v *Williams*, 1 Black, H, 25, at p 27

"The rule that a man's own acts shall be taken most strongly against himself, obtains not only in grants, but extends, in principle, to other engagements and undertakings" (*l*) Thus, the return of a writ of *fi fa* shall, if the meaning be doubtful, be construed against the sheriff, and, if sued for a false return, he shall not be allowed to defend himself by putting a construction on his own return which would make it bad in law, when it admits of another construction which will make it good (*m*)

In like manner, with respect to contracts not under seal, the generally received doctrine of law undoubtedly is that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound further than it was his intention that he should be bound, and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party (*n*) This principle applies to a condition in a policy of insurance which "being the language of the company must, if there be any ambiguity in it, be taken most strongly against them" (*o*), and to an exception to the shipowner's liability in a bill of lading, which is the language of the shipowner (*p*)

A remarkable illustration of the maxim is to be found in a case arising out of the failure of the Glasgow Bank By the articles of that bank any person who became the holder of a share became subject to all the liabilities of an original partner Certain shares were transferred into the names of persons who were entered in the stock ledger as "trustees" The bank failed,

(*l*) *Per* Hotham, B, in *Gibson* v *Minet*, 1 Black, H, 569, at p 586 "A release in deed, which is the act of the party, shall be taken most strongly against himself" (Co Litt 264 b cited in *Ford* v *Beech*, 11 Q B 842, at p 869)

'Although the words of a covenant are to be construed according to the intent of the parties, yet they are to be taken most strongly against the party who stipulates' (*per* Holroyd, J, in *Webb* v *Plummer*, 2 B & Ald 746, at p 752) See *W Lond Ry Co* v *L & N W Ry Co*, 11 C B 254, at pp 309, 339

(*m*) See *Reynolds* v *Barford*, 7 M & Gr 449, at p 456, cf *ante*, p 201

(*n*) *Per* Alderson, B, in *Mayer* v *Isaac*, 6 M & W 605, at p 612, commenting on observations of Bayley, B, in *Nicholson* v *Paget*, 1 Cr & M 48 See *Alder* v *Boyle*, 4 C B 635

(*o*) *Per* Cockburn, C J, in *Notman* v *Anchor Ass Co*, 4 C B N S 476, at p 481, *Fitton* v *Accidental Death Ins Co*, 17 Id 122, at pp 134, 135, *Fowkes* v *Manchester & L Life Ass Co*, 3 B & S 917, *per* Ld St Leonards in *Anderson* v *Fitzgerald*, 4 H L Cas 484, at p 507, *per* Blackburn, J, in *Braunstein* v *Accidental Death Ins Co*, 1 B & S 782, at p 799, *per* Fletcher Moulton, L J, in *Joel* v *Law Un & Crown Ins Co*, [1908] 2 K B 863, at p 890

(*p*) *Per* Lord Loreburn in *Nelson Line* v *Nelson*, [1908] A C 16, at p 19

with large liabilities, and the trustees were placed on the list of contributories liable to calls in their own right. On a petition to rectify the list it was decided that they were personally liable as partners to the creditors of the bank, the House of Lords being of opinion that the expression, "as trustees," was ambiguous and must be construed *fortius contra proferentes*, so as to carry out the main object of the contract (*q*)

If the party giving a guarantee leaves anything ambiguous in his expressions, it has been said that such ambiguity must be taken most strongly against him (*r*), though it would rather seem that the document in question is to be construed according to the intention of the parties to it as expressed by the language which they have employed, understood fairly in the sense in which it is used, the intention being, if needful, ascertained by looking to the relative position of the parties at the time when the instrument was written (*s*)

If a carrier give two different notices, limiting his responsibility in case of loss, he will be bound by that which is least beneficial to himself (*t*) In like manner, where a party made a contract of sale as agent for A, and, on the face of such agreement, stated that he made the purchase, paid the deposit, and agreed to comply with the conditions of sale, for A, and in the mere character of agent, it was held that this act of the contracting party must be taken *fortissime contra proferentem*, and that he could not, therefore, sue as principal on the agreement, without notice to the defendant before action brought, that he was the party really interested (*u*) So, if an instrument be couched in terms so ambiguous as to make it doubtful whether it be a bill of exchange or a promissory note, the holder may, as against the party who made the instrument, treat it as either (*x*) If documents are drawn and accepted by the same

(*q*) *Muir* v *City of Glasgow Bank*, 4 App Cas 337

(*r*) *Hargreave* v *Smee*, 6 Bing 244, at p 248, *Stephens* v *Pell*, 2 Cr & M 710 See *Cumpston* v *Haigh*, 2 Bing N C 449, at p 454

(*s*) *Per* Bovill, C J, in *Coles* v *Pack*, L R 5 C P 65, at p 70, *Wood* v *Priestner*, L R 2 Ex 66 and 282

(*t*) *Munn* v *Baker*, 2 Stark 255 See *Phillips* v *Edwards*, 3 H & N 813, at p 820

(*u*) *Bickerton* v *Burrell*, 5 M & S 383, at p 386, as to which case, see *Rayner* v *Grote*, 15 M & W 359 See also, *Boulton* v *Jones*, 2 H & N 564, and cases there cited, *Carr* v *Jackson*, 7 Exch 382

(*x*) *Edis* v *Bury*, 6 B & C 433, *Block* v *Bell*, 1 M & Rob 149, *Lloyd* v *Oliver*, 18 Q B 471, *Forbes* v *Marshall*, 11 Exch 166 In *M'Call* v *Taylor*, 19 C B N S 301, the instrument in question was held to be neither a bill of exchange nor a promissory note

parties (which in strictness would make them promissory notes and not bills of exchange), yet if the intention to give and receive such documents as bills of exchange be clear, both the parties to the documents and the holders may treat them as such (*y*)

In the Roman law, the rule under consideration for the construction of contracts may be said, in substance, to have existed, although its meaning differed considerably from that which attaches to it in our own the rule there was, *fere secundum promissorem interpretamur* (*z*), where *promissor*, in fact, signified the person who contracted the obligation (*a*), that is, who replied to the *stipulatio* proposed by the other contracting party In case of doubt, then, the clause in the contract thus offered and accepted, was interpreted against the *stipulator*, and in favour of the *promissor*, *in stipulationibus cum quæritur quid actum sit verba contra stipulatorem interpretanda sunt* (*b*), and the reason given for this mode of construction is, *quia stipulatori liberum fuit verba late concipere* (*c*) the person stipulating should take care fully to express that which he proposes shall be done for his own benefit

When dealing with a *mercantile* instrument, the Courts are not restrained to such nicety of construction as is the case with regard to conveyances, pleadings, and the like," and in reference to a charterparty, it has been observed (*d*) that ' generally speaking where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff and the least burthensome to the defendant " Further, in reference to the same instrument, it has been remarked that the merchant " is in most cases the party best acquainted with the trade for which the ship is taken up, and with the difficulties which may impede the performance by him of his contract, words, therefore, in a charterparty, relaxing in his favour a clause by which an allowance to him of time for a specified object is in the interest of the ship precisely limited, must be read as inserted on his

(*y*) *Williams* v *Ayers*, 3 App Cas 133 See the Bills of Exchange Act, 1882 (45 & 46 Vict c 61), s 5 (2)

(*z*) D 45, 1, 99, pr

(*a*) Brisson *ad verb* " *Promissor*," " *Stipulatio*, " 1 Pothier, by Evans, 58

(*b*) D 45, 1, 38, § 18

(*c*) D 45, 1, 19, pr , D 2, 14, 39

(*d*) *Per* Maule, J , in *Cockburn* v *Alexander*, 6 C B 791, at p 814, see also *per* Maule, J , in *Gether* v *Capper*, 15 Id 696, at p 707

requirement, and construed at the least with this degree of strictness against him that they shall not have put upon them an addition to their obvious meaning", though that meaning, where it is ambiguous, must be gathered from the surrounding circumstances to which the charterparty was intended to apply (*e*)

When the general rule should be applied

It must further be observed that the general rule in question, being one of some strictness and rigour, is the last to be resorted to, and is never to be relied upon but when all other rules of exposition fail (*f*) In some cases, indeed, it is possible that any construction which the Court may adopt will be contrary to the real meaning of the parties, and, if parties make use of such uncertain terms in their contracts, the safest way is to go by the grammatical construction, and if the sense of the words be *in equilibrio*, then the rule of law will apply, *verba chartarum fortius accipiuntur contra proferentem* (*g*)

Exception to rule—When it would work a wrong to a third person

Moreover, the principle under consideration does not seem to hold when a harsh construction would work a wrong to a third person, it being a maxim that *constructio legis non facit injuriam* (*h*) Therefore if tenant in tail make a lease for life generally, this shall be taken to mean a lease for the life of the lessor (*i*), for this stands well with the law, and not for the life of the lessee, which it is beyond the power of a tenant in tail to grant (*k*)

Wills and statutes

Acts of Parliament are not, in general, within the reason of the rule under consideration, because they are not the words of *parties*, but of the legislature, neither does this rule apply

Public companies

to wills (*l*) Where, however, an Act is passed for the benefit of a canal, railway, or other company, it has been observed, that this is a bargain between a company of adventurers and the public, the terms of which are expressed and set forth in the Act, and the rule of construction (*m*) in such cases is now fully

(*e*) *Hudson* v *Ede*, L R 2 Q B 566, at p 578

(*f*) Bac Max, reg 3, 1 Duer Insur 210

(*g*) *Per* Bayley, J, in *Love* v *Pares*, 13 East, 80, at p 86

(*h*) Co Litt 183 a Shepp Touch 88, *Rodger* v *Comptoir d Escompte de Paris*, L R 2 P C 393, at p 406

(*i*) *Per* Bayley, J, in *Smith* v *Doe* d *Jersey*, 2 B & B 551, see Finch, Law, 60 (*k*) 2 Bl Com 380

(*l*) 2 Dwarr Stats 688, Bac Max, reg 3

(*m*) The rule that a private Act 'is to be construed as a contract or a conveyance, is a mere rule of construction" (*per* Byles, J, in *Shrewsbury* v *Scott*, 6 C B N S 1, at pp 218—219) Cf *per* Ld Macnaghten in *Davis* v *Taff Vale Ry Co*, [1895] A C 542, at p 559 As to the recitals in a private Act, see *Shrewsbury Peerage*, 7 H L Cas 1

established to be, that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public, the former being entitled to claim nothing which is not *clearly* given to them by the Act (*n*) Where, therefore, by such an Act, rates are imposed upon the public and for the benefit of the company, such rates must be considered as a tax upon the subject, and it is a sound general rule that a tax shall not be considered to be imposed (or at least not for the benefit of a subject) without a plain declaration of the intent of the legislature to impose it (*o*)

In a well-known case, which is usually cited as an authority upon the construction of Acts for the formation of companies to carry out works of a public nature, the law was thus laid down by Lord Eldon —"When I look upon these Acts of Parliament, I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them, and I have no hesitation in asserting, that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution Such Acts have now become extremely numerous, and from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else, that they shall do and shall forbear all that they are thereby required to do and to forbear as well with reference to the interests of the public as with reference to the interests of individuals" (*p*) Acts, Remarks of Lord Eldon

(*n*) *Per* Ld Tenterden in *Stourbridge Canal Co* v *Wheeley* 2 B & Ad 792 (recognised in *Priestley* v *Foulds*, 2 Scott, N R 205, *per* Maule, J , at p 228) *Geldart* v *Gladstone*, 11 East, 675, at p 685 (recognised *Barrett* v *Stockton & D Ry Co* , 2 Scott, N R 337, at p 370, which latter case is cited in *Ribble Nav Co* v *Hargreaves*, 17 C B 385, at p 402), *per* Maule, J , in *Portsmouth Floating Bridge Co* v *Nance* 6 Scott, N R 823, at p 831, *Blakemore* v *Glamorganshire Canal Nav* , 1 My & K 165 (as to the remarks of Ld Eldon in which case, see *per* Alderson, B , in *Lee* v *Milner*, 2 Yo & C (Exch) 611, at p 618), *per* Ld Chelmsford in *Ware* v *Regent's Canal Co* , 28 L J Ch 153, at p 157, and *per* Cockburn, C J , in *Baxendale* v *G W Ry Co* , 16 C B N S 137

(*o*) *Kingston upon Hull Dock Co* v *Browne*, 2 B & Ad 43, at pp 58, 59, *Grantham Can Nav Co* v *Hall*, 14 M & W 880

(*p*) *Blakemore* v *Glamorganshire Can Nav* , 1 My & K 154, at p 162, cited by Jervis, C J , in *York & N Mid Ry Co* v *R* , 1 E & B 858, at pp 868, 869

such as here referred to (*q*), have been called Parliamentary bargains made with each of the landowners Perhaps more correctly they ought to be treated as conditional powers given by Parliament to take the lands of the different proprietors, through whose estates the works are to proceed Each landowner, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else (*r*)

Railway Acts

So, with respect to Railway Acts, it has been repeatedly laid down that the language of these Acts is to be treated as the language of their promoters, they ask the legislature to confer privileges upon them, and profess to give the public certain advantages in return Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public (*s*) "The statute," said Alderson, B (*t*), speaking of such an Act, "gives this company power to take a man's land without any conveyance at all, for if they cannot find out who can make a conveyance to them, or if he refuses to convey, or if he fail to make out a title, they may pay their money into Chancery, and the land is at once vested in them by a parliamentary title But in order to enable them to exercise this power, they must *follow the words of the Act strictly*" And it is clear that the words of a statute will not be strained beyond their reasonable import to impose a burthen upon, or to restrict the operation of, a public company (*u*) It will, of course, be borne in mind that the principle of construing *contra proferentem* an Act of the kind above alluded to can only be applied where a doubt presents itself as to the meaning, for such an Act, and every part of it,

(*q*) See also *supra*, n (*m*) and (*o*)

(*r*) *Per* Alderson, B, in *Lee* v *Milner*, 2 Yo & C 611, at p 618, adopted by Jervis, C J, in *York & N Mid Ry Co* v *R*, 1 E & B 858, at p 869

(*s*) *Per* Tindal, C J, in *Parker* v *G W Ry Co*, 7 Scott, N R 835, at p 870 As to the construction of a contract scheduled to a private Act of Parliament, see *Corbett* v *S E Ry*, [1906] 2 Ch 12, *Crosfield, Joseph & Sons* v *Manch Ship Can Co*, [1904] 2 Ch 123, and [1905] A C 421

(*t*) *Doe* d *Hutchinson* v *Manchester, Bury, & R Ry Co*, 14 M & W 687, at p 694, see *Webb* v *Manch & Leeds Ry Co*, 1 Ry Cas 576, at p 599 *per* Ld Langdale in *Gray* v *Liverpool & Bury Ry Co*, 4 Id 235, at p 240, *per* Ld Macnaghten in *Herron* v *Rathmines Commrs*, [1892] A C 498, at p 523

(*u*) *Smith* v *Bell*, 2 Ry Cas 877, *Parrett Nav Co* v *Robins*, 3 Id 383, *Cracknell* v *Mayor of Thetford*, L R 4 C P 629, at pp 634, 637

must be read according to the ordinary and grammatical sense of the words used, and with reference to those established rules of construction which we have already stated

Grant from the Crown

Lastly, with reference to the maxim *fortius contra proferentem*—where a question arises on the construction of a grant of the Crown, the rule under consideration is reversed, for such grant is construed most strictly against the grantee, and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words (*r*), the method of construction just stated seeming, as judicially remarked (*y*), "to exclude the application of either of these two phrases (*z*), *expressum facit cessare tacitum*, or *expressio unius est exclusio alterius* That which the Crown has not granted by express clear and unambiguous terms, the subject has no right to claim under a grant or charter" (*a*)

AMBIGUITAS VERBORUM LATENS VERIFICATIONE SUPPLETUR, NAM QUOD EX FACTO ORITUR AMBIGUUM VERIFICATIONE FACTI TOLLITUR (*Bac Max*, *reg* 23)—*Latent ambiguity may be explained by evidence, for an ambiguity which arises by proof of an extrinsic fact may be removed in like manner*

Definition of latent and patent ambiguity

Two kinds of ambiguity occur in written instruments the one is called *ambiguitas latens* (*b*), *i e*, where the writing appears on the face of it certain and free from ambiguity, but the ambiguity is introduced by evidence of something extrinsic,

(*x*) Arg in *R* v *Mayor of London*, 1 Cr M & R 1, at pp 12, 15, and cases there cited, Chit Pre of the Crown, 391, Finch, Law, 101

(*y*) *Per* Pollock, C B in *E Archipelago Co* v *R*, 2 E & B 856, at pp 906, 907

(*z*) *Post*, p 420

(*a*) It is established on the best authority, that in construing grants from the Crown, a different rule of construction prevails from that by which grants from one subject to another are to be construed In a grant from one subject to another, every intendment is to be made against the grantor, and in favour of the grantee, in order to give full effect to the grant, but in grants from the Crown an opposite rule of construction prevails Nothing passes except that which is expressed, or which is matter of necessary and unavoidable intendment, in order to give effect to the plain and undoubted intention of the grant And in no species of grant does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown *ex gr* where a monopoly is granted (*per* Cockburn, C J, in *Feather* v *R*, 6 B & S 257, at pp 283, 284, citing the observations of Ld Stowell in *The Rebeckah*, 1 C Rob 227, at p 230)

(*b*) Of which see an example in *Raffles* v *Wichelhaus*, 2 H & C 906

or by some collateral matter outside the instrument the other species is called *ambiguitas patens*, *i e*, an ambiguity apparent on the face of the instrument itself (*c*)

Rule as to patent ambiguity

Ambiguitas patens, said Lord Bacon, cannot be holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of the lower account in law, for that were to make all deeds hollow, and subject to averment, and so, in effect, to make that pass without deed which the law appoints shall not pass but by deed (*d*), and this rule, as above stated and explained, applies not only to deeds, but to written contracts in general (*e*), and especially, as will be seen by the examples to be given, to wills

On this principle, a devise to "one of the sons of J S" (who has several sons), cannot be explained by parol proof (*f*), and if there be a blank in the will for the devisee's name, parol evidence cannot be admitted to show what person's name the testator intended to insert (*g*), it being an important rule that, in expounding a will, the Court is to ascertain, not what the testator actually intended as distinguished from what his words express, but what is the meaning of the words he has used (*h*)

If, as Sir James Wigram observed, the statutes relating to wills had merely required that a nuncupative will should not

(*c*) Bac Max, reg 23 The remarks respecting ambiguity here offered should be taken in connection with those appended to the five maxims which follow next The subject of latent and patent ambiguities and likewise of misdescription, is very briefly treated in the text, since ample information thereupon may be found in the masterly treatise of Sir James Wigram, upon the 'Admission of the Extrinsic Evidence in Aid of the Interpretation of Wills"

(*d*) Bac Max reg 23, see *Doe* d *Tyrrell* v *Lyford*, 4 M & S 550, *Cholmondeley* v *Clinton*, 2 Mer 171, at p 343, *Doe* d *Gord* v *Needs*, 2 M & W 129, at p 139, *Stead* v *Berrier*, Raym Sir T, 408, at p 411

(*e*) See *Hollier* v *Eyre*, 9 Cl & F 1

A contract, said Pollock, C B, in *Nichol* v *Godts*, 10 Exch 191, must be read according to what is written by the parties, for it is a well known principle of law, that a written contract cannot be altered by parol If A and B make a contract in writing, evidence is not admissible to show that A meant something different from what is stated in the contract itself, and that B at the time assented to it If that sort of evidence were admitted, every written document would be at the mercy of witnesses who might be called to swear anything" See *Besant* v *Cross*, 10 C B 895, *Martin* v *Pycroft*, 2 De G M & G 785, *post*, Chap X

(*f*) *Strode* v *Russell*, 2 Vern 621, at 624, see *Cheyney's Case*, 5 Rep 68 See also *Castledon* v *Turner*, 3 Atk 257, *Harris* v *Bp of Lincoln*, 2 P Wms 135, at 136, 137, *per* Tindal, C J, in *Doe* d *Winter* v *Perratt*, 7 Scott, N R 1, at p 36 See, also, *per* Littledale, J, and Parke, J, in *Shortreds* v *Cheek*, 1 A & E 57, at p 60

(*g*) *Boyle* v *A G*, 2 Atk 239, *Hunt* v *Hort*, 3 Bro C C 311, cited in *Miller* v *Travers*, 8 Bing 244, at p 254

(*h*) *Per* Parke, J, in *Doe* d *Gwillim* v *Gwillim*, 5 B & Ad 122, at p 129

be set up in opposition to a written will, parol evidence might, in many cases, be admissible to explain the intention of the testator, where the person or thing intended by him is not adequately described in the will, but if the true meaning of those statutes be that the writing which they require shall itself express the intention of the testator, it is difficult to understand how the statutes can be satisfied merely by a writing, if the description it contains has nothing *in common with* that of the person intended to take under it, or not enough to determine his identity To define that which is indefinite is to make a material addition to the will (*i*) In accordance with these observations, where a testator devised property "first to K, then to ——, then to L," and the will referred to a card as showing the parties designated by these letters, but it did not appear that this card existed at the time of the execution of the will, it was held that the card was clearly inadmissible in evidence, the Court observing, that this was a case of a patent ambiguity, and that, according to all the authorities, parol evidence to explain the meaning of the will could not legally be admitted (*k*)

If, then, as further observed in the treatise already cited, a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use the words is, as a general proposition, inadmissible, in other words, the judgment of a Court in expounding a will must be simply declaratory of what is in the will (*l*), and to construe a will, where the intent of the testator cannot be known, has been designated as *intentio cæca et sicca* (*m*) The devise, therefore, in cases falling within the scope of this observation, will, since the will is *insensible*, and not really *expressive of any intention*, be void for uncertainty (*n*)

The rule as to patent ambiguities which we have been considering is not confined in its operation to the interpretation of wills Where a bill of exchange was expressed in figures to be drawn for £245, and in words for two hundred pounds,

(*i*) See Wigram, Extrin Evid, 4th ed 127, 128

(*k*) *Clayton* v *Nugent*, 13 M & W 200

(*l*) Wigram, Extrin Evid, 4th ed pp 98 *et seq*, where many instances of this rule are given See also *Goblet* v *Beechey*, 3 Sim 24

(*m*) *Per* Rolle, C J, in *Tayler* v *Web*, Sty 319

(*n*) In *Mayor of Gloucester* v *Osborn*, 1 H L Cas 272, legacies failed for uncertainty of purpose

value received, with a stamp applicable to the higher amount, evidence to show that the words "and forty-five" had been omitted by mistake was held inadmissible (*o*), for, the doubt being on the face of the instrument, extrinsic evidence could not be received to explain it The instrument, however, was held to be a good bill for the smaller amount, it being a rule that, where there is a discrepancy between the figures and the words of a bill, the words prevail (*p*) But, although a patent ambiguity cannot be explained by extrinsic evidence, it may, in some cases, be helped by construction, or a comparison of other parts of the instrument with that particular part in which the ambiguity arises, and in others, it may be helped by a right of election vested in the grantee or devisee (*q*), the power being given to him of rendering certain that which was before altogether uncertain and undetermined For instance, where a general grant is made of ten acres of ground adjoining or surrounding a particular house, part of a larger quantity of ground, the choice of such ten acres is in the grantee, and a devise to the like effect is to be considered as a grant (*r*), and if I grant ten acres of wood where I have one hundred, the grantee may elect which ten he will take, for, in such a case, the law presumes that the grantor was indifferent on the subject (*s*) So, if a testator leaves a number of articles of one kind to a legatee, and dies possessed of a greater number, the legatee and not the executor has the right of selection (*t*)

On the whole, then, we may observe, in the language of Lord Bacon, that all ambiguity of words within the deed, and not out of the deed, may be helped by construction, or, in some cases, by election, but never by averment, but rather shall make the deed void for uncertainty (*u*)

Rule, how qualified

The general rule, however, as to patent ambiguity must be received with this qualification, viz , that extrinsic evidence is unquestionably admissible for the purpose of showing that the uncertainty which appears on the face of the instrument does

(*o*) *Saunderson* v *Piper*, 5 Bing N C 425

(*p*) Ibid at pp 431, 434, statutory effect is given to this rule by the Bills of Exchange Act, 1882 (45 & 46 Vict c 61), s 9 (2)

(*q*) See *Duckmanton* v *Duckmanton*, 5 H & N 219

(*r*) *Hobson* v *Blackburn*, 1 My & K B 571, at p 575

(*s*) Bac Max , reg 23 See also, *Richardson* v *Watson*, 4 B & Ad 787 Vin Abr " *Grants*," (H 5)

(*t*) *Jacques* v *Chambers*, 2 Colly 435

(*u*) Bac Max , reg 23, see *per* Tindal, C J , in *Doe* d *Winter* v, *Perratt*, 7 Scott, N R 1, at p 36, Wigram, Extrin Evid , 3rd ed 83, 101

not, in point of fact, exist, and that the intent of the party, though uncertainly and ambiguously expressed, may yet be ascertained, by proof of facts, to such a degree of certainty as to allow of the intent being carried into effect (*x*) In cases falling within the scope of this remark, the evidence is received, not for the purpose of proving the testator's intention, but of explaining the words which he has used Suppose, for instance, a legacy, "to one of the children of A by her late husband B", suppose, further, that A had only one son by B, and that this fact was known to the testator, the necessary consequence, in such a case, of bringing the words of the will into contact with the circumstances to which they refer must be to determine the identity of the person intended, it being the form of expression only, and not the intention, which is ambiguous, and evidence of facts requisite to reduce the testator's meaning to certainty would not, it seems, in the instance above put, be excluded, though it would be quite another question if A had more sons than one, or if her husband were living (*y*)

Latent ambiguity

With respect to *ambiguitas latens*, the rule is that, inasmuch as the ambiguity is raised by extrinsic evidence, so it may be removed in the same manner (*z*) Therefore, if a person grant his manor of S to A and his heirs, and the truth is, he hath the manors both of North S and South S, this ambiguity shall be helped by averment as to the grantor's intention (*a*) So, if one devise to his son John, when he has two sons of that name (*b*), or to the eldest son of J S, and two persons, as in the case of a second marriage, meet that designation (*c*), evidence is admissible to explain which of the two was intended Wherever, in short, the words of the will in themselves are plain

(*x*) 2 Phill Evid, 10th ed 389

(*y*) Wigram, Extrin Evid, 4th ed 80

(*z*) 2 Phill Evid, 10th ed 392, Wigram, Extrin Evid, 4th ed 109, *per* Williams, J, in *Way* v *Hearn*, 13 C B N S 292, at p 305 'A latent ambiguity is raised by evidence", *per* Coleridge, J, in *Simpson* v *Margitson*, 11 Q B 23, at p 25 Where parol evidence has been improperly received to explain a supposed latent ambiguity, the Court *in banco* could decide upon the construction of the instrument without regard to the finding of the jury upon such evidence (*Bruff* v *Conybeare*, 13 C B N S 263)

(*a*) Bac Max, reg 23, *Partridge* v *Strange*, Plowd 85, *Miller* v *Travers*, 8 Bing 244, at p 248

(*b*) *Counden* v *Clarke*, Hob 29, at p 32, see *Fleming* v *Fleming*, 1 H & C 342, *Jones* v *Newman*, 1 Black, W, 60, *Cheyney's Case*, 5 Rep 68, *per* Tindal, C J, in *Doe* d *Winter* v *Perratt*, 7 Scott, N R 1, at p 36

(*c*) *Per* Erskine, J, in *Saunderson* v *Piper*, 5 Bing N C 425, at p 433, see *Doe* d *Gord* v *Needs*, 2 M & W 129, *Richardson* v *Watson*, 4 B & Ad 787, at p 792 And see the cases cited 2 Phill Evid, 10th ed 393 *et seq*

and unambiguous, but they become ambiguous by the circumstance that there are two persons, to each of whom the description applies, then parol evidence may be admitted to remove the ambiguity so created (*d*)

A like rule applies also where the subject-matter of a devise or bequest is called by divers names, "as if I give lands to Christchurch in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate*, Oxford, this shall be holpen by averment, because there appears no ambiguity in the words" (*e*)

In all cases, indeed, in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject matter really intended to be devised, or who was the person really intended to take under the will, and this appears to be the extent of the maxim as to *ambiguitas latens* (*f*) The characteristic of these cases is, that the words of the will *do* describe the object or subject intended, and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever, it only enables the Court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the devisor understood to be signified by the description which he used in the will (*g*)

A devise was made of land to M B, for life, remainder to "her three daughters, Mary, Elizabeth, and Ann," in fee, as tenants in common At the date of the will, M B had two legitimate daughters, Mary and Ann, living, and one illegitimate, Elizabeth Extrinsic evidence was held admissible to rebut the claim of the last-mentioned, by showing that M B formerly had a legitimate daughter named Elizabeth, who died

(*d*) *Per* Alderson, B, in *Clayton* v *Nugent*, 13 M & W 200, at p 206, see *Smith* v *Jeffryes*, 15 Id 561, *Dorset* v *Hawarden*, 3 Curt 80

(*e*) Bac Max, reg 23

(*f*) *Miller* v *Travers*, 8 Bing 244, at pp 247, 248, *per* Abbott, C J, in *Doe* d *Westlake* v *Westlake*, 4 B & Ald 57 (distinguished in *Fleming* v *Fleming*, 1 H & C 242, at p 247) See also *Re Stephenson*, [1897] 1 Ch 75

(*g*) *Doe* d *Gord* v *Needs*, 2 M & W 129, at p 140, *Walpole* v *Cholmondeley*, 7 T R 138

before the date of the will, and that the testator did not know of her death, or of the birth of the illegitimate daughter (*h*)

Similarly, where a testator appointed his "nephew Joseph Grant" to be the executor of his will, evidence was admitted to show that the testator meant by that description, not his own brother's son who bore that name, but his wife's brother's son, who also bore that name and whom the testator had constantly spoken of as his nephew (*i*)

"The rule as to the reception of parol evidence to explain a will," remarked Romilly, M R, in *Stringer* v *Gardiner* (*k*), "is perfectly clear In every case of ambiguity, whether latent or patent, parol evidence is admissible to show the state of the testator's family or property, but the cases in which parol evidence is admissible to show the person intended to be designated by the testator are those cases of latent ambiguity, mentioned by Sir J Wigram, where there are two or more persons who answer the descriptions in the will, each of whom standing alone, would be entitled to take"

Extrinsic evidence necessarily admissible for some purposes

It is true, moreover, that parol evidence must be admissible to some extent to determine the application of *every* written instrument It must, for instance, be received to show what it is that corresponds with the description (*l*), and the admissibility of such evidence for this purpose being conceded, it is only going one step further to give parol evidence, as in the above instances, of other extrinsic facts, which determine the application of the instrument to one subject, rather than to others, to which, on the face of it, it might appear equally applicable (*m*)

"Speaking philosophically," said Rolfe, B, "you must always look beyond the instrument itself to some extent, in order to ascertain who is meant, for instance, you must look to names and places" (*n*), and "in every specific devise or bequest it is clearly competent and necessary to inquire as to the thing specifically devised or bequeathed" (*o*) Thus, "parol evidence is always necessary to show that the party sued is the

(*h*) *Doe* d *Thomas* v *Benyon*, 12 A & E 431, see *Doe* d *Allen* v *Allen*, Id 451

(*i*) *Grant* v *Grant*, L R 2 P & D 8 and 5 C P 727 (as to which case see *per* Cotton, L J, in *Re Parker*, 17 Ch D 262, at p 265)

(*k*) 28 L J Ch 758 See also, *Re Taylor*, 34 Ch D 255, at p 258

(*l*) *Macdonald* v *Longbottom*, 1 E & E 977

(*m*) 2 Phill Ev, 10th ed 333

(*n*) In *Clayton* v *Nugent*, 13 M & W 200, at p 207

(*o*) *Per* Ld Cottenham in *Shuttleworth* v *Greaves*, 4 My & Cr 35, at p 38

person making the contract, and bound by it" (*p*) So, if the word Blackacre be used in a will, there must be evidence to show that the field in question is Blackacre (*q*) Where there is a devise of an estate purchased of A, or of a farm in the occupation of B, it must be shown by extrinsic evidence what estate was purchased of A, or what farm was occupied by B, before it can be known what is devised (*r*) So, whether parcel or not of the thing demised is always matter of evidence (*s*) In these and similar cases, the instrument appears on the face of it to be perfectly intelligible, and free from ambiguity, yet extrinsic evidence must, nevertheless, be received, for the purpose of showing to what the instrument refers (*t*)

The rule as to *ambiguitas latens*, above briefly stated, may likewise be applied to mercantile instruments with a view to ascertain the *intention*, though not to vary the *contract* of the parties (*u*) Therefore, where the plaintiffs, the patentees of an invention for the manufacture of rifles, had granted a licence to the defendants to use the patent, the latter covenanting to pay a royalty for every rifle manufactured "under the powers hereby granted," it being thought at that time (but erroneously) that all persons manufacturing for the government were entitled to the free use of a patent, the Court admitted extrinsic evidence to show that the licence was not intended to apply to rifles manufactured by the defendants for the government, on the ground that the words "under the powers hereby granted" contained a latent ambiguity, and might be explained by extraneous evidence (*x*) And although, generally speaking, the construction of a written contract is for the Court, when it is shown by extrinsic evidence that the terms of the contract

(*p*) *Trueman* v *Loder*, 11 A & E 589, at p 594 See *Stebbing* v *Spicer*, 8 C B 827

(*q*) *Doe* d *Preedy* v *Holtom*, 4 A & E 76, at p 82 (recognised in *Doe* d *Webster* v *Webster*, 12 A & E 442, at p 450, cited, *per* Williams, J, in *Doe* d *Willetts* v *Willetts*, 7 C B 709, at p 715), see *per* Bovill, C J, in *Horsey* v *Graham*, L R 5 C P 9, at p 14

(*r*) *Per* Grant, M R, in *Sandford* v *Raikes*, 1 Mer 646, at p 653

(*s*) *Per* Buller, J, in *Doe* d *Freeland* v *Burt*, 1 T R 701, at p 704, *Paddock* v *Fradley*, 1 Cr & J 90, *Doe* d *Beach* v *Jersey*, 3 B & C 870, *Lyle* v *Richards*, L R 1 H L 222

(*t*) *Per* Patteson, J, and Coleridge, J, in *Doe* d *Preedy* v *Holtom*, 4 A & E 76, at pp 81, 82 See *Doe* d *Webster* v *Webster*, 12 A & E 442 Evidence of co existing circumstances was admitted to explain the condition of a bond in *Montefiore* v *Lloyd*, 15 C B N S 203 Evidence was admitted to identify pauper with person described in indenture of apprenticeship in *R* v *Wooldale*, 6 Q B 549

(*u*) *Smith* v *Jeffryes*, 15 M & W 561

(*x*) *Roden* v *Lond Small Arms Co*, 46 L J Q B 213

are ambiguous, evidence is admissible to explain the ambiguity, and to show what the parties really meant "Where there is an election between two meanings, it is, properly, a question for the jury" (*y*) And in a case (*z*), where the defendants under an agreement signed by them as three of the directors of a company had agreed to repay to the plaintiff £500 advanced by him to the company, the learned judges, referring to *Macdonald* v *Longbottom* (*a*), and *Acebal* v *Levy* (*b*), admitted parol evidence to show that the defendants were liable as principals on the agreement, and ultimately gave judgment accordingly

Where, as we shall hereafter see, a contract is entered into with reference to a known and recognised use of particular terms employed by the contracting parties, or with reference to a known and established usage, evidence may be given to show the meaning of those terms, or the nature of that usage, amongst persons conversant with the particular branch of commerce or business to which they relate But cases of this latter class more properly fall within a branch of the law of evidence which we shall separately consider, viz , the applicability of usage and custom to the explanation of written instruments (*c*)

QUOTIES IN VERBIS NULLA EST AMBIGUITAS, IBI NULLA EXPOSITIO CONTRA VERBA FIENDA EST (*Wing Max p 24*)—*In the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument*

Rule where there is not ambiguity

It seems desirable, before proceeding to consider some additional maxims relative to the subject of ambiguity in written instruments, to observe that, according to the above maxim, it is not allowable to interpret what has no need of interpretation, and that the law will not make an exposition against the express words and intent of the parties (*d*) Hence,

(*y*) *Per* Maule, J , in *Smith* v *Thompson*, 8 C B 44, at p 59 (see, however, *per* Ld Cairns in *Bowes* v *Shand*, 2 App Cas 455, at p 462), *Bank of N Z* v *Simpson*, [1900] A C 182, at p 189, *per* Ld Davey As to ambiguous contracts, see also, *Boden* v *French*, 10 C B 886, at p 889

(*z*) *McCollin* v *Gilpin*, 6 Q B D 516

(*a*) 1 E & E 977

(*b*) 10 Bing 376

(*c*) See the maxim, *optimus interpres rerum usus*, Chap X

(*d*) Co Litt 147 a, *per* Kelynge, C J , in *Lanyon* v *Carne*, 2 Saunds 161, at p 167 See *Jesse* v *Roy*, 1 Cr , M & R 316

if I grant to you that you and your heirs, or the heirs of your body, shall distrain for a rent of forty shillings within my manor of S , this, by construction of law, *ut res magis valeat*, amounts to a grant of rent out of my manor of S , in fee-simple, or fee-tail, for the grant would be of little effect if the grantee had but a bare distress and no rent But if a rent of forty shillings be granted out of the manor of D , with a right to distrain if such rent be in arrear in the manor of S , this does not amount to a grant of rent out of the manor of S , for the rent is granted to be issuing out of the manor of D , and the parties have expressly limited out of what land the rent shall issue, and upon what land the distress shall be taken (*e*)

It may, however, be laid down as a general rule, applicable as well to cases in which a written instrument is required by law, as to cases in which it is not, that where such instrument appears on the face of it to be complete, parol evidence is inadmissible to vary or contradict the agreement *e g* , to show that the word ' and " was inserted by mistake (*f*), in such cases the Court will look to the written contract, in order to ascertain the meaning of the parties, and will not admit parol evidence, to show that the agreement was in reality different from that which it purports to be (*g*) And, therefore, where a charter-party provided that the vessel was to proceed to a named port or so near thereto as she could safely get always afloat, evidence of a custom of the port for vessels to be lightened in the roads before proceeding into the harbour was held inadmissible in an action by the charterer against the shipowner for not lightening the vessel, but proceeding instead to the nearest safe port to that named in the charter-party, on the ground that such a custom would vary the express terms of the charter (*h*)

Although, moreover, it has been said that a somewhat strained interpretation of an instrument may be admissible where an absurdity would otherwise ensue, yet, if the intention of the parties is not clear and plain, but *in equilibrio*, the words shall receive their more natural and proper construction (*i*)

(*e*) Co Litt 147 a

(*f*) *Hitchin* v *Groom*, 5 C B 515

(*g*) *Per* Bayley and Holroyd, JJ , in *Williams* v *Jones*, 5 B & C 108, *Spartali* v *Benecke*, 10 C B 212

(*h*) *The Alhambra*, 6 P D 68, see *The Nisa*, [1892] P 411

(*i*) *Earl of Bath's Case*, Carter, 96, at pp 108, 109 (adopted 1 Fonbl Eq , 5th ed 445, n)

"The general rule," said Tindal, C J (*k*), "I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves, and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible", therefore words deleted from a document and initialled cannot be looked at for the purpose of arriving at the intention of the parties (*l*) 'The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception from—or, perhaps, to speak more precisely, not so much an exception from, as a corollary to—the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party" (*m*), and although parol evidence cannot be used to add to or detract from the description in a deed, or to alter it in any respect, such evidence is always admissible to show the condition of every part of the property and all other circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable the Court to judge of the meaning of the

Remarks in *Shore* v *Wilson*

(*k*) In *Shore* v *Wilson*, 5 Scott, N R 958, at p 1037 For an instance of the application of this rule to a will, see *Doe* d *Chichester* v *Oxenden*, 3 Taunt 147, *Doe* d *Oxenden* v *Chichester*, 4 Dow, 65 (as to which see Wigram, Extrin Evid, 4th ed 89)

(*l*) *Inglis* v *Buttery*, 3 App Cas 552, see *Campbell* v *Campbell*, 5 Id 787, at p 814

(*m*) *Per* Tindal, C J, in *Shore* v *Wilson*, 5 Scott, N R 958, at pp 1037, 1038, see *Montefiore* v *Lloyd*, 15 C B N S 203, *Leathley* v *Spyer*, L R 5 C P 595, and see also *Re Grainger*, [1900] 2 Ch 756, *Re Eve*, [1909] 1 Ch 796, *In re Jameson*, [1908] 2 Ch 111 (cases on admissibility of evidence for purpose of construing wills)

instrument (*n*) "You may," observed Coleridge, J (*o*), with reference to a guarantee under the old law (*p*), "explain the meaning of the words used by any legal means Of such legal means, one is to look at the situation of the parties Till you have done that, it is a fallacy to say that the language is ambiguous that which ends in certainty is not ambiguous"

Cases in illustration

The following cases may be mentioned as falling within the scope of the preceding remarks 1st, where the instrument is in a foreign language, in which case the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language (*q*), 2ndly, ancient words may be explained by contemporaneous usage, 3rdly, if the instrument be a mercantile contract, the meaning of the terms must be ascertained by the jury according to the acceptation amongst merchants, 4thly, if the terms are technical terms of art, their meaning must, in like manner, be ascertained by the evidence of persons skilled in the art to which they refer In such cases, the Court may at once determine, upon the inspection of the instrument, that it belongs to the province of the jury to ascertain the meaning of the words, and, therefore, that, in the inquiry, extrinsic evidence to some extent must be admissible (*r*)

It may be scarcely necessary to observe that the maxim under consideration applies equally to the interpretation of an Act of Parliament, the general rule being that *a verbis legis non est recedendum* (*s*) A court of law will not make any interpretation contrary to the express letter of a statute, for nothing can so well explain the meaning of the makers of the Act as their own direct words, since *index animi sermo*, and *maledicta expositio quæ corrumpit textum* (*t*), it would be dangerous to give scope for making a construction in any case

(*n*) *Baird* v *Fortune*, 4 Macq 127, at p 149, *Magee* v *Lovell*, L R 9 C P 107, at p 112

(*o*) In *Bainbridge* v *Wade*, 16 Q B 89, at p 100, see *Morrell* v *Cowan*, 7 Ch D 151

(*p*) See now the Mercantile Law Amendment Act, 1856 (19 & 20 Vict c 97) s 3

(*q*) As to this proposition, see 2 Phill Ev, 10th ed 366

(*r*) *Per* Erskine, J, in *Shore* v *Wilson*, 5 Scott, N R 958, at p 988, *per* Parke, B, in *Clift* v *Schwabe*, 3 C B 437, at pp 469, 470 As to the construction of a settlement in equity, see, *per* Ld Campbell in *Evans* v *Scott*, 1 H L Cas 43, at p 66

(*s*) *Erdrick's Case*, 5 Rep 118 a, cited, Wing Max p 25

(*t*) *Bozoun's Case*, 4 Rep 34 b, at 35 a, *Baldwin's Case*, 2 Rep 24 b, Wing Max, p 26, compare "*viperina est expositio quæ corrodit viscera textus*," in *Powlter's Case*, 11 Rep 29 a, at 34 a

against the express words, where the meaning of the makers is not opposed to them, and when no inconvenience will follow from a literal interpretation (*u*) "Nothing," observed Lord Denman, "is more unfortunate than a disturbance of the plain language of the legislature, by the attempt to use equivalent terms" (*x*)

CERTUM EST QUOD CERTUM REDDI POTEST (*Noy, Max*, 9*th ed* 265)—*That is sufficiently certain which can be made certain*

General application of rule

This maxim, which sets forth a rule of logic as well as of law, is peculiarly applicable in construing a written instrument For instance, although every estate for years must have a certain beginning and a certain end, 'albeit there appear no certainty of years in the lease, yet, if by reference to a certainty it may be made certain, it sufficeth" (*y*)

Lease

Therefore, if a man make a lease for so many years as J shall name, this is a good lease for years, for though it is at present uncertain, yet when J hath named the years, it is reduced to a certainty So, if a parson make a lease for twenty years, if he shall so long live and continue parson, it is good, for there is a certain period fixed, beyond which it cannot last, though it may determine sooner on the lessor's death or his ceasing to be parson (*z*)

"It is true," said Lord Kenyon, "that there must be a certainty in the lease as to the commencement and duration of the term, but that certainty need not be ascertained at the time, for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient As, if a lease be granted for twenty-one years, after three lives in being though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and *id certum est quod certum reddi potest*" (*a*) But where an executory agreement for a lease did not mention the date from which the lease was to commence, it was held that it was not to be inferred that it was to commence from the date of

(*u*) *Erdrick's Case*, 5 Rep 118 a

(*x*) *Everard* v *Poppleton*, 5 Q B 181, at p 184, *per* Coltman, J, in *Gadsby* v *Barrow*, 8 Scott, N R 799, at p 804

(*y*) Co Litt 45 b

(*z*) 2 Bla Com 143, *Bishop of Bath's Case*, 6 Rep 34 b, at 35 b, Co Litt 35 b

(*a*) *Goodright* v *Richardson*, 3 T R 462

the agreement, in the absence of language pointing to that conclusion (*b*)

Again, it is a rule of law that "no distress can be taken for any services that are not put into certainty nor can be reduced to any certainty, for *id certum est quod certum reddi potest*" (*c*), and, accordingly, where land is demised at a rent which is capable of being reduced to a certainty, the lessor will be entitled to distrain for the same (*d*)

Habendum

The office of the *habendum* in a deed is to limit, explain, or qualify the words in the premises, but if the words of the *habendum* are manifestly contradictory and repugnant to those in the premises, they must be disregarded (*e*) A deed shall be

Uncertainty

void if it be totally uncertain, but if the King's grant refers to another thing which is certain, it is sufficient, as, if he grant to a city all liberties which London has, without saying what liberties London has (*f*)

Agreement

An agreement in writing for the sale of a house did not describe the particular house, but it stated that the deeds were in the possession of A The Court held the agreement sufficiently certain, since it appeared upon the face of the agreement that the house referred to was the house of which the deeds were in the possession of A , and, consequently, the house might easily be ascertained, and *id certum est quod certum reddi potest* (*g*)

Additional instances

Again, the word "certain" must, in a variety of cases, where a contract is entered into for the sale of goods, refer to an indefinite quantity at the time of the contract made, and must mean a quantity which is to be ascertained according to the above maxim (*h*)

And where the law requires a particular thing to be done, but does not limit any period within which it must be done, the act required must be done within a reasonable time, and a reasonable time is capable of being ascertained by evidence,

(*b*) *Marshall* v *Berridge*, 19 Ch D 233, see also *Edwards* v *Jones*, 124 L T 740

(*c*) Co Litt 96 a, 142 a, *Parke* v *Harris*, 1 Salk 262

(*d*) *Daniel* v *Gracie*, 6 Q B 145, *Pollitt* v *Forrest*, 11 Q B 949 As to a feoffment of lands, see Co Litt 6 a, and *Maugham* v *Sharpe*, 17 C B N S 443

(*e*) *Doe* d *Timmis* v *Steele*, 4 Q B 663

(*f*) Com Dig , "*Grant*" (E 14) (G 5), Finch, L , 49

(*g*) *Owen* v *Thomas*, 3 My & K 353, see *Plant* v *Bourne*, [1897] 2 Ch 281, at p 288, *Auerbach* v *Nelson*, [1919] 2 Ch 383

(*h*) *Per* Ld Ellenborough in *Wildman* v *Glossop*, 1 B & Ald 9, at p 12

by the plaintiff but must be pleaded by the opposite party (*g*) 'The difference is, that where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception, but where there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to show the proviso (*h*)

Hence, if an Act of Parliament or a private instrument contain, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause may in pleading, set out that clause alone, without noticing the separate and distinct clause which operates as an exception But if the exception itself be incorporated in the general clause, then the party relying upon the general clause must in pleading, state it with the exception, and if he state it as containing an absolute unconditional stipulation, without noticing the exception, it will be a variance (*i*)

In accordance with the first of these rules where one section of a penal statute creates an offence, and a subsequent section specifies certain exceptions thereto, the exceptions need not be negatived by the party prosecuting (*k*) So, where the exception is created by a distinct subsequent Act of Parliament, as well as where it occurs in a subsequent section of the same Act, the above remark applies (*l*), and this rule has likewise been held applicable where an exception was introduced by way of proviso in a subsequent part of a section of a statute which imposed a penalty, and on a former part of which section the plaintiff sued for the penalty relied (*m*) 'There is,' remarked Alderson, B ,

(*g*) *Spieres* v *Parker* 1 T R 141 *R* v *Jukes* 8 T R 542 *per* Ld Mansfield in *R* v *Jarvis* cited *R* v *Stone*, 1 East 639 at p 646 n *Stevens* v *Stevens* 5 Exch 306

(*h*) *Per* Treby, C J , in *Jones* v *Axen*, 1 Raym Ld 119 (cited in *Gill* v *Scrivens* 7 T R 27, at 31), see *Russell* v *Ledsam* 14 M & W 574 *Crou* v *Falk*, 8 Q B 467

(*i*) *Vavasour* v *Ormrod* 6 B & C 430 (cited Arg *Tucker* v *Webster*, 10 M & W 371, at p 373), see *per* Ld Abinger in *Gr Junction Ry Co* v *White* 8 Id 214, at p 221 *Thibault* v *Gibson* 12 Id 88, at p 94 (cited *per* Ld Denman in *Palk* v *Force*, 12 Q B 666 at p 672) See also *Roe* d *Allport* v *Bacon* 4 M & S 366, at p 368, *Paddock* v *Forrester*, 3 Scott, N R 715 1 Wms Saunds 262 b (1), *R* v *Jukes* 8 T R 542

(*k*) *Van Boven* v *Case* 9 Q B 669 See *Hutchinson* v *Manchester etc Ry Co* , 15 M & W 314 at p 318

(*l*) See *per* Ld Abinger in *Thibault* v *Gibson*, 12 M & W 88, at p 94

(*m*) *Simpson* v *Ready*, 12 M & W 736 (as to which case, see *per* Alder

"a manifest distinction between a proviso and an exception Therefore, if an exception occurs in the description of the offence in the statute, the burden of proof rests with the complainant to show that the accused does not come within it (*n*), but, if the exception comes by way of proviso, and does not alter the offence, but merely states what persons are to take advantage of it, then the defence must be specially pleaded, or may be given in evidence under the general issue, according to circumstances ' (*o*)

The latter of the two rules above mentioned may be thus illustrated An exception was introduced into the reservation of rent in a demise, not in express terms, but only by reference to subsequent matter in the instrument, viz , by the words, ' except as hereinafter mentioned ", the plaintiff in his declaration stated the reservation without the exception, this was held, according to the above rule, to be a variance (*p*)

AD PROXIMUM ANTECEDENS FIAT RELATIO, NISI IMPEDIATUR SENTENTIA *(Noy, Max , 9th ed p 4)—Relative words refer to the next antecedent, unless by such construction the meaning of the sentence would be impaired*

rule admits relaxation

Relative words must ordinarily be referred to the last antecedent, where the intent upon the whole deed or instrument does not appear to the contrary (*q*), and where the matter itself does not hinder it (*r*) the "last antecedent" being the last

son, B in *Mayor of Saltord* v *Ackers*, 16 Id 85, at p 92), *per* Parke, B in *Thibault* v *Gibson*, 12 Id 88 at p 96

(*n*) *Davis* v *Scrace* L R 4 C P 172, *Taylor* v *Humphries* 17 C B N S 539

(*o*) *Per* Alderson, B in *Simpson* v *Ready*, 12 M & W 736 at p 740 *Simpson* v *Ready*, 11 Id 344, see *per* Ld Mansfield in *Spieres* v *Parker*, 1 T R 141, at 144, and in *R* v *Jarvis*, 1 East, 643 (e), *Bousfield* v *Wilson*, 16 M & W 185, *Tennant* v *Cumberland*, 1 E & E 401

(*p*) *Variasour* v *Ormrod*, 6 B & C 430

(*q*) Com Dig *Parols* (A 14, 15), Jenk Cent 180 Dyer, 46 b Wing Max , p 19 See *Bryant* v *Wardell*, 2 Exch 479 *Pratt* v *Ashley*, 1 Exch 257, *Elect Tel Co* v *Brett* 10 C B 838, *R* v *Brown*, 17 Q B 833, with which compare *Re Jones*, 7 Exch 586 *E Co s Ry Co* v *Marriage* 9 H L Cas 32 (cited by Channell, B , in *Tetley* v *Wanless*, L R 2 Ex 21, at p 29, and in *Latham* v *Lafone*, Id 115, at p 123), *Bristol & E Ry Co* v *Garton*, 8 H L Cas 477

(*r*) Finch, Law, 8

word which can be made an antecedent so as to have a meaning (*s*)

But, although this general proposition is true in strict grammatical construction, yet there are numerous examples in the best writers to show that the context often requires a deviation from the rule, and that the relative may refer to nouns which go before the last antecedent, and either take from it or give to it some qualification (*t*)

For instance, an order of magistrates was directed to the parish of W , in the county of R , and also to the parish of M , in the county of L , and the words 'county of R " were then written in the margin, and the magistrates were, in a subsequent part of the order, described as justices of the peace for the county aforesaid it was held that it thereby sufficiently appeared that they were justices for the county of R (*u*)

The above rule of grammar is, of course, applicable to wills as well as to other written instruments for instance —A testator devised all his *property* situate in P , and also his farm called S , to his adopted child M He then left to his nephew, W all his other lands, and the will contained this subsequent clause ' And should M have lawful issue, *the said property* to be equally divided between her lawful issue ' It was held that these words, "the said property" did not comprise the lands devised to the nephew, although it was argued that they must, according to the true grammatical construction of the will, either comprise *all* the property before spoken of, or must refer to the next antecedent (*x*) Wills

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(*s*) *Per* Tindal, C J , in *R* v *Wright*, 1 A & E 445 See *Esdaile* v *Maclean*, 15 M & W 277, *Williams* v *Newton*, 14 M & W 747, *Peake* v *Screech*, 7 Q B 603, *R* v *St Margaret s, Westminster*, Id 569, *Ledsam* v *Russell* (in error), 16 M & W 633, and 1 H L Cas 687

(*t*) See *Staniland* v *Hopkins*, 9 M & W 178, at p 192, where a difficulty arose upon the construction of a statute See, also, *A G* v *Shillibeer*, 3 Exch 73 *Beer* v *Santer*, 10 C B N S 435, *Beckh* v *Page*, 7 Id 861, *Kintore* v *Inverury*, 4 Macq 520

(*u*) *R* v *St Mary s, Leicester* 1 B & Ald 327, *R* v *Casterton*, 6 Q B 507, *Baring* v *Christie*, 5 East, 398, *R* v *Chilverscoton*, 8 T R 178

(*x*) *Peppercorn* v *Peacock*, 3 Scott, N R 651 See *Hall* v *Warren*, 9 H L Cas 420, *Doe* d *Gore* v *Langton* 2 B & Ad 680, at p 691, *Cheyney s Case* 5 Rep 68 a, and cases collected in *R* v *Richards*, 1 Moo & R 177, *Owen* v *Smith*, 2 Black Hy 594, *Galley* v *Barrington*, 2 Bing 387, 27 R R 668, *Doe* d *Beech* v *Nall*, 6 Exch 102 *Peacock* v *Stockford*, 3 De G M & G 73, at p 79

CONTEMPORANEA EXPOSITIO EST OPTIMA ET FORTISSIMA IN LEGE (2 *Inst* 11)—*The best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up* (*y*)

ient
nts, &c

There is no better way of interpreting ancient words, or of construing ancient grants, deeds, and charters, than by usage (*z*), and the uniform course of modern authorities fully establishes the rule that, however general the words of an ancient grant may be, it is to be construed by evidence of the manner in which the thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended (*a*) Thus, if it be doubtful on the face of an instrument whether a present demise or future letting was meant, the intention of the parties may be elucidated by the conduct they have pursued (*b*) and where the words of an instrument are ambiguous, the Court may call in aid acts done under it as a clue to the intention (*c*)

tutes

Upon the same principle, also, depends the great authority which, in construing an old statute, is attributed to the construction put upon it by judges who lived at or soon after the time when the statute was made, as being best able to determine the intention of the legislature from their knowing the circumstances to which the statute related (*d*) and where the words of an Act are obscure, and where the sense of the legislature cannot, with certainty, be collected by interpreting the language according to grammatical correctness, considerable stress is laid upon the light in which it was received and held by the con-

(*y*) The Courts however, have frequently repudiated the idea of being influenced in their interpretation of a statute by knowledge of what occurred in Parliament during the passing of the bill see for instance, *per* Pollock C B in *Barbat* v *Allen* 7 Exch 609, at 617 *per* Alderson B, in *Gorham* v *Exeter*, 5 Exch 630 at p 667

(*z*) *Per* Ld Hardwicke in 4 *G* v *Parker*, 3 Atk 576, and 2 Inst 282 (cited in *R* v *Bellringer* 4 T R 810, at p 819) *per* Parke, B in *Clift* v *Schwabe*, 3 C B 437 at p 469, and *Jewison* v *Dyson* 9 M & W 556, *R* v *Mashiter*, 6 A & E 153, *R* v *Davie* Id 374 *Senhouse* v *Earle*, Amb 285, at 288, Co Litt 8 b, *Lockwood* v *Wood* 6 Q B 31, *per* Ld Eldon in 4 *G* v *Forster*, 10 Ves 335, at p 338 *R* v *Dulwich College*, 17 Q B 600

(*a*) *Weld* v *Hornby*, 7 East 195 at p 199 *R* v *Osbourne* 4 East 327

(*b*) *Chapman* v *Bluck*, 4 Bing N C 187 at p 195

(*c*) *Per* Tindal, C J, in *Doe* d *Pearson* v *Ries* 8 Bing 178, at p 181

(*d*) 2 Phill Evid 10th ed 420, *Bank of England* v *Anderson* 3 Bing N C 589, at p 666 See the resolutions in *Heydon's Case* 3 Rep 7 (as to which see *per* Pollock, C B, in *A G* v *Sillem* 2 H & C 431, at p 509), Ld Camden's Judgment in *Entick* v *Carrington*, 19 How St Trials, 1030 at pp 1043 *et seq* *per* Coleridge, J, in *R* v *Archb of Canterbury* 11 Q B 483 at pp 595, 596, *per* Crompton J, in *Sharpley* v *Mablethorpe* 3 E & B 906, at p 917, *per* Byles, J, in *Shrewsbury* v *Scott*, 6 C B N S 1, at p 213

temporary lawyers of repute Great regard, said Sir E Coke, ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made ' (*e*) And, " it is by no means an inconvenient mode of construing statutes to presume that the legislature was aware of the state of the law at the time they were passed (*f*) Yet, an Act which purports to amend the law is not conclusive evidence of what the earlier law was (*g*) and even the use of the words ' it is declared does not necessarily render an Act retrospective in operation (*h*)

Conformably to what has been said, stress was laid by several of the judges in the *Fermoy Peerage Case* (*i*), upon the usage observed in the creation of Irish Peerages since the passing of the Act of Union And in *Salkeld* v *Johnson* (*k*), the Court of Exchequer, referring to the statute 2 & 3 Will 4 c 100 observed, ' We propose to construe the Act according to the legal rules for the interpretation of statutes, principally by the words of the statute itself which we are to read in their ordinary sense, and only modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity, but no further (*l*) It is proper also to consider the state of the law which it proposes or purports to alter, the mischiefs which existed and which it was intended to remedy (*m*), and the nature of the remedy provided, and to look at the statutes *in pari materia* (*n*), as a means of explaining this statute These are the proper modes of ascertaining the intention of the legislature "

Generally, however, usage does not aid interpretation unless there be ambiguity (*o*) If there has been a long usage to apply trust funds to purposes warranted by one possible construction of a will, but not by another, the Courts lean to that

Limits of the maxim

(*e*) 2 Inst 11, 136, 181 see *per* Holt C J in *Harcourt* v *Fox* Comb 209 *Newcastle Corp* v *A G* 12 Cl & F 402 at p 419 *Morgan* v *Crawshay* L R 5 H L 304 at p 315

(*f*) *Per* Pollock, C B , in *Jones* v *Broun* 2 Exch 329

(*g*) *Molluo* v *Court of Wards* L R 4 P C 419, at p 437

(*h*) *Harding* v *Queensland Commrs* , [1898] A C 769

(*i*) 5 H L Cas 716 at pp 747 785

(*k*) 2 Exch 256, at p 273

(*l*) *Ante*, pp 362, *et seq*

(*m*) Cf *per* Ld Esher in *Powell* v *Kempton Co* [1898] 2 Q B 242 at pp 255, 256

(*n*) See *Ex p Copeland* 2 De G M & G 914

(*o*) *N E Ry Co* v *Hastings* [1900] A C 260

CONTEMPORANEA EXPOSITIO EST OPTIMA ET FORTISSIMA IN LEGE (*2 Inst* 11)—*The best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up* (*y*)

Ancient grants, &c

There is no better way of interpreting ancient words, or of construing ancient grants, deeds, and charters, than by usage (*z*), and the uniform course of modern authorities fully establishes the rule that, however general the words of an ancient grant may be, it is to be construed by evidence of the manner in which the thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended (*a*) Thus, if it be doubtful on the face of an instrument whether a present demise or future letting was meant, the intention of the parties may be elucidated by the conduct they have pursued (*b*) and where the words of an instrument are ambiguous, the Court may call in aid acts done under it as a clue to the intention (*c*)

Statutes

Upon the same principle, also, depends the great authority which, in construing an old statute is attributed to the construction put upon it by judges who lived at or soon after the time when the statute was made, as being best able to determine the intention of the legislature from their knowing the circumstances to which the statute related (*d*) and where the words of an Act are obscure, and where the sense of the legislature cannot, with certainty, be collected by interpreting the language according to grammatical correctness, considerable stress is laid upon the light in which it was received and held by the con-

(*y*) The Courts, however, have frequently repudiated the idea of being influenced in their interpretation of a statute by knowledge of what occurred in Parliament during the passing of the bill see for instance *per* Pollock C B in *Barbat* v *Allen* 7 Exch 609 at 617, *per* Alderson B in *Gorham* v *Exeter*, 5 Exch 630, at p 667

(*z*) *Per* Ld Hardwicke in 4 *G* v *Parker*, 3 Atk 576 and 2 Inst 282 cited in *R* v *Bellringer*, 4 T R 810, at p 819) *per* Parke B, in *Clift* v *Schwabe* 3 C B 437 at p 469, and *Jewison* v *Dyson* 9 M & W 556, *R* v *Mashiter* 6 A & E 153, *R* v *Davie* Id 374, *Senhouse* v *Earle*, Amb 285 at 288 Co Litt 8 b *Lockwood* v *Wood* 6 Q B 31 *per* Ld Eldon in *A G Forster* 10 Ves 335, at p 338 *R* v *Dulwich College*, 17 Q B 600

(*a*) *Weld* v *Hornby*, 7 East 195 at p 199 *R* v *Osbourne*, 4 East, 327

(*b*) *Chapman* v *Black*, 4 Bing N C 187 at p 195

(*c*) *Per* Tindal, C J, in *Doe* d *Pearson* v *Ries* 8 Bing 178, at p 181

(*d*) 2 Phill Evid, 10th ed 420, *Bank of England* v *Anderson* 3 Bing N C 589, at p 666 See the resolutions in *Heydon's Case* 3 Rep 7 (as to which see *per* Pollock, C B, in *A G* v *Sillem* 2 H & C 431 at p 509), Ld Camden's Judgment in *Entick* v *Carrington* 19 How St Trials 1030, at pp 1043 *et seq* *per* Coltridge, J, in *R* v *Archb of Canterbury*, 11 Q B 483, at pp 595, 596, *per* Crompton J, in *Sharpley* v *Mablethorpe* 3 E & B 906, at p 917, *per* Byles, J, in *Shrewsbury* v *Scott*, 6 C B N S 1, at p 213

temporary lawyers of repute "Great regard,' said Sir E Coke, 'ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made" (*e*) And, "it is by no means an inconvenient mode of construing statutes to presume that the legislature was aware of the state of the law at the time they were passed (*f*) Yet, an Act which purports to amend the law is not conclusive evidence of what the earlier law was (*g*), and even the use of the words "it is declared' does not necessarily render an Act retrospective in operation (*h*)

Conformably to what has been said, stress was laid by several of the judges in the *Fermoy Peerage Case* (*i*), upon the usage observed in the creation of Irish Peerages since the passing of the Act of Union And in *Salkeld* v *Johnson* (*k*), the Court of Exchequer, referring to the statute 2 & 3 Will 4 c 100 observed, 'We propose to construe the Act according to the legal rules for the interpretation of statutes, principally by the words of the statute itself which we are to read in their ordinary sense, and only modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity, but no further (*l*) It is proper also to consider the state of the law which it proposes or purports to alter, the mischiefs which existed and which it was intended to remedy (*m*), and the nature of the remedy provided, and to look at the statutes *in pari materia* (*n*), as a means of explaining this statute These are the proper modes of ascertaining the intention of the legislature"

Generally, however, usage does not aid interpretation unless there be ambiguity (*o*) If there has been a long usage to apply trust funds to purposes warranted by one possible construction of a will, but not by another, the Courts lean to that

Limits of the maxim

(*e*) 2 Inst 11, 136 181 see *per* Holt C J , in *Harcourt* v *Fox* Comb 209 *Newcastle Corp* v *A G* 12 Cl & F 402 at p 419, *Morgan* v *Crawshay* L R 5 H L 304, at p 315

(*f*) *Per* Pollock, C B , in *Jones* v *Brown*, 2 Exch 329

(*g*) *Mollwo* v *Court of Wards*, L R 4 P C 419 at p 437

(*h*) *Harding* v *Queensland Commrs* , [1898] A C 769

(*i*) 5 H L Cas 716 at pp 747 785

(*k*) 2 Exch 256, at p 273

(*l*) *Ante* pp 362, *et seq*

(*m*) Cf *per* Ld Esher in *Powell* v *Kempton Co* [1898] 2 Q B 242 at pp 255, 256

(*n*) See *Ex p Copeland* 2 De G M & G 914

(*o*) *N E Ry Co* v *Hastings* [1900] A C 260

construction which upholds the usage, but usage does not justify deviation from terms which are plain (*p*) it is a strong ground for the interpretation of doubtful expressions, but affords no sanction to manifest breaches of trust (*q*) Similarly, against the clear words of a statute no usage is of avail (*r*), and hence it has been said that the maxim amounts to no more than this, that if an Act be susceptible of the construction put upon it by long usage, the Courts will not disturb that construction (*s*)

But where a statute is silent upon some points, usage, especially if it be not inconsistent with the directions actually given, may well supply the defect, and where a statute uses language of doubtful import, what has been done under it for a long course of years may well give an interpretation reducing uncertainty to a fixed rule In such cases the maxim hereafter illustrated (*t*), is applicable *optimus legis interpres consuetudo* (*u*)

In construing an ancient statute, such as the Act of Uniformity, contemporaneous usage is of great value, and to ascertain what that usage was the Courts may refer to all such ancient works as a careful historian would rely upon, for the law permits a reference to historical works in order to ascertain ancient facts of a public nature (*v*)

But in construing a modern statute *contemporanea expositio* is of no value, and the Courts have refused to apply it to statutes passed within the last hundred years (*y*)

Judicial decisions

Similar in effect to an unbroken usage is a long current of judicial decisions (*z*), and where the authorities are consistent

(*p*) *Per* Turner, L J in *A G* v *Rochester*, 5 De G M & G 797, at p 822 (cited by Ld Hatherley in *A G* v *Sidney Sussex College*, L R 4 Ch 722, at p 732)

(*q*) See *Drummond* v *A G for Ir*, 2 H L Cas 837 861 863

(*r*) *Per* Ld Brougham in *Dunbar Magis* v *Roxburghe*, 3 Cl & F 335, at p 354

(*s*) *Per* Pollock, C B, in *Pochin* v *Duncombe*, 1 H & N 842, at p 856 (with which compare *Guyn* v *Hardwicke*, 1 H & N 49, at p 53), *per* Ld Campbell in *Gorham* v *Bp of Exeter*, 15 Q B 52, at pp 73, 74

(*t*) See Chap X, where the admissibility of usage to explain instruments is considered, and further authorities are cited

(*u*) See *per Ld* Brougham in *Dunbar Magis* v *Roxburghe*, 3 Cl & F 335, at p 354, *Re Mackenzie*, [1899] 2 Q B 566

(*x*) *Read* v *Bp of Lincoln*, [1892] A C 644

(*y*) *Trustees of Clyde Nav* v *Laird*, 8 A C 658, at p 673, *Assheton Smith* v *Owen*, [1906] 1 Ch 179, at p 213, but see *R* v *Commrs of Inl Rev* [1891] 1 Q B 485, at p 489

(*z*) *Windham* v *Chetwynd* 1 Burr 414, at p 419

a Court may feel bound by them even if it does not wholly approve of the principles which have been acted upon (*a*)

QUI HÆRET IN LITERA HÆRET IN CORTICE (*Co Litt* 283 *b*)—*He who considers merely the letter of an instrument goes but skin-deep into its meaning*

The law of England respects the effect and substance of the matter, and not every nicety of form or circumstance (*b*) 'The reason and spirit of cases make law, and not the letter of particular precedents" (*c*) Hence it is, as we have already seen, a general rule connected with the interpretation of deeds and written instruments, that, where the intention is clear, too minute a stress should not be laid on the strict and precise signification of words (*d*) For instance, by the grant of a remainder, a reversion may pass, and *e converso* (*e*), and if a lessee covenant to leave all the timber which was growing on the land when he took it, the covenant will be broken, if, at the end of the term, he cuts it down, but leaves it there, for this, though a literal performance of the covenant, would defeat its intent (*f*)

False grammar

In accordance with this principle, it is a further rule that *mala grammatica non vitiat chartam* (*g*) -the grammatical construction is not always, in judgment of law, to be followed, and neither false English nor bad Latin makes a deed void when its meaning is apparent (*h*) Thus, the word 'and" has, as already intimated, in certain cases, been read "or," and *vice versa*, when this change was rendered necessary by the context (*i*) Where, however, a proviso in a lease was altogether

(*a*) *Newton* v *Cowrie* 4 Bing 234 at p 241

(*b*) Co Litt 283, Wing Max p 19 See *per* Coltman, J, in *Scott* v *Sargent* 2 Scott N R 289, at p 300

(*c*) *Per* Ld Mansfield in *Fisher* v *Prince* 3 Burr 1363

(*d*) *Ante*, p 352

(*e*) *Roll* v *Osborn*, Hobart, 20 at 27

(*f*) Woodf L & T, 21st ed p 781 Cf *Hamilton* v *Hector*, L R 13 Eq 511, at p 523

(*g*) See *Shrewbury's Case* 9 Rep 46 b, at 48 a, *Finch's Case* 6 Rep 39 Wing Max, p 18, Vin Abr, '*Grammar*' (A), Lofft, 441 It may as properly be said in Scotch as in English law that *falsa grammatica non vitiat chartam* (*per* Ld Chelmsford in *Gollan* v *Gollan*, 4 Macq 585 at p 591)

(*h*) Co Litt 233 b, *Osborn's Case*, 10 Rep 130, at 133, *Fountain* v *Guavers*, 2 Show 333 See *R* v *Wooldale*, 6 Q B 549, at p 565

(*i*) *Chapman* v *Dalton*, Plowd 284, at 289, *Harris* v *Davis*, 1 Coll 416 (followed in *Re Clerk*, [1915] 2 Ch 301, distinguished in *Re Whitehead*, [1920]

ungrammatical and insensible, the Court declared that they did not consider themselves bound to find out a meaning for it (*k*)

In interpreting an Act of Parliament, likewise, it is not always a true line of construction to decide according to the strict letter of the Act, but, subject to the remarks already made (*l*), the Courts may consider what is its fair meaning (*m*), and expound it differently from the letter, in order to preserve the intent (*n*) The meaning of particular words, indeed, in statutes, as well as in other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained (*o*)

Still more so is this the case in applying the words used by a judge in giving his reasons for a judgment The effect of a judgment declaring the law cannot be avoided by considering the exact words used by a judge and then seeking 'to evade the pressure of his words" by a colourable alteration of the subject-matter with reference to which they are used—"*qui haret in litera, haret in cortice*" (*p*)

Contracts

The maxim applies also to the interpretation of contracts so as to place the construer in the same position as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words, and of the correct application of the language to the things described (*q*), and extrinsic evidence for these purposes is admissible (*r*)

1 Ch 298) See *per* Ld Halsbury in *Mersey Docks* v *Henderson* 13 App Cas 595 at p 603

(*k*) *Doe d Wyndham* v *Carew* 2 Q B 317 *Berdoe* v *Spittle* 1 Exch 175 See *Moverly* v *Lee*, 2 Raym Ld 1223

(*l*) *Ante*, pp 352, *et seq*

(*m*) *Per* Ld Kenyon in *Halsey* v *Hales*, 7 T R 194, at 196 *Fowler* v *Padget*, Id 509 *Magdalen Coll Case* 11 Rep 66 b at 73 a, Litt, s 67, with the commentary, cited in *Wilkinson* v *Hall*, 3 Bing N C 508 at p 525, Co Litt 381 b See *Vincent* v *Slaymaker* 12 East 372, Arg *Bignold* v *Springfield*, 7 Cl & F 71, at p 109, and cases there cited

(*n*) *Butler and Baker's Case* 3 Rep 25 a, at 27 a *Semper in obscuris quod minimum est sequimur* (D 50, 17 9), which is a safe maxim for guidance in our own law, see *per* Maule, J, in *Williams* v *Crosling* 3 C B 957, at p 962

(*o*) Judgm in *R* v *Hall*, 1 B & C 123 (cited in *Flounders* v *Donner*, 2 C B 63, at p 66)

(*p*) *Per* Ld Halsbury in *Wedderburn* v *Atholl*, [1900] A C 403 at p 417

(*q*) Addison on Contracts, 11th ed, p 46, and cases there cited

(*r*) *Hudson* v *Stewart* L R 9 C P 311 *Brown* v *Fletcher* 35 L T 165

CHAPTER IX

THE LAW OF CONTRACTS

A CURSORY glance at the contents of the preceding pages will show that we have frequently had occasion to refer to the law of contracts, in illustration of maxims submitted to the reader Many, indeed, of our leading principles of law have necessarily a direct bearing upon the law merchant, and must, therefore, be constantly borne in mind when attention is directed to that subject The following pages are devoted to a review of such maxims as are peculiarly, though by no means exclusively, applicable to contracts, and an attempt has been made, by the arrangement adopted, to show, as far as practicable, the connection between these maxims, and the relation in which they stand to each other The first of these maxims sets forth the general principle, that parties may, by express agreement *inter se*, and subject to certain restrictions, acquire rights or incur liabilities which the law of itself would not have conferred or imposed The maxims subsequently considered show that a man may—except where contracting out is prohibited by statute —renounce a right which the law has given to him, that one who enjoys the benefit, must likewise bear the inconvenience or loss resulting from his contract, that, where the right or where the delinquency on each side is equal in degree, the title of the party in actual possession prevails Having thus stated preliminary rules applicable to the conduct and position of contracting parties, we proceed to examine the nature of the consideration essential to a valid contract the liabilities attaching respectively to vendor and purchaser the various modes of payment and receipt of money the effect of contracting, or, in general, of doing any act, through the intervention of an agent and the legal consequences which flow from the subsequent ratification of a prior act Lastly, we state how a contract may be revoked or dissolved, and how a vested right of action may be affected by the Statute of Limitations, or by the negligence or death of the party possessing it It will

be evident, from this brief outline of the principles set forth in this chapter, that some of them apply to actions of tort, as well as to actions founded on contract, and when such is the case, the remarks appended are not confined to actions of the latter description The general object, however, has been to exhibit the most important elementary rules relative to *contracts*, and to show how the law may, through their medium, be applied to regulate the infinitely varied transactions of a mercantile community

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MODUS ET CONVENTIO VINCUNT LEGEM (*2 Rep* 73, *Co Litt* 19)—*The form of agreement and the convention of parties overrule the law*

General principles

This may be regarded as the most elementary principle of law relative to contracts (*a*) and may be thus stated in a somewhat more comprehensive form The conditions annexed to a grant or devise, the covenants inserted in a conveyance or lease, and the agreements, whether written or verbal, entered into between parties, have, when duly executed and perfected, and subject to certain restrictions, the force of law over those who are parties to such instruments or agreements (*b*) "Parties to contracts," remarked Erle, J, 'are to be allowed to regulate their rights and liabilities themselves (*c*) and 'the Court will only give effect to the intention of the parties as it is expressed by the contract' (*d*)

Where the tenant of a house covenanted in his lease to pay a reasonable share of the expenses of supporting and repairing all party-walls, and to pay all taxes, duties, assessments,

(*a*) In illustration of it, see *Walsh* v *Sec of State for India*, 10 H L Cas 367 *Savin* v *Hoylake Ry Co*, L R 1 Ex 9 *Barlow* v *Teal*, 15 Q B D 501

(*b*) A 'contract' is defined to be *Une convention par laquelle les deux parties, ou seulement l une des deux, promettent et s engagent envers l autre a lui donner quelque chose ou a faire ou à ne pas faire quelque chose*" (Pothier, s Oblig, pt 1, chap 1, art 1, s 1) '*Omne jus aut consensus fecit, aut neces sitas constituit aut firmavit consuetudo*' (D 1 3, 40) "It is the essence of as contract that there should be a concurrence of intention between the parties the to the terms It is an agreement because they agree upon the terms upon *Dav* subject matter, the consideration and the promise (*per* Cleasby, B, in (*c*) s v *Haycock* L R 4 Ex 373, at p 381)
Lanc *Gott* v *Gandy*, 2 E & B 845, at p 847 *per* Erle, J, in *M'Manus* v
(*d*) *and Yorks Ry Co* 4 H & N 327, at p 343
in *Rog* Judgm in *Stadhard* v *Lee*, 3 B & S 364, at p 372, *per* Bramwell, B, v *Brow* *rs* v *Hadley*, 2 H & C 227, at p 249, and see *Manch S & L Ry Co* *r*, 8 App Cases, 703

and impositions, parliamentary and parochial—"it being the intention of the parties that the landlord should receive the clear yearly rent of £60 in net money, without any deduction whatever"—and during the lease the owner of the next house built a party-wall between his own house and the house demised, under the provisions of the 14 Geo 3, c 78 it was held that the tenant, and not the landlord, was bound to pay the moiety of the expense of the party-wall, "for," observed Lord Kenyon, the covenants in the lease render it unnecessary to consider which of the parties would have been liable under the Act, *modus et conventio vincunt legem*" (*e*)

So, in *Roubotham* v *Wilson* (*f*), Martin, B, observed, "I think the owner of land may grant the surface, subject to the quality or incident that he shall be at liberty to work the mines underneath, and not be responsible for any subsidence of the surface If the law of itself, under certain circumstances, protects from the consequences of an act, I think a man may contract for such protection in a case where the law of itself would not apply, *modus et conventio vincunt legem*."

In an action for not carrying away tithe corn, the plaintiff alleged that it was 'lawfully and in due manner" set out it was held that this allegation was satisfied by proof that the tithe was set out according to an agreement between the parties, although the agreed mode varied from that prescribed by the common law, the tithe being set out in shocks, and not in sheaves, as the law directed (*g*)

Mercantile transactions

The same comprehensive principle applies, also, to agreements having immediate reference to mercantile transactions thus, the stipulations contained in articles of partnership may be enforced, and must be acted on as far as they go, their terms being explained, and their deficiencies supplied, by reference to the general principles of law Although, therefore, a new partner is entitled to occupy his place, if there be an express individual member of the firm, yet the executor of a deceased partner is entitled to occupy his place, if there be an express stipulation to that effect in the agreement of partnership Again, the lien which a factor has upon the goods of his principal (*h*) arises from a tacit agreement between the parties,

(*e*) *Barrett* v *Bedford*, 8 T R 602, at p 605
(*f*) 8 E & B 123, at p 150
(*g*) *Facey* v *Hurdom*, 3 B & C 213 See *Halliwell* v *Trappes*, 2 Taunt 55
(*h*) See *Dixon* v *Stansfeld*, 10 C B 398

which the law implies, but, where there is an express stipulation to the contrary, it puts an end to the general rule of law (*i*) The general lien of a banker, also, is part of the law merchant, and will be upheld by the Courts, unless there be some agreement between the banker and the depositor, either express or implied, inconsistent with such right (*k*)

So, it has been remarked that, in the ordinary case of a sale of chattels, time is not of the *essence* of the contract, *unless* it be made so by express agreement, and this may be effected with facility by introducing conditional words into the bargain, the sale of a specific chattel on credit, therefore, although that credit be limited to a definite term, transfers the property in the goods to the buyer, giving the seller, when that term has expired, a right of action for the price, and a lien upon the goods, if they be still in his possession, till that price be paid (*l*)

Doctrine of equity
Specific performance

The doctrine relative to specific performance may here be mentioned, as showing that Courts of equity fully acknowledge the efficacy of contracts, where *bona fide* entered into in accordance with the formalities if any, required by law Equity, indeed, from its peculiar jurisdiction, has power for enforcing the fulfilment of contracts which the common law does not possess (*m*), and in exercising this power, it acts upon the principle that express stipulations, if valid, prescribe the law *quoad* the contracting parties For instance, money was devised to be laid out in land to the use of B in tail, remainder to the use of C in fee B, having no issue, agreed with C to divide the money, but before the agreement was carried out B died, whereupon C becoming, as he supposed, entitled to the whole fund, refused to complete the agreement The Court, however, upon a bill filed by B 's personal representatives, decreed a

(*i*) *Per* Ld Kenyon in *Walker* v *Birch* 6 T R 258 at 262 As to the general lien of a wharfinger at common law see *Dresser* v *Bosanquet* 4 B & S 460, at p 486

(*k*) *Brandao* v *Barnett*, 12 Cl & F 787, and 3 C B 519, *Misa* v *Currie* 1 App Cas 554, at p 569

As to the lien of a shipowner on the cargo for freight, see *How* v *Kirchner*, 11 Moo P C 21, *Kirchner* v *Venus*, 12 Id 361

(*l*) *Martindale* v *Smith* 1 Q B 389 at p 395 (cited in *Page* v *Eduljee*, L R 1 P C 127, at p 145) In *Spartali* v *Benecke* 10 C B 212, at p 216 Wilde, C J, observes, 'If a vendor agrees to sell for a deferred payment, the property passes, and the vendee is entitled to call for a present delivery without payment" See the Sale of Goods Act, 1893 (56 & 57 Vict c 71), ss 10 (1) 18, 41 (1) (b)

(*m*) See *Benson* v *Paull*, 6 E & B 273

specific performance (*n*), acting thereby in strict accordance with the maxim, *modus et conventio vincunt legem* (*o*)

Without venturing further into the wide field which is here opening upon us, we may add that it does sometimes happen, notwithstanding an express agreement between parties, that peculiar circumstances present themselves which afford grounds for the interference of a Court of equity, in order that the contract entered into may be so modified as to meet the justice of the case For instance, where an attorney, who died three weeks later, received, whilst he lay ill, 120 guineas by way of apprentice fee with a clerk who was placed with him, the Court decreed a return of 100 guineas, although the articles provided that if the attorney should die within the year £60 only should be returned (*p*) With respect to this case, Lord Kenyon, indeed, observed (*q*) that in it the jurisdiction of a Court of equity had been carried 'as far as could be', but the decision seems, from the facts stated in the pleadings (*r*), to be supportable upon a plain ground of equity, viz, that of mutual mistake, misrepresentation, or unconscientious advantage (*s*), and, consequently, not really opposed to the spirit of the maxim, *modus et conventio vincunt legem*

Limitation of rule

The rule under consideration, however, is subject to limitation, and does not apply where the express provisions of any law are violated by the contract, nor, in general, where the interests of the public, or of third parties, would be injuriously affected by its fulfilment *Pacta, quæ contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere, indubitati juris est* (*t*), and *privatorum conventio juri publico non derogat* (*u*) 'If the thing stipulated for is in itself contrary to law, the paction by which the execution of the illegal act is stipulated must be held as intrinsically null *pactis privatorum juri publico non derogatur*" (*v*) Accordingly illegality may be pleaded as a defence to an action on a deed Thus, where the defendant and other obligors on a bond had agreed to execute the bond in favour of the plaintiff as security

Bond for illegal purpose

(*n*) *Carter* v *Carter*, Cas t Talb 271
(*o*) See, also, *Frank* v *Frank*, 1 Chanc Cas 84
(*p*) *Newton* v *Rowse*, 1 Vern 3rd ed 460 See *Re Thompson*, 1 Exch 864 *Whincup* v *Hughes*, L R 6 C P 78, at p 83
(*q*) In *Hale* v *Webb*, 2 Bro Ch 78, at p 80
(*r*) See *Newton* v *Rowse*, *supra*
(*s*) 1 Story, Eq Jurisp, 12th ed p 460 (*t*) C 2 3 6
(*u*) D 50, 17, 45, § 1, D 2 14 38, 9 Rep 141
(*v*) Arg, *Phillips* v *Innes*, 4 Cl & F 234, at p 241

for money paid by him to another person as a bribe not to prosecute the other obligors for perjury, the defendant was permitted to set up the agreement and thereby avoid the payment of the bond on the ground of illegality (*x*)

Again, the jurisdiction of the Courts cannot be ousted by mere agreement of the parties (*y*) Contracts in writing often contain an "arbitration clause" Such clause, in so far as it provides for the reference of disputes, is valid (*z*), but, being construed as collateral to the rest of the contract, it is no defence in law to an action thereon (*a*), though it may entitle the defendant to have the action stayed (*b*) A clause which provides absolutely that a right under the contract shall not be enforceable by action is void, as an attempt to oust jurisdiction (*y*), but if it merely provides that an award, fixing the debt or the damages, shall be a condition precedent to the recovery thereof by action, it is not only valid, but is a defence to the action if brought before the award (*c*)

Not only is the consent or private agreement of individuals ineffectual in rendering valid any direct contravention of the law (*d*), but it will altogether fail to make just, sufficient, or effectual that which is unjust or deficient in respect to any matter which the law declares to be indispensable and not circumstantial merely (*e*) Therefore an agreement by a married woman, that she will not avail herself of her coverture as a ground of defence to an action on a personal obligation which she has incurred, would not be valid or effective in support of the plaintiff's claim and by way of answer to a plea of coverture (*f*), for a married woman is under a total disability, and her contract is absolutely void, except where it can be viewed as a contract by her husband through her agency (*g*), or is within the Married Women's Property Acts

(*x*) *Collins* v *Blantern*, 2 Wils K B See 1 Smith s L C , 12th ed , p 412, and authorities cited in the note thereto (*y*) *Horton* v *Sayer*, 4 H & N 643

(*z*) *Livingston* v *Ralli*, 5 E & B 132

(*a*) *Collins* v *Locke*, 4 App Cas 674, *Dawson* v *Fitzgerald*, 1 Ex D 257

(*b*) See the Arbitration Act 1889 (52 & 53 Vict c 49), ss 4, 27

(*c*) *Scott* v *Avery*, 5 H L Cas 811, *Viney* v *Bignold*, 20 Q B D 172, *Caledonian Ins Co* v *Gilmour*, [1893] A C 85

(*d*) See *Brit Wagon Co* v *Gray*, [1896] 1 Q B 35, and cf *Montgomery* v *Liebenthal*, [1898] 1 Q B 487

(*e*) Bell, Dict and Dig of Scot Law, 694

(*f*) See *Liverp Adelp Loan Ass* v *Fairhurst*, 9 Exch 422, *Wright* v *Leonard*, 11 C B N S 258 *Cannam* v *Farmer*, 3 Exch 698, *Bartlett* v *Wells*, 1 B & S 836, *Bateman* v *Faber* [1898] 1 Ch 144

(*g*) See *post*, p 540

So, with reference to a provision in a foreign policy of insurance against all perils of the sea, "*nullis exceptis*," it was observed that, although there was an express exclusion of any exception by the terms of the policy, yet the reason of the thing engrafts an implied exception even upon words so general as these, as, for example, in the case of damage occasioned by the wilful fault of the assured it being a general rule that insurers are not liable when loss or damage happens by the fraud of the assured, from which rule it is not permissible to derogate by any pact to the contrary, for *nulla pactione effici potest ut dolus præstetur* (*h*)—a man cannot validly contract that he shall be irresponsible for his own fraud Neither will the law permit a person who enters into a binding contract, to say, by a subsequent clause, that he will not be liable to be sued for a breach of it (*i*)

Agreement cannot affect the rights of third parties

It is equally clear that an agreement entered into between two persons cannot, in general, affect the rights of a third party, who is a stranger to it, thus, an agreement between A and B, that B shall discharge a debt due from A to C, does not prejudice C 's right to sue A for the debt, *debitorum pactionibus creditorum petitio nec tolli nec minui potest* (*k*), and, according to the rule of the Roman law, *privatis pactionibus non dubium est non lædi jus cæterorum* (*l*)

In the above and similar cases, then, as well as in some others relative to the disposition of property, which have been noticed in the preceding chapter (*m*), another maxim emphatically applies *fortior et potentior est dispositio legis quam hominis* (*n*)—the law in some cases overrides the will of the individual, and renders ineffective and futile his expressed intention or contract (*o*)

(*h*) Judgm in *Cullen* v *Butler* 5 M & S 461 at p 466, D 2, 14 27, 3 See *Trinder* v *Thames, &c Ins Co*, [1898] 2 Q B 114, *Shaw* v *G W Ry Co* [1894] 1 Q B 373, at p 382

(*i*) *Per* Martin, B in *Kelsall* v *Tyler* 11 Exch 513, at p 534

(*k*) 1 Pothier Oblig, 108 109 See, however, *Rouse* v *Bradford Bank* [1894] A C 586

(*l*) D 2, 15, 3, pr

(*m*) See also, *per* Ld Kenyon in *Doe* d *Mitchinson* v *Carter*, 8 T R 57, at p 61 Arg, *Goodtitle* d *Vincent* v *White*, 15 East, 174, at p 178

(*n*) Co Litt 234 a (cited 15 East, at p 178) The maxim is illustrated by Williams, J, in *Hybart* v *Parker*, 4 C B N S 209, at pp 213 214

(*o*) For instance, a man cannot, by his own acts or words, render that irrevocable, which in its own nature and according to established rules of law, is revocable, as in the case of a will Similarly, it was said that ' the rule which prohibits the assignment of a right to sue on a covenant, is not one which can be dispensed with by the agreement of the parties, and it applies to covenants

Surrender by operation of law

For instance, "surrender" is the term applied in law to "an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist", as in the case of a lessee taking a second lease from the lessor, or a tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor In such case the surrender is not the result of *intention*, for, if there was no intention to surrender the particular estate, or even if there was an express intention to keep it unsurrendered, the surrender would be the act of the law, and would prevail in spite of the intention of the parties (*p*) *fortior et potentior est dispositio legis quam hominis* (*q*)

Subject to such and similar exceptions, however, the general rule of the civil law holds equally in our own *pacta conventa quæ neque contra leges neque dolo malo inita sunt omnimodo observanda sunt* (*r*) compacts which are not illegal, and do not originate in fraud, must in all respects be observed

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QUILIBET POTEST RENUNCIARE JURI PRO SE INTRODUCTO (*Wing Max*, *p* 483)—*Any one may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour* (*s*)

Waiver of defence

According to the well-known principle expressed in this maxim, a defendant may, as a rule, decline to avail himself of

expressed to be with assignees as well as to others (Judgm in *Wetherell* v *Langston* 1 Exch 634 at p 645) And see judgm in *Hibblewhite* v *M'Morine* 6 M & W 200, at p 216

(*p*) *Lyon* v *Reed*, 13 M & W 285 at p 306 (commented on in *Nickells* v *Atherstone*, 10 Q B 944, at p 951) As to surrender by operation of law, see also the cases collected, 2 Smith, L C, 12th ed, pp 872—882 *Doe* d *Hull* v *Wood* 14 M & W 682, *Morrison* v *Chadwick* 7 C B 266, *Tanner* v *Hartley*, 9 C B 634 Judgm in *Doe* d *Biddulph* v *Poole* 11 Q B 713, at p 716

(*q*) Co Litt 234 a, 338 a It may possibly happen too, that the direction of a particular legal tribunal will have to be disregarded by a judge, as opposed to the common law (see *per* Coleridge, J, in *Rankin* v *Hamilton* 15 Q B 187, at p 192) And see other instances, in connection with illegal contracts, *post* *Et vide per* Ld Truro in *Ellcock* v *Mapp*, 3 H L Cas 492, at p 507, *per* Parke, B, in *Hallett* v *Dowdall*, 18 Q B 2, at p 87

(*r*) C 2, 3, 29

(*s*) Bell, Dict and Dig of Scots Law, 545, 1 Inst 99 a, 2 Inst 183, *Beaufage's Case*, 10 Rep 99 b, at 101 a, *Wilson* v *McIntosh* [1894] A C 129 at p 133

The words *pro se* were introduced to show that no man can renounce a right, of which the claims of society forbid the renunciation (*per* Ld Westbury in *Hunt* v *Hunt*, 31 L J Ch 161, at p 175) For instance, if an action be

a defence which would be at law a valid and sufficient answer to the plaintiff's demand, and waive his right to insist upon that defence (*t*)

Statute of Limitations

For instance, a defendant, who is sued for a debt barred by the Limitation Act, 1623 (*u*), may waive his right to rely upon the defence which that statute confers (*x*), and the benefit of the statute may also be waived by a debtor before action brought to recover the debt (*y*), by his signing a written (*z*) promise to the creditor—and not to a third party—to pay the debt, either unconditionally or subject to conditions afterwards fulfilled, or a written acknowledgment of the debt from which such a promise may be inferred (*a*) or, again, by his making a part payment on account of the whole debt under circumstances which do not rebut the implication of a promise by him to pay the balance (*b*)

Infancy

Similarly, where a person is sued after his coming of age for a debt which he contracted during his infancy, and which, owing to his infancy, was either voidable by him, or even absolutely void (*c*), it is, no doubt, generally open to him to waive such ground of defence The statute law (*d*) has, indeed affected the general rule of the common law (*e*), that a person binds himself by his ratification after full age to transactions which he entered into while an infant, yet there are still transactions to which that rule applies For instance, if an infant makes a settlement of property upon his marriage the settlement is generally voidable by him upon his coming

brought upon a contract which is shown at the trial to be illegal the Courts may apply the maxim *ex turpi causa non oritur actio* although the defendant has not pleaded the illegality (*Scott* v *Brown* [1892] 2 Q B 724) see *post* p 466

(*t*) See *per* Bayley, J in *Boull* v *Wood*, 2 M & S 23, *per* Abbott C J in *Bonner* v *Wilkinson* 5 B & Ald 682 *Graham* v *Inglett* 1 Exch 651 at p 656, shows that a plaintiff might waive the benefit of the statute 4 Ann c 16 s 11, which required that a plea in abatement should be verified by affidavit

(*u*) 21 Jac 1 c 16

(*x*) See R S C 1883 O 19 r 15

(*y*) *Bateman* v *Pindar*, 3 Q B 574 (as to which see *Spencer* v *Hemmerde* [1922] 2 A C 507 at p 521)

(*z*) See the Statute of Frauds Amendment Act 1828 (9 Geo 4 c 14) s 1, the Mercantile Law Amendment Act 1856 (19 & 20 Vict c 97) s 13

(*a*) See *Re River Steamer Co* L R 6 Ch 822, at p 828, *Green* v *Humphreys* 26 Ch D 474, *Stamford Bank* v *Smith* [1892] 1 Q B 765, *Re Beavan* [1912] 1 Ch 196 at p 205

(*b*) *Morgan* v *Roulands*, L R 7 Q B 493 *Tanner* v *Smart* 6 B & C 603

(*c*) Infants Relief Act 1874 (37 & 38 Vict c 62) s 1, see also the Betting and Loans (Infants) Act 1892 (55 & 56 Vict c 4), s 5

(*d*) 37 & 38 Vict c 62, s 2, see *Smith* v *King*, [1892] 2 Q B 543

(*e*) See *Harris* v *Wall*, 1 Exch 122

of age, but he may waive his right to avoid it by his then ratifying it, or, indeed, by his not repudiating it within a reasonable time after his majority (*f*)

Renunciation of right

A man may also not merely relinquish a particular line of defence, but he may also renounce a claim which might have been substantiated, or release a debt which might have been recovered by ordinary legal process, or he may, by his express contract or stipulation, exclude some more extensive right, which the law would otherwise have conferred upon him In all these cases, the rule holds, *omnes licentiam habere his quæ pro se indulta sunt renunciare* (*g*)—every man may renounce a benefit or waive a privilege which the law has conferred upon him (*h*) For instance, whoever contracts to purchase an estate in fee-simple without any stipulation to vary the general right, is entitled to call for a conveyance of the fee, and to have a good title to the legal estate made out But a man may, by express stipulation, or by contract, or even by consent testified by acquiescence or otherwise, bind himself to accept a title merely equitable, or a title subject to some incumbrance, and whatever defect there may be, which is covered by this stipulation, must be disregarded by the conveyancer to whom the abstract of title is submitted, as not affording a valid ground of objection (*i*) Again, the right to estovers is incident to the estate of a tenant for life or years (though not to the estate of a strict tenant at will), unless he be restrained by special covenant to the contrary, which is usually the case, so that here the above maxim, or that relating to *modus et conventio*, may be applied (*k*)

Waiver of notice of dishonour

Another familiar instance of the application of the same principle occurs in connection with the law of bills of exchange (*l*) The general rule is, that, in order to charge the drawer or indorser of a bill, the holder must, on the day the bill falls due, present it to the acceptor for payment (*m*), and,

(*f*) *Edwards* v *Carter*, [1893] A C 360, *Re Hodson*, [1894] 2 Ch 421

(*g*) C 1, 3 51, C 2 3 29, *Invito beneficium non datur* D 50, 17, 69 See, as an illustration *Markham* v *Stanford*, 14 C B N S 376, at p 383 (distinguished in *Morten* v *Marshall*, 2 H & C 905)

(*h*) *Per* Erle C J, in *Rumsey* v *N E Ry Co*, 14 C B N S 641, at p 649, *Caledon Ry Co* v *Lockhart*, 3 Macq 808, at p 822, *per* Martin, B in *Rowbotham* v *Wilson*, 8 E & B 123 at p 151, *per* Pollock, C B, and Bramwell, B, in *Morten* v *Marshall*, 2 H & C 305, at pp 308, 309 See *Enohin* v *Wylie*, 10 H L Cas 1, at p 15

(*i*) 3 Prest Abs Tit 221

(*k*) Co Litt 41 b

(*l*) Now codified by the Bills of Exchange Act, 1882 (45 & 46 Vict c 61)

(*m*) Ss 45, 46

if payment be refused, he must give to the drawer or indorser notice of the dishonour within a reasonable time thereafter (*n*) As regards the drawer, the reason of this rule is that the acceptor is presumed to have in his hands effects of the drawer for the purpose of discharging the bill, and, therefore, notice to the drawer is requisite, in order that he may withdraw his effects as speedily as possible from the acceptor's hands Unless these previous steps have been taken, generally the drawer cannot be resorted to on non-payment of the bill, and the want of notice of the dishonour to a drawer, who has effects in the hands of the acceptor, is considered as tantamount to payment by him Again, where a bill has been indorsed, and the holder intends to sue an indorser, it is incumbent on him first to demand payment from the acceptor on the day when the bill falls due, and, in case of refusal, to give notice thereof within a reasonable time to the indorser, the reason being that the indorser is in the position of a surety only, and his undertaking to pay the bill is not an absolute, but a conditional undertaking, that is, in the event of a demand made on the acceptor (who is primarily liable) at the time when the bill becomes due, and of refusal on his part to pay As, however, the rule requiring presentment for payment and notice of dishonour was introduced for the benefit of the party to whom such notice must be given, it may, in accordance with the above maxim, be waived by that party (*o*) But though a party may thus waive the consequences of *laches* in respect of himself, he cannot do so in respect of antecedent parties, for that would violate another legal principle, which limits the application of the maxim now under consideration to cases in which no injury is inflicted, by the renunciation of a legal right, upon a third party

Qualification of rule

It will be seen, from some of the preceding instances, that the rule which enables a man to renounce a right which he might otherwise have enforced, must be applied with this qualification, that, in general, a private compact cannot be permitted to derogate from the rights of third parties (*p*) In other words, although a party may renounce a right or benefit *pro se introductum*, he cannot renounce that which has been introduced for the benefit of another party, thus, the rule that

(*n*) 45 & 46 Vict c 61, ss 47—50
(*o*) Ss 46 (2) (e), 50 (1) (b)
(*p*) See *Brunsdon* v *Allard*, 2 E & E 19, *Slater* v *Mayor of Sunderland*, 33 L J Q B 37

a child within the age of nurture cannot be separated from the mother by order of removal, was established for the benefit and protection of the child, and therefore cannot be dispensed with by the mother's consent (*q*)

Principal and surety

One case may, however, be mentioned to which the rule applies, without qualification—that of a release by one of several joint creditors, which, in the absence of fraud and collusion, operates as a release of the claim of the other creditors, and may be pleaded accordingly On the other hand, the creditor's discharge of one joint or joint and several debtor is a discharge of all (*r*), and a release of the principal debtor discharges the sureties, unless, indeed, there be an express reservation of remedies as against them, enabling the release to be construed as a mere covenant not to sue the principal (*s*)

It is also a well-known principle of law that, where a creditor gives time to the principal debtor (*t*), there being a surety to secure payment of the debt, and does so without consent of or communication with the surety, he discharges the surety from liability, as he thereby places him in *a new situation* (*u*), and exposes him to a risk to which he would not otherwise be liable (*x*), and this seems to afford a further illustration of the

(*q*) *R* v *Birmingham*, 5 Q B 210 See *R* v *Combs* 5 E & B 892 *Salford Guardians* v *Manchester Overseers* 10 Q B D 172 at p 175

(*r*) *Nicholson* v *Revill*, 4 A & E 675 at p 683 Co Litt 232 a, *Price* v *Barker*, 4 E & B 760, at p 777, *Clayton* v *Kynaston*, 2 Salk 573, 2 Roll Abr 410 (D) 1, 412 (G) 4

(*s*) *Kearsley* v *Cole*, 16 M & W 128 *Thompson* v *Lack* 3 C B 540, *Price* v *Barker*, 4 E & B 760, at p 779 *Owen* v *Homan* 4 H L Cas 997, at p 1037 See *Com Bank of Tasm* v *Jones* [1893] A C 313

(*t*) The general rule of law where a person is surety for the debt of another is this—that though the creditor may be entitled after a certain period, to make a demand and enforce payment of the debt he is not bound to do so and provided he does not preclude himself from proceeding against the principal he may abstain from enforcing any right which he possesses If the creditor has voluntarily placed himself in such a position that he cannot sue the principal, he thereby discharges the surety But mere delay on the part of the creditor unaccompanied by any valid contract with the principal will not discharge the surety (*per* Pollock, C B, in *Price* v *Kirkham*, 3 H & C 437 at p 441)

(*u*) See *Harrison* v *Seymour*, L R 1 C P 518 *Un Bank of Manchester* v *Beech*, 3 H & C 672, *Skillett* v *Fletcher*, L R 2 C P 469, and cases there cited

(*x*) *Per* Ld Lyndhurst in *Oakeley* v *Pasheller* 4 Cl & F 207, at p 233 See further as to the rule above stated *per* Ld Brougham in *Mactaggart* v *Watson*, 3 Cl & F 525, at p 541, *per* Ld Eldon in *Samuell* v *Howorth*, 3 Mer 272, at p 278 (adopted by Ld Cottenham in *Creighton* v *Rankin*, 7 Cl & F 325, at p 346), *Manley* v *Boycot*, 2 E & B 46, *Pooley* v *Harradine*, 7 Id 431, *Lawrence* v *Walmsley*, 12 C B N S 799, at p 808 See also *Bonar* v *Macdonald*, 3 H L Cas 226, *Gen S Nav Co* v *Rolt*, 6 C B N S 550, *Way* v *Hearn*, 11 Id 774, and 13 Id 292, *Frazer* v *Jordan*, 8 E & B 303, *Taylor* v *Burgess*,

remark already offered, that a renunciation of a right cannot in general (*y*) be made to the injury of a third party

Where, however, a husband, whose wife was entitled to a fund in Court, signed a memorandum after marriage, agreeing to secure half her property on herself, it was held that it was competent for the wife to waive this agreement, while executory, and that any benefit which her children might have taken under it, had it been executed, was defeated by her waiver (*z*)

Lastly, it is clear that the maxim, *quilibet potest renunciare jure pro se introducto*, is inapplicable where an express statutory direction enjoins compliance with the forms which it prescribes for instance, a testator cannot dispense with the observance of formalities essential to the validity of a will, for the provisions of the Wills Act were introduced for the benefit of the public, not of the individual, and must be regarded as positive ordinances of the legislature, binding upon all (*a*) Nor can an individual waive a matter in which the public have an interest (*b*), or a public body, entrusted with powers to be exercised for the benefit of the public, waive their right to exercise any of those powers (*c*), and the maxim seems also inapplicable where a defendant enters into an agreement by which he is to be deprived of that right to protection to which by law he is absolutely entitled (*d*)

Provision positive laws

QUI SENTIT COMMODUM SENTIRE DEBET ET ONUS (2 *Inst* 489, 1 *Rep* 99 *a*) *He who derives the advantage ought to sustain the burthen*

This rule (*e*) applies as well where an implied covenant runs with the land, as where the present owner or occupier of land is bound by the express covenant of a prior occupant, whenever, indeed, the ancient maxim, *transit terra cum onere*, holds

Covenant running with the land

5 H & N 1, *Bailey* v *Edwards* 4 B & S 761 *Rouse* v *Bradford Bank* [1894] A C 586

(*y*) See *Langley* v *Headland*, 19 C B N S 42

(*z*) *Fenner* v *Taylor*, 2 Russ & My 190

(*a*) See *per* Wilson, J, in *Habergham* v *Vincent*, 2 Ves Jun 204 at p 227 (cited in *Zichy Ferraris* v *Hertford* 3 Curt 468 at pp 493 498)

(*b*) *Per* Alderson, B, in *Graham* v *Ingleby*, 1 Exch 651, at p 657

(*c*) *Lyr Harb Trustees* v *Oswald*, 8 App Cas 623, *Spurling* v *Bantoft*, [1891] 2 Q B 384, see also *Tabbicom* v *King*, [1899] 1 Q B 444

(*d*) *Lee* v *Read*, 5 Beav 381

(*e*) In exemplification whereof see *Hayward* v *Duff*, 12 C B N S 364

true (*f*) The burthen of repairs has, we may observe, always been thrown as much as possible, by the spirit of the common law, upon the occupier or tenant, not only in accordance with the principle contained in the above maxim, but also because it would be contrary to justice, that the expense of accumulated dilapidation should, at the end of a tenancy, fall upon the landlord, when a small outlay of money by the tenant in the first instance would have prevented any necessity for such expense, to which we may add that, generally, the tenant alone has the opportunity of observing, from time to time, when repairs become necessary In a leading case on this subject, the facts were that a man demised a house by indenture for years, and the lessee, for himself and his executors, covenanted with the lessor to repair the house at all times necessary, the lessee afterwards assigned it to another party, who suffered it to decay, it was adjudged that covenant lay at suit of the lessor against the assignee, although the lessee had not covenanted for him and his assigns, for the covenant to repair, which extends to the support of the thing demised, is *quodammodo* appurtenant to it, and goes with it, and, inasmuch as the lessee had taken upon himself to bear the charges of the reparations, the yearly rent was the less, which was to the benefit of the assignee, and *qui sentit commodum sentire debet et onus* (*g*)

The following case also serves to illustrate the same principle An action was brought by the devisee in fee of premises against the executor of a devisee for life of the same premises for permissive waste, the devise providing that the tenant for life should keep the premises in repair The Court pronounced judgment in favour of the plaintiff on the ground that, however doubtful might be the liability, in respect of permissive waste (*h*), of a tenant for life, upon whom no express duty to repair was imposed by the instrument creating the estate, yet where such a duty was imposed the liability passed with the enjoyment of the thing thus demised (*i*)

The maxim under consideration affects a person who accepts a bequest of leaseholds For instance, a person who enjoys leasehold property under a will, as legal or equitable tenant for life, is generally bound, as between himself and the testator's

(*f*) Co Litt 231 a See *Moule* v *Garrett*, L R 5 Ex 132, and cases there cited

(*g*) *Dean of Windsor's Case* 5 Rep 24 a

(*h*) See *Re Cartwright*, 41 Ch D 532

(*i*) *Woodhouse* v *Walker*, 5 Q B D 404, *Aspden* v *Seddon*, 1 Ex D 496

estate, to perform all the tenant's obligations under the lease which arise during the course of his life interest (*k*)

Liability *ratione tenuræ*

A liability to repair a public highway may attach to corporations and to individuals by reason of the tenure of lands held by them, and in former days it was common for testators to leave portions of their estate charged with this liability (*l*), and owners of premises fronting a new street may now be called upon to contribute towards making it good under the provisions of the Public Health Act, 1875, s 150 (*m*)

Principal and agent

It has been designated a principle of "universal application" that "where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthen The contract must be performed in its integrity" (*n*) Accordingly, where a person adopts a contract which was made on his behalf, but without his authority, he must adopt it altogether He cannot ratify that part which is beneficial to himself, and reject the remainder, he must take the benefit to be derived from the transaction *cum onere* (*o*) Moreover, where the owner of goods entrusts them to an agent, and authorises him to sell them as his own goods in his own name as principal, and the goods are bought by a buyer in the belief that the agent is the principal, the right of the owner of the goods to recover the price from the buyer is subject to any right of set-off as against the agent which accrued to the buyer while he still believed that the agent was principal (*p*), and it is a rule of general application that a person who allows his agent to appear in the character of principal must take the consequences of the agent being dealt with on the footing that he really is the principal (*q*)

Assignee

Again, it is a very general and comprehensive rule, which falls within the scope of the maxim under consideration, that the assignee of a chose in action takes it subject to all the equities to which it was liable in the hands of the assignor (*r*)

(*k*) *Re Betty*, [1899] 1 Ch 821, *Re Gjers* [1899] 2 Ch 54

(*l*) Glen on Highways, 107 *et seq* (*m*) 38 & 39 Vict c 55

(*n*) *Per* Ld Cranworth in *Bristow* v *Whitmore*, 9 H L Cas 391 at p 401 (where there was a difference of opinion as to the application of the maxim, see *per* Ld Wensleydale, Id 406, at pp 404, 418), cited in *The Feronia*, L R 2 A & E 65, at pp 75, 77, 85—86

(*o*) *Per* Ld Ellenborough in *Hovil* v *Pack* 7 East, 164 at p 166

(*p*) *Semenza* v *Brinsley*, 18 C B N S 467 at p 477, *Cooke* v *Eshelby*, 12 App Cas 271

(*q*) *Montague* v *Forwood*, [1893] 2 Q B 350, at p 356

(*r*) *Brandon* v *Brandon*, 25 L J Ch 896, *Newfound Gov* v *Newfound Ry Co*, 13 App Cas 199, at p 212

If, moreover, a person accepts anything which he knows to be subject to a duty or charge, it may be rational to conclude that he means to take such duty or charge upon himself, and the law may imply a promise to perform what he has so taken upon himself (*s*)

Analogous rule in equity,

In administering equity the maxim, *qui sentit commodum sentire debet et onus*, may properly be said to merge in the yet more comprehensive rule *equality is equity*—upon the consideration of which it is not within the scope of our plan to enter The following instances of the application in equity of the maxim immediately under our notice must suffice The legatee of a house, held by the testator on lease at a reserved rent, higher than it could be let for after his death, cannot reject the gift of the lease and claim an annuity under the will, but must take the benefit *cum onere* (*t*) A testator gives a specific bequest to A , and directs that in consideration of the bequest A shall pay his debts the payment of the debts is, in this case, a condition annexed to the specific bequest, and if A accept the bequest, he is bound to pay the debts, though they exceed the value of the property bequeathed to him (*u*)

and in Scotch law

We may observe also that the Scotch doctrine of "approbate and reprobate" is strictly analogous to that of election in our own law, and may, consequently, be properly referred to the maxim now under consideration The principle on which this doctrine depends is, that a person shall not be allowed at once to benefit by and to repudiate an instrument, but that, if he choose to take the benefit which it confers, he shall likewise discharge the obligation or bear the *onus* which it imposes 'It is equally settled in the law of Scotland as of England, that no person can accept and reject the same instrument If a testator give his estate to A , and give A 's estate to B , Courts of equity hold it to be against conscience that A should take the estate bequeathed to him, and at the same time refuse to give effect to the implied condition contained in the will of the testator The Court will not permit him to take that which cannot be his but by virue of the disposition of the will, and at the same time to keep what, by the same will, is given or intended to be given to another person It is contrary to the

(*s*) See *Lucas* v *Nockells*, 1 Cl & F 438, at p 457, where Bosanquet, J , adopts a passage in Abbott, Shipp , 5th ed , p 286

(*t*) *Talbot* v *Radnor*, 3 My & K 252

(*u*) *Messenger* v *Andrews*, 4 Russ 478, and see *Armstrong* v *Burnett*, 20 Beav 424

established principles of equity that he should enjoy the benefit, while he rejects the condition of the gift" (*x*) Where, therefore, an express condition is annexed to a bequest, the legatee cannot accept and reject, approbate and reprobate the will containing it If the testator, possessing a landed estate of small value, and a large personal estate, bequeath the personal estate to the heir, who was not otherwise entitled to it, upon condition that he shall give the land to another, the heir must either comply with the condition, or forego the benefit intended for him (*y*) We may add that the above rule, as expressed by the maxim *quod approbo non reprobo*, likewise holds where the condition is implied merely, provided there be clear evidence of an intention to make the bequest conditional, and in this case, likewise, the heir will be required to perform the condition or to renounce the benefit (*z*)—*Qui sentit commodum sentire debet et onus*

Election under will

The converse of the above maxim also holds, and is occasionally cited and applied, for instance, inasmuch as the principal is bound by the acts of his authorised agent, so he may take advantage of them (*a*)—*Qui sentit onus sentire debet et commodum*

The converse of this maxim holds

In the case of a ferry, there is a public duty, the ferryman is bound to "give attendance at due times, keep a boat in due order, and take but reasonable toll" (*b*), and if he make default he is fineable on indictment (*c*) But there are compensations, the ferryman has an exclusive right of ferrying across the stream which his ferry crosses within the area to which his franchise extends (*d*) The maxim, *qui sentit onus sentire debet et commodum*, is, in fact, made to apply, but there are reasonable limits to its application, and the ferryman's monopoly does not extend to new traffic which has come into existence since the ferry and is wholly different from that contemplated by the grantor of the franchise for the ferry (*e*)

Grant of ferry, &c

(*x*) *Per* Ld Eldon in *Kerr* v *Wauchope*, 1 Bligh 1, at pp 21 22
(*y*) Shaw on Obligations, s 184 (*z*) Ibid s 187
(*a*) *Seignior* v *Wolmer*, Godb 360, Judgm in *Higgins* v *Senior* 8 M & W 835, at p 844
(*b*) Sir M Hales De Jure Maris as cited in *A G* v *Simpson*, [1901] 2 Ch 671, at p 718
(*c*) Ibid *Paine* v *Patrick* (*al* Partridge), 3 Mod 289 at p 294
(*d*) See *Newton* v *Cubitt*, 12 C B N S 32, *Hopkins* v *G N Ry Co*, 2 Q B D 224, *Dibdin* v *Skirrow*, [1908] 1 Ch 41, *General Estates Co* v *Beaver*, [1913] 2 K B 433
(*e*) *Cowes U D C* v *Southampton, etc*, *Packet Co*, [1905] 2 K B 287, *Hammerton* v *Dysart*, [1916] 1 A C 57

Although, moreover, the maxim *qui sentit commodum sentire debet et onus*, to which we have above mainly adverted, applies to throw the burthen of partnership debts upon the partnership estate (*f*), which is alone liable to them in the first instance, yet the converse of this maxim holds with regard to the partnership creditor (*g*)

IN EQUALI JURE MELIOR EST CONDITIO POSSIDENTIS (*Plowd* 296)—*Where the right is equal, the claim of the party in actual possession shall prevail*

Melior est conditio possidentis

The general rule is, that possession constitutes a sufficient title against every person not having a better title "He that hath possession of lands, though it be by *disseisin*, hath a right against all men but against him that hath right" (*h*), for, "till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is *prima facie* evidence of a legal title in the possessor, so that, speaking generally, the burthen of proof of title is thrown upon any one who claims to oust him this possessory title, moreover, may, by length of time and negligence of him who had the right, by degrees ripen into a perfect and indefeasible title" (*i*)

Ejectment

Hence, it is a familiar rule that, in ejectment, the party controverting my title must recover by his own strength, and not by my weakness (*k*), and "when you will recover anything from me, it is not enough for you to destroy my title, but you must prove your own better than mine, for without a better right, *melior est conditio possidentis*" (*l*) Similarly, mere possession will support trespass *qu cl fr* against any one who

Trespass *qu cl fr*

(*f*) "Perhaps the maxim that he who partakes the advantage ought to bear the loss is only the consequence not the cause why a man is made liable as a partner" (*per* Blackburn, J, in *Bullen* v *Sharp*, L R 1 C P 86 at p 111)

(*g*) The maxim *qui sentit onus sentire debet et commodum* is applied also in equity See, for example, *Pitt* v *Pitt*, 1 T & R 180, Francis, Mix 5

(*h*) Doct & Stud 9

(*i*) 2 Blac Com 196

(*k*) *Digby* v *Fitzherbert*, Hobart, 101, at 103, 104, *Case XXXVI*, Jenk Cent 118, *per* Lee, C J, in *Martin* v *Strachan*, 5 T R 101, at 110, n See *Feret* v *Hill* 15 C B 207 (explained by Maule, J, in *Canham* v *Barry*, Id 597 at p 611), *Davison* v *Gent*, 1 H & N 744, at p 750

(*l*) *R* v *Worcester*, Vaugh 53, at 58, 60, *Digby* v *Fitzherbert*, Hob 101, at 103 See *Asher* v *Whitlock*, L R 1 Q B 1

cannot show a better title (*m*), therefore he who commits a trespass upon the possession of another, being himself a wrong-doer, has no right to put the other party to proof of his title (*n*) And to the like effect are the rules of the civil law *non possessori incumbit necessitas probandi possessiones ad se pertinere* (*o*), and *in pari causa possessor potior haberi debet* (*p*)

The same rule as to the effect of possession holds good with regard to chattels For instance, if a person finds a jewel and takes possession of it (*q*), he becomes entitled to keep it as against any person who has no better title, and he can maintain trover for a conversion thereof by a mere wrong-doer (*r*) It must be noticed, however, that the possessor of land is generally entitled, as against the finder, to chattels found on the land, for, as a rule, the possession of land carries with it possession of everything which is upon the land, and, therefore, as against a mere finder, also the right to possess it (*s*) Chattels

It is a rule laid down in the Digest that the condition of the defendant shall be favoured rather than that of the plaintiff, *favorabiliores rei potius quam actores habentur* (*t*), a maxim which admits of very simple illustration in the ancient practice of our own Courts, for, if, on moving in arrest of judgment, it appeared from the whole record that the plaintiff had no cause of action, the Court would never give judgment for him, for *melior est conditio defendentis* (*u*) *Melior est conditio defendentis*

If a loss must fall upon one or other of two innocent parties who are both free from blame, justice being thus *in equilibrio*, the application of the maxim, *melior est conditio possidentis*, frequently turns the scale (*x*) It was, indeed, laid down by Ashhurst, J , "as a broad general principle, that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it" (*y*) But, in the light of later decisions, this Which of two innocent parties must suffer

(*m*) *Every* v *Smith*, 26 L J Ex 344, *Jones* v *Chapman*, 2 Exch 803, and cases there cited

(*n*) Addison on Torts, 8th ed , p 303, citing *Fisher* v *Whitlock*, *supra*

(*o*) C 4 19, 2

(*p*) D 50, 17, 128, § 1

(*q*) As to larceny of lost chattels, see *R* v *Glyde*, L R 1 C C 139

(*r*) *Armory* v *Delamirie*, 1 Stra 504, see 1 Sm L C , 12th ed , p 396

(*s*) *S Staff Water Co* v *Sharman*, [1896] 2 Q B 44, *Elwes* v *Brigg Gas Co* , 33 Ch D 562

(*t*) D 50, 17, 125

(*u*) See *Brickhead* v *York*, Hob 197, at 199

(*x*) *Per* Bayley, J , in *East Ind Co* v *Tritton*, 3 B & C 280, at p 289

(*y*) In *Lickbarrow* v *Mason*, 2 T R 63, at 70

proposition requires modification (*z*) As a rule, A is not liable to make good a loss which has fallen upon B by the act of C, unless the proximate cause of the loss was the breach of a duty owed by A to B (*a*) For example, A innocently accepts a bill of exchange drawn by C for £500, but so drawn as to facilitate the forgery which C subsequently commits by fraudulently altering the bill into a bill for £3,500, after the forgery B becomes the holder of the bill in due course (*b*), he cannot cast any loss he sustains through the forgery upon A, for A owed him no duty, either by law or by contract, to take precautions against the alteration (*c*) 'It is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they have no reason to anticipate although there may be an exception in the case where one of the parties to the instrument has, either by express agreement, or by implication established in the law, become bound to use such precautions" (*d*)

Freedom from blame, however, by no means leads in all cases to the application of the maxim, *melior est conditio possidentis* For instance, money which has been paid and received without fault on either side is frequently recoverable, either as paid under a mistake of fact (*e*), or on the ground of failure of consideration (*f*), or in consequence of the express or implied terms of some contract Thus, in *Cox* v *Prentice* (*g*), the plaintiffs bought from the defendant a bar of silver at an agreed price per ounce, and paid the price of four ounces which an assayer, acting as agent for both parties, calculated that the bar contained, after the delivery of the bar it was discovered that it in fact contained only two ounces, and it was held that the plaintiffs, having first offered to return the bar, were entitled to recover the difference in value between its supposed and its

(*z*) See *per* Ld Coleridge in *Arnold* v *Cheque Bank* 1 C P D 587 at p 588, *per* Ld Field in *Bank of Eng* v *Vagliano Bros*, [1891] A C 107, at p 169

(*a*) *Le Lievre* v *Gould*, [1893] 1 Q B 491

(*b*) See the Bill's of Exchange Act, 1882 (45 & 46 Vict c 61), s 64

(*c*) *Scholfield* v *Londesborough*, [1896] A C 514 see also *Col Bank of Austral* v *Marshall*, [1906] A C 559

(*d*) *Per* Ld Halsbury, [1896] A C at p 537

(*e*) *Shand* v *Grant*, 15 C B N S 324, see *ante*, p 181

(*f*) See *Jones* v *Ryde*, 5 Taunt 488, at p 495, *Devaux* v *Conolly* 8 C B 640

(*g*) 3 M & S 344, and 8 C B 658—659

true weight, as money had and received to their use, for this was a case of mutual innocence and equal error

Rule in equity

In Courts of equity, where two persons, having an equal equity, have been equally innocent and equally diligent, the general rule applicable is, *melior est conditio possidentis* or *defendentis* Such Courts frequently refuse to interfere against a *bona fide* purchaser for valuable consideration of the legal estate who purchased without notice of any adverse equitable title (*h*) provided that the purchaser's legal title is complete (*i*)

Par delictum

Not only *in aquali jure*, but likewise *in pari delicto*, is it true that *potior est conditio possidentis*, where each party is equally in fault, the law favours him who is actually in possession, a well-known rule, which is, in fact, included in that more comprehensive maxim to which the present remarks are appended "If," said Buller, J, "a party come into a court of justice to enforce an illegal contract, two answers may be given to his demand the one, that he must draw justice from a pure fountain, and the other, that *potior est conditio possidentis*" (*k*) Agreeably to this rule, where money is paid by one of two parties to such a contract to the other, in a case where both may be considered as *participes criminis*, an action will not lie after the contract is executed to recover the money If A agree to give B money for doing an illegal act, B cannot recover the money by action, although he has done the act, yet, if the money be paid A cannot recover it back (*l*) So the premium paid on an illegal insurance, to cover a trading with an enemy, cannot be recovered back, though the underwriter cannot be compelled to make good the loss (*m*) In these and similar cases, the party actually in possession has the advantage *cum par delictum est duorum semper oneratur petitor et melior habetur possessoris causa* (*n*)

(*h*) *Thorndike* v *Hunt* 3 De G & J 563 *Taylor* v *Blakelock* 42 Ch D 560

(*i*) *Powell* v *Lond & Prov Bank* [1893] 1 Ch 610, and [1893] 2 Ch 555 See also the maxim, *qui prior est tempore*, &c *ante*, p 284

(*k*) *Munt* v *Stokes*, 4 T R 561, at p 564 see 2 Inst 391

(*l*) *Webb* v *Bishop*, cited 1 Selw N P, 13th ed at p 112 see *Browning* v *Morris*, Cowp 790, *per* Park, J in *Richardson* v *Mellish*, 2 Bing 229, at p 250, *Taylor* v *Chester*, L R 4 Q B 309 *Harse* v *Pearl Ins Co*, [1904] 1 K B 558, *Farmers Mart* v *Milne*, [1915] A C 106

(*m*) *Vandyck* v *Hewitt*, 1 East, 96, *Lowry* v *Bourdieu*, Dougl 468, *Andree* v *Fletcher*, 3 T R 266, *Lubbock* v *Potts*, 7 East, 449, *Palyart* v *Leckie*, 6 M & S 290, *Cowie* v *Barber*, 4 M & S 16 See *Edgar* v *Fowler* 3 East, 222, *Thistlewood* v *Cracroft*, 1 M & S 500

(*n*) D 50, 17, 154

In pari delicto potior est conditio possidentis

"The maxim, *in pari delicto potior est conditio possidentis*, is as thoroughly settled as any proposition of law can be It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money, or handed over property, in pursuance of an illegal or immoral contract, to recover it back 'for (*o*) the Courts will not assist an illegal transaction in any respect'" (*p*) The maxim is, therefore, intimately connected with the more comprehensive rule of our law, *ex turpi causa non oritur actio* (*q*), on account of which no Court will allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal' (*r*) and the maxim may be said to be a branch of that comprehensive rule for the well-established test, for determining whether money or property which has been parted with in connection with an illegal transaction can be recovered in a Court of justice, is to ascertain whether the plaintiff, in support of his case, or as part of his cause of action, necessarily relies upon the illegal transaction if he "requires aid from the illegal transaction to establish his case," the Court will not entertain his claim (*s*)

In connection with this test it must be observed that, until the contrary be shown, there is a presumption that when money is paid it is paid in discharge of an antecedent debt or liability upon the plaintiff who claims the repayment of money lies the onus of proving circumstances rendering the defendant liable to repay it (*t*) The application of the test led to the defeat of an action to recover the half of a bank-note, pledged to secure payment of a debt which was contracted for an illegal consideration, and of which debt no payment or tender had been made (*u*)

Locus pœnitentiæ while contract executory

In *Taylor* v *Bowers* (*x*), the rule laid down, and acted upon, was that 'where money has been paid or goods delivered, under

(*o*) *Per* Ld Ellenborough in *Edgar* v *Fowler* 3 East 222

(*p*) Judgm in *Taylor* v *Chester* L R 4 Q B 309 at p 313 See *Collins* *Blantern* 2 Wils K B 341 and *Holman* v *Johnson* Cowp 341, at 343

(*q*) *Post* p 472

(*r*) *Per* Lindley L J, in *Scott* v *Brown* [1892] 2 Q B 724, at p 728

(*s*) *Simpson* v *Bloss* 7 Taunt 246 and *Fivaz* v *Nicholls* 2 C B 501 (both approved in *Farmers Mart* v *Milne* [1915] A C 106, at p 113) See also *Scott* v *Brown* [1892] 2 Q B 724

(*t*) *Welch* v *Seaborn* 1 Stuk 474, *Aubert* v *Walsh*, 4 Taunt 293 *Ex p Cooper*, W N, 1882, p 96

(*u*) *Taylor* v *Chester*, L R 4 Q B 309

(*x*) 1 Q B D 291 see also *Symes* v *Hughes* L R 9 Eq 475

an unlawful agreement, but there has been no further performance of it, the party paying the money, or delivering the goods, may repudiate the transaction, and recover back his money or goods' (*y*) and it was said that such action "is not founded upon the illegal agreement, nor brought to enforce it but, on the contrary, the plaintiff has repudiated the agreement and his action is founded on that repudiation" (*y*) This doctrine was followed in a later case (*z*), in which a lady gave money to a marriage broker under an illegal contract by which part of the money was to be returned if he did not procure her an engagement of marriage within nine months She repudiated the agreement within the period and recovered the whole of the money paid In *Kearley* v *Thomson* (*a*), however some doubt was expressed by the Court as to whether the above rule was sound, and it was held that where money has been paid under an illegal agreement a *partial* carrying into effect of the illegal purpose for which it was paid is sufficient to prevent the recovery of the money *d fortiori*, the money cannot be recovered if the illegal purpose has been fully completed (*b*) It is to be observed that in *Tappenden* v *Randall* (*c*), where the doctrine was applied, that there was a *locus pœnitentiæ*, enabling a person to recover money paid under an illegal contract so long as the contract remained executory, it was suggested (*d*) that such doctrine would not apply to a contract 'of a nature too grossly immoral for the Court to enter into any discussion of it as where one man has paid money by way of hire to another to murder a third person'

The general rule undoubtedly is that 'whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again" (*e*), and this rule so far as it affects a party to an unlawful contract, necessarily affects also all such assignees or representatives of that party as stand in no better position than the party himself (*f*) A Assignees

(*y*) *Per* Cockburn, C J 1 Q B D 295, see also *per* Mellish I J Id 300, and *per* Bayley and Littledale, JJ, in *Hastelow* v *Jackson*, 8 B & C 221, at pp 224 226

(*z*) *Herman* v *Charlesworth*, [1905] 2 K B 123

(*a*) 24 Q B D 742

(*b*) *Herman* v *Jeuchner*, 15 Q B D 561

(*c*) 2 B & P 467

(*d*) By Heath, J

(*e*) *Per* Wilmot, C J, in *Collins* v *Blantern*, 2 Wils 341

(*f*) See *Belcher* v *Sambourne* 6 Q B 414, *Re Mapleback*, 4 Ch D 150

Trustee in bankruptcy

trustee in bankruptcy, however, can sometimes recover money paid by the bankrupt under an illegal contract, and not recoverable by the bankrupt himself, on the ground that he claims the money, not through the bankrupt, but by force of his own title thereto under the bankruptcy law (*g*)

Impar delictum

In certain circumstances parties to an illegal transaction ought not to be regarded as *in pari delicto* 'Where contracts or transactions are prohibited by positive statutes for the sake of protecting one set of men from another set of men, the one from their situation and condition being liable to be oppressed or imposed upon by the other there the parties are not *in pari delicto*, and in furtherance of these statutes the person injured, after the transaction is finished and completed, may bring his action and defeat the contract' (*h*) And it may be said generally that the doctrine of *par delictum* is inapplicable "in cases of oppressor and oppressed For this reason a debtor was allowed to recover money which he had secretly paid to one of his creditors in order to induce him to agree to a composition (*i*), both parties were *in delicto*, because the act was a fraud upon the other creditors but it was held not to be *par delictum*, because the one had power to dictate, the other no alternative but to submit

It appears that equity will give relief to a person who has been party to an illegal transaction, and paid money or given securities under it, if he has acted under pressure or undue influence (*k*), and it has been laid down generally that where the parties to an illegal contract are not *in pari delicto*, and where public policy may be considered as advanced by allowing the more excusable of the two to sue for relief against the transaction, relief may be given to him in equity (*l*)

One party innocent

In an action for money had and received to the use of the

(*g*) *Re Campbell* 14 Q B D 32, where *Re Mapleback supra*, was distinguished See also *Doe* d *Williams* v *Lloyd* 5 Bing N C 741 *Clarke* v *Shee*, 1 Cowp 197

(*h*) *Per* Ld Mansfield in *Browning* v *Morris* 2 Cowp 790, see also *per* Fry, L J in *Kearley* v *Thompson*, 24 Q B D 742 The provisions of a statute sometimes enable the one party to an illegal contract to sue the other although both contracted with knowledge that the contract was illegal (see *Lewis* v *Knight*, 4 E & B 917, *Barclay* v *Pearson*, [1893] 2 Ch 154, *Bonnard* v *Dott*, [1906] 1 Ch 740)

(*i*) *Atkinson* v *Denby*, 7 H & N 934, and 6 Id 778, and cases there cited

(*k*) *Osbaldiston* v *Simpson*, 13 Sim 513, *Williams* v *Bayley*, L R 1 H L 200, *Jones* v *Merionethshire Soc*, [1892] 1 Ch 173, at p 183

(*l*) See *per* Knight Bruce L J, in *Reynell* v *Sprye* 1 D M & G 660, at p 679

two plaintiffs (*m*), the defendant relied on a receipt for the money, signed by one of them It was held that the receipt did not estop the plaintiffs from proving, as they did, that the money had not been paid (*n*), and upon proof that the receipt was a fraudulent transaction, between the defendant and the plaintiff who signed it, to which his co-plaintiff was not privy, it was also held that neither the maxim, *in pari delicto potior est conditio possidentis*, nor the maxim, *nemo allegans turpitudinem suam est audiendus* (*o*), was applicable to defeat the action One of the plaintiffs was not *in delicto*, and as against him the defendant could not rely upon his own fraud

Agents

Thus far we have considered the effect of *pari delictum* as between the immediate parties to the illegal transaction, or persons who claim under them we must add that, where money payable under an illegal contract, is paid by one party thereto to a third person, who receives it as agent for the other party, the maxim under consideration does not generally apply to prevent such other party from recovering the money from his agent, as money had and received to the plaintiff's use (*p*) The obligation of an agent, who has received money to the use of his principal, to pay it over to him, rests upon the agent's own promise which the law implies from his so receiving the money, and, since the principal bases his claim to the money upon that promise, and not upon the original contract in respect of which the money was paid to the agent, it is generally immaterial whether such original contract was legal or illegal (*q*) A principal, however, cannot recover money received for him by his agent, if such receipt itself was illegal and part of an illegal transaction in which both principal and agent were concerned (*r*) The law will not lend its assistance to adjust the profits of a partnership formed for the purpose of deriving profit from an illegal adventure, or to settle the mutual claims

(*m*) *Shaife* v *Jackson*, 3 B & C 421, *Farrar* v *Hutchinson*, 9 A & E 641, see *per* Parke B, in *Wallace* v *Jackson*, 7 M & W 273

(*n*) See *Bowes* v *Foster*, 2 H & N 779, *Lee* v *L & Y Ry Co*, L R 6 Ch 527 Cf *Bickerton* v *Walker*, 31 Ch D 151, *Lloyd's Bank* v *Bullock* [1896] 2 Ch 192

(*o*) 4 Inst 279

(*p*) *Tennant* v *Elliott*, 1 B & P 3, *Farmer* v *Russell* Id 296, *Bousfield* *Wilson*, 16 M & W 185

(*q*) See 1 B & P at pp 298 299 Cf *Bridger* v *Savage*, 15 Q B D 363

(*r*) *Nicholson* v *Gooch*, 5 E & B 999, at p 1016

of the parties engaged in it (*s*) The maxim, *ex pacto illicito non oritur actio*, clearly applies (*t*)

Stakeholders

Again, where a principal pays money to his own agent, authorising him to apply it to a particular purpose, it is generally open to the principal, so long as the money remains in the agent's hands unapplied, to revoke the authority and demand the money back, and the agent cannot resist this demand by saying that the purpose to which he was originally authorised to apply the money was illegal (*u*) And, similarly, if a party to an illegal wager pays money thereunder, not to the other party, but to a stakeholder, the stakeholder, so long as the money remains in his hands, is bound to return the money to that party if he demand it back before it has been paid to the winner or the winner's agent he is liable to the loser if he pay the loser's money to the winner after notice from the loser not to do so (*x*), though it is otherwise, if he pay it to the winner without any such notice from the loser (*y*) This rule, that the authority of the stakeholder to pay the money may be revoked before it has been acted upon, tends to prevent the illegal contract from being executed

Contribution between joint tort feasors

To the maxim respecting *par delictum* may be referred the rule that one of two joint wrong-doers cannot enforce against the other any claim for contribution or indemnity, although the former has borne, or is about to bear, the entire burden of making compensation for the joint wrong (*z*) This rule, however does not apply in the case of contribution in general average (*a*), and, moreover, is limited to cases in which the wrong-doer who seeks such redress knew, or must be presumed

(*s*) Judgm in *M'Callan* v *Mortimer* 9 M & W 636 at pp 642 643 see *Everet* v *Williams* (the Case of the Two Highwaymen) cited in *Burrows* v *Rhodes*, [1899] 1 Q B 816, at p 826 and cf *Thwaites* v *Coulthwaite* [1896] 1 Ch 496

(*t*) See *Stewart* v *Gibson* 7 Cl & F 707 at p 728

(*u*) *Taylor* v *Lendey* 9 East, 49, *Bone* v *Eckless* 5 H & N 925

(*x*) *Cotton* v *Thurland*, 5 T R 405 *Smith* v *Bickmore* 4 Taunt 474 *Hastelow* v *Jackson* 8 B & C 221, *Barclay* v *Pearson*, [1893] 2 Ch 154, at p 168 See also *Strachan* v *Univers Stock Exch* [1895] 2 Q B 329 (affirmed [1896] A C 167), at p 344 and *Burge* v *Ashley*, [1900] 1 Q B 744, 747 (cases where the contract was void under the Gaming Act 1845 (8 & 9 Vict c 109) but not illegal)

(*y*) *Howson* v *Hancock*, 8 T R 575 *Gatty* v *Field*, 9 Q B 431 440, see also *Strachan* v *Univers Stock Exch* (No 2), [1895] 2 Q B 697, at p 705

(*z*) *Merryweather* v *Nixan*, 8 T R 186, see *The Englishman*, [1894] P 239, and [1895] P 212 (distinguished in *The Morgengry* [1900] P 1

(*a*) *Austin Friars S S Co* v *Spillers & Bakers* [1915] 3 K B 586

to have known, that he was doing an unlawful act (*b*) A person, who has been employed or requested to do an act, which in itself was not necessarily or apparently illegal, and which he has done honestly and *bona fide* in compliance with his employer's instructions or request, is therefore generally entitled to be indemnified by his employer against the consequences of such act proving to be an injury to third persons (*c*), but only where he has acted without negligence, and where the injury is the natural and direct consequence of the act, and not a consequence arising merely from the particular manner in which the act is done (*d*), and the rule does not affect an action of deceit, brought by a person who has been induced by a fraudulent misrepresentation to do acts which were in fact illegal, or even criminal, but which, in consequence of such representation, he did in the belief that they were neither illegal nor immoral acts (*e*) Again one of two partners who has discharged a liability of the firm, incurred through the wrongful acts of his co-partner to which he himself was not privy (*f*), or through negligent acts done, not by himself, but by a servant of the firm (*g*), can generally claim indemnity or contribution from his co-partner Moreover, it is well established that, where money has been paid by a trustee in breach of trust to persons who took it knowing the payment to be a breach of trust, they and the trustee are not joint tort-feasors within the above rule (*h*)

Innocent agent

Innocent partner

Innocent trustee

Ex Dolo malo non oritur Actio (*Per* Lord Mansfield in *Holman* v *Johnson*, Cowp 341, at p 343)—*A right of action cannot arise out of fraud*

It was thought convenient to place this maxim in immediate proximity to that which precedes it, because these two important

Connection between this and the preceding maxim

(*b*) *Adamson* v *Jarvis* 4 Bing 66, at p 73 see *per* Ld Herschell in *Palmer* v *Wick, &c Co* [1894] A C 318, at p 324

(*c*) *Betts* v *Gibbins*, 2 A & E 57 see *Shackell* v *Rosier*, 2 Bing N C 634, at p 637 *Toplis* v *Grane* 5 Bing N C 636, at p 650, *Dugdale* v *Lovering*, L R 10 C P 196 *Groves* v *Webb* 114 L T 1082

(*d*) *Per* Lindley L J in *Cory* v *Lambton, etc Collieries*, 115 L T 738, at p 740

(*e*) *Burrows* v *Rhodes*, [1899] 1 Q B 816 (as to which see *Leslie* v *Reliable, etc Agency*, [1915] 1 K B 652, at pp 658—660) *Dixon* v *Faucus* 30 L J Q B 137

(*f*) *Campbell* v *Campbell* 7 Cl & F 166, at p 181

(*g*) *Pearson* v *Skelton*, 1 M & W 504

(*h*) *Moxham* v *Grant*, [1900] 1 Q B 88, at p 93

rules of law are intimately related to each other, and the cases which have already been cited in illustration of the rule as to *par delictum* may be referred to generally as establishing the position, that an action cannot be maintained which is founded in fraud, or which springs *ex turpi causa* The connection which exists between these maxims may, indeed, be satisfactorily shown by reference to a case already cited In *Fivaz* v *Nicholls* (*i*), an action was brought to recover damages for an alleged conspiracy between B , the defendant, and a third party, C , to obtain payment of a bill of exchange accepted by the plaintiff in consideration that B would abstain from prosecuting C for embezzlement, and it was held that the action would not lie, inasmuch as it sprang out of an illegal transaction, in which both plaintiff and defendant had been engaged, and of which proof was essential in order to establish the plaintiff's claim as stated upon the record In this case, therefore, the maxim, *ex dolo malo non oritur actio*, was evidently applicable and not less so, with regard both to the original corrupt agreement and to the subsequent alleged conspiracy, was the general principle of law, *in pari delicto potior est conditio defendentis* (*k*) To the class of cases also which establish that contribution cannot be enforced amongst wrong-doers (*l*), and that a person, who has knowingly committed an act declared by the law to be criminal, will not be permitted to recover compensation from others who participated with him in the commission of the crime (*m*), a similar remark seems equally to apply Bearing in mind, then, this connection between the two kindred maxims, we shall proceed to consider briefly the very comprehensive principle, *ex dolo malo*, or, more generally, *ex turpi causa, non oritur actio*

Dolus in the Roman law

In the first place, then, we may observe that the word *dolus*, when used in its more comprehensive sense, was understood by the Roman jurists to include "every intentional misrepresentation of the truth made to induce another to perform an act which he would not else have undertaken" (*n*), and a marked distinction accordingly existed in the civil law between *dolus bonus* and *dolus malus* the former signifying that degree of

(*i*) 2 C B 501 at pp 512 515 See *ante* p 466
(*k*) See also *Stevens* v *Gourley* 7 C B N S 99 at p 108
(*l*) See *ante* p 470
(*m*) *Per* Ld Lyndhurst in *Colburn* v *Patmore*, 1 Cr M & R 73, at p 83, *per* Maule, J , in *Fivaz* v *Nicholls* 2 C B 501 at p 509
(*n*) Mackeld Civ Law, 165

artifice or dexterity which a person might lawfully employ to advance his own interest, in self-defence against an enemy or for some other justifiable purpose (*o*), and the latter including every kind of craft, guile, or machination, intentionally employed for the purpose of deception, cheating, or circumvention (*p*) As to the latter species of *dolus* (with which alone we are now concerned), it was a fundamental rule, to be observed by everyone in a judicial position, that *dolo malo pactum se non servaturum* (*q*), and, in our own law, it is a familiar principle that an action brought upon a supposed contract which is shown to have arisen from fraud, may be successfully resisted (*r*) Rule in our law

It is, moreover, a general proposition that an agreement to do an unlawful act cannot be supported at law (*s*)—that no right of action can spring out of an illegal contract (*t*), and this rule, which applies not only where the contract is especially illegal, but whenever it is opposed to public policy (*t*) or founded on an immoral consideration (*u*), is expressed by the well-known maxim, *ex turpi causa non oritur actio*, and is in accordance with the doctrine of the civil law, *pacta quæ turpem causam continent non sunt observanda* (*x*), that is to say, wherever the consideration, which is the ground of the promise, or the promise which is the consequence or effect of the consideration, is unlawful, the whole contract is void A Court of law will not, then, lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties

(*o*) Mackeld Civ Law 169 Bell Dict and Dig of Scots Law 319 D 4 3, 3, Brisson *ad verb Dolus* Tayl Civ Law 4th ed 118

(*p*) D 4 3 1 § 2, Id 50 17 79 Id 2 14 7 § 9

(*q*) D 2 14, 7, § 9

(*r*) *Per* Patteson, J, in *Campbell* v *Fleming* 1 A & E 40 at p 42 *per* Holroyd J in *Batson* v *Donovan* 4 B & Ald 21, at p 94 *per* Ld Mansfield in *Gibbon* v *Paynton* 4 Burr 2298, at p 2300, *Evans* v *Edmonds* 13 C B 777, *Canham* v *Barry* 15 C B 597 (with which cf *Feret* v *Hill*, Id 207) *Reynell* v *Sprye*, 1 De G M & G 660, *Curson* v *Belworthy* 3 H L C 742 The effect of fraud upon a contract, and the right to rescind a contract on the ground of fraud are discussed under the maxim *caveat emptor* post

(*s*) *Per* Ld Abinger in *Lewis* v *Davison*, 4 M & W 654, at p 657

(*t*) *Per* Ashhurst, J, in *Blachford* v *Preston*, 8 T R 89 at 93 See *Jones* v *Waite*, 5 Scott N R 951, 5 Bing N C 341, and 1 Id 656 *Ritchie* v *Smith*, 6 C B 462, *Cundell* v *Dawson*, 4 Id 376, *Sargent* v *Wedlake* 11 Id 732

(*u*) *Allen* v *Rescous*, 2 Lev 174 *Walker* v *Perkins* 3 Burr 1568, *Wetherell* v *Jones* 3 B & Ad 221, at pp 225, 226, *Egerton* v *Brownlow* 4 H L Cas 1 (distinguished in *Caithness* v *Sinclair*, [1912] S C 79, and in *Re Wallace* [1920] 2 Ch 274)

(*x*) D 2, 14, 27, § 4, I 3, 20, 24

for the express purpose of carrying into effect that which is prohibited by the law of the land, and this objection to the validity of a contract must, from authority and reason, be allowed in all cases to prevail No legal distinction can be supported between the application of this objection to parol contracts and to contracts under seal, for 'it would be inconsistent with reason and principle to hold, that, by the mere ceremony of putting a seal to an instrument, that is, by the voluntary act of the parties themselves, a contract, which was void in itself, on the ground of its being in violation of the law of the land, should be deemed valid, and an action maintainable thereon, in a Court of justice (*y*)

Collins v Blantern

In *Collins v Blantern* (*z*), which is a leading case to show that illegality may well be pleaded as a defence to an action on a bond, it was alleged that the bond had been given to the obligee as an indemnity for a note entered into by him for the purpose of inducing the prosecutor of an indictment for perjury to withhold his evidence For the plaintiff, it was contended that the bond was good and lawful, the condition being simply for the payment of a sum of money, and that no averment should be admitted that the bond was given upon an unlawful consideration not appearing upon the face of it, but it was held that the bond was void *ab initio*, and that the facts might be specially pleaded, and it was observed by Wilmot, C J delivering the judgment of the Court, that the manner of the transaction was to gild over and conceal the truth, and whenever Courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish and show the transactions in their true light" And again, "this is a contract to tempt a man to transgress the law, to do that which is injurious to the community it is void by the common law, and the reason why the common law says such contracts are void is for the public good *you shall not stipulate for iniquity* All writers upon our law agree in this—no polluted hand shall touch the pure fountains of justice" (*a*)

Interference with course of justice

It is obviously detrimental to the interests of the public that the course of justice should be perverted, and upon that

(*y*) *Per* Tindal C J in *Gas Light Co v Turner*, 5 Bing N C 666 at p 675

(*z*) 2 Wils 341 see 1 Sm L C 12th ed, p 412

(*a*) See, also, *Prole v Wiggins*, 3 Bing N C 230, *Parton v Popham* 9 East 408, *Pole v Harrobin* Id 416, n, *Gas Light Co v Turner*, 5 Bing N C 666, and 6 Id 324, *Cuthbert v Haley*, 8 T R 390

ground, and in accordance with the decision in *Collins* v *Blantern*, it has been frequently ruled that agreements to compromise pending criminal prosecutions are illegal and void (*b*), and such an agreement cannot be enforced, even though it was entered into with the sanction of the judge at the trial of the proceedings to which it related (*c*) There is authority for saying that a compromise is permissible in the case of a misdemeanor, such as a common assault, which might have been made the subject of a civil action, and which is not regarded for this purpose as an offence of a public nature (*d*) but this exception to the general rule clearly does not extend to the offence of obstructing a highway, for that is a matter which concerns the public (*e*) Similarly agreements, whether express or implied, that no prosecution shall be instituted for a supposed crime are illegal, and no action can be maintained thereon (*f*), though it appears that a mere threat of a prosecution, made by a creditor to his debtor, does not invalidate a security for payment of the debt which the debtor subsequently gives to the creditor, and which the creditor, though induced thereby not to prosecute, yet takes without entering into any agreement whatever that he will not prosecute (*g*) Other agreements which are illegal, because they tend to interfere improperly with the course of justice, are agreements to pay money for the withdrawal of a petition to set aside a public election on the ground of bribery (*h*), or of a motion to strike a solicitor off the rolls for professional misconduct (*i*), or of opposition to a bankrupt's application for his discharge (*k*) and also agreements, made with a surety for the appearance or good conduct of a defendant to criminal proceedings, to

(*b*) See *Ex p Critchley*, 3 D & L 527, *Re Campbell*, 14 Q B D 32 *Lound* v *Grimwade* 39 Ch D 605

(*c*) *Keir* v *Leeman*, 6 Q B 308, 9 Id 371, *Windhill L Bd* v *Vint* 45 Ch D 351 See *R* v *Blakemore*, 14 Q B 544, *R* v *Hardey* Id 529 *R* v *Alleyne*, 4 E & B 186

(*d*) *Keir* v *Leeman*, *supra* *Fisher* v *Apollinaris Co* L R 10 Ch 297

(*e*) *Windhill L Bd* v *Vint*, *supra*

(*f*) *Ward* v *Lloyd*, 6 M & Gr 785, *Clubb* v *Hutson*, 18 C B N S 414 *Williams* v *Bayley*, L R 1 H L 200 *Re Mapleback* 4 Ch D 150 *Flower* v *Sadler*, 10 Q B D 572 *Jones* v *Merionethshire Soc* [1892] 1 Ch 173

(*g*) *Ward* v *Lloyd*, and *Flower* v *Sadler* *supra*

(*h*) *Coppock* v *Bower*, 4 M & W 361

(*i*) *Kirwan* v *Goodman* 9 Dowl 330

(*k*) *Kearley* v *Thomson*, 24 Q B D 742

indemnify the surety against his liabilities as such (*l*) None of these agreements will be enforced by the Courts (*m*)

Contract, when invalid

As a general rule, then, a contract cannot be made the subject of an action if it be impeachable on the ground of dishonesty, or as being opposed to public policy if it be either *contra bonos mores*, or forbidden by the law (*n*) In answer to an action founded on such an agreement, the maxim may be urged, *ex maleficio non oritur contractus* (*o*) - a contract cannot arise out of an act radically vicious and illegal "those who come into a court of justice to seek redress must come with clean hands, and must disclose a transaction warranted by law" (*p*), and "it is quite clear, that a court of justice can give no assistance to the enforcement of contracts which the law of the land has interdicted" (*q*)

It does not fall within the plan of this work to enumerate much less to consider at length, all the different grounds on which a contract may be invalidated for illegality (*r*) We shall merely cite some few cases in illustration of the above remarks In strict accordance with them, it has been held that no action could be maintained on a bond given to a person

Examples of rule Bond for unlawful purpose

(*l*) *Herman* v *Jeuchner* 15 Q B D 561 *Consol E & F Co* v *Musgrave* [1900] 1 Ch 37

(*m*) As to the compromise of divorce suits see *Gipps* v *Hume* 31 L J Ch 37, and *Brown* v *Brine* 1 Ex D 5 and compare *Upton* v *Henderson* 106 L T 839

(*n*) *Per* Ld Kenyon in *Kirkman* v *Shawcross*, 6 T R 14 at p 16 *Stevens* v *Gourley*, 7 C B N S 99 *Cunard* v *Hyde* 2 E & E 1 See *per* Holroyd, J, in *Doe d Wellard* v *Hawthorn* 2 B & Ald 96, at p 103, *per* Martin B in *Horton* v *Westminster Impr Commrs* 7 Exch 780, at p 791

As to contracts void on the ground of maintenance or champerty see *Earle* v *Hopwood* 9 C B N S 566 *Simpson* v *Lamb* 7 E & B 84 *Sprye* v *Porter* Id 58 *Grell* v *Levy*, 16 C B N S 73 *Anderson* v *Radcliffe*, E B & E 806, *Alabaster* v *Harness*, [1895] 1 Q B 339 *Rees* v *De Bernardy* [1896] 2 Ch 437

(*o*) Judgm in *Shove* v *Webb* 1 T R 734 *Parsons* v *Thompson* 1 Black, H, 322 See *Nicholson* v *Gooch*, 5 E & B 999 1015 which forcibly illustrates the maxim

(*p*) *Per* Ld Kenyon in *Petrie* v *Hannay*, 3 T R 418 at 422

(*q*) *Per* Ld Eldon in *Ex parte Dyster*, 2 Rose 349, at p 351

(*r*) The following cases, however, may be referred to upon this subject, in addition to those already cited *Simpson* v *Ld Howden*, 9 Cl & F 61 (cited by Ld Campbell in *Hall* v *Dyson* 17 Q B 785 (as to which, see *Hills* v *Mitson*, 8 Exch 751, at p 791), and by Ld St Leonards in *Hawkes* v *E Cos Ry Co*, 1 De G M & G 737, at p 753), *Preston* v *Liverpool, &c Ry Co*, 5 H L Cas 605, *Jones* v *Waite* 9 Cl & F 101 *Mittelholzer* v *Fullarton* 6 Q B 989 and 1022, *Santos* v *Illidge*, 8 C B N S 861, and 6 Id 841, *Bousfield* v *Wilson*, 16 M & W 185 In *Attwood* v *Small*, 6 Cl & F 232, the effect of fraud on a contract of sale was much considered, but this case properly falls under the maxim, *caveat emptor* to which therefore, the reader is referred

in consideration of his doing, and inducing others to do something contrary to and prohibited by the valid terms of letters patent, and that the obligee was equally incapable of recovering, whether he knew or did not know the terms of the letters patent—the ignorance, if in fact it existed, resulting from his own fault (*s*) 'The question,' said Lord Tenterden, 'comes to this can a man have the benefit of a bond by the condition of which he undertakes to violate the law?' It seems to me that it would not be according to the principles of the law of England, which is a law of reason and justice, to allow a man to maintain an action under such circumstances, it would be to hold out an encouragement to any man to induce others to become dupes, and to pay their money for that from which they could derive no advantage'

Judgment obtained by collusion

In *scire facias* against the defendant as member of a steam-packet company, the plea stated that the original action was for a demand in respect of which neither defendant in the *scire facias*, nor the packet company, nor the defendant in the original action (the public officer of the company), was by law liable, as the plaintiff at the commencement of the action well knew, and that, such registered officer and the plaintiff well knowing the premises, the said officer fraudulently and deceitfully, and by connivance with plaintiff, suffered the judgment in order to charge the defendant in *scire facias* The Court held the plea to be good, and further observed that fraud *no doubt vitiates everything* (*t*), and that, upon being satisfied of such fraud, they possessed power to vacate, and would vacate, their own judgment (*u*)

Fisher v *Bridges*

To take yet one other illustration of the maxim before us To a declaration in a covenant for the payment of a certain sum of money, the defendant pleaded that, before the making of the covenant, it was unlawfully agreed between the plaintiff and defendant that the plaintiff should sell and the defendant purchase of him a conveyance of land for a term of years, in consideration of a sum of money to be paid by the defendant to the plaintiff, "to the intent and in order and for the purpose

(*s*) *Duvergier* v *Fellowes*, 1 Cl & F 39

(*t*) See, for instance, *Foster* v *Mackinnon*, L R 4 C P 704 711 (explained in *Carlisle, &c Bank* v *Bragg*, [1911] 1 K B 489, at pp 493 497), *Lewis* v *Clay*, 67 L J Q B 224

(*u*) *Philipson* v *Egremont*, 6 Q B 587, at p 605, *Dodgson* v *Scott*, 2 Exch 457 See also *per* Pollock, C B in *Rogers* v *Hadley*, 32 L J Ex 241, at p 248

is the plaintiff at the time of the making the said agreement well knew,' that the land should be sold by lottery, contrary to the statutes in such case made and provided that afterwards in pursuance of the said illegal agreement, the land was assigned for the term and a part of the purchase-money remaining unpaid, the defendant, to secure the payment thereof to the plaintiff, made the covenant in the declaration mentioned Upon these pleadings, the Court of Queen's Bench held that the covenant in question appeared to have been made after the illegal transaction between the parties had terminated, that it formed no part of such transaction, and was consequently unaffected by it The judgment thus given was, however reversed in error upon grounds which seem conclusive The original agreement was clearly tainted with illegality, inasmuch as all lotteries were prohibited by the Lotteries Act, 1698 (*x*) and by the Gaming Act 1738 (*y*), all sales of lands by lottery were declared to be void to all intents and purposes The agreement being illegal then no action could have been brought to recover the purchase money of the land which was the subject-matter thereof, and the covenant accordingly being connected with an illegal agreement, could not be enforced (*z*) And further, even if the defendant's plea were not to be understood as alleging that the covenant was given in pursuance of an illegal agreement, it would, remarked the Court of Exchequer Chamber, still show a good defence to the action, for "the covenant was given for the payment of the purchase-money It springs from and is the creature of that illegal agreement and if the law would not enforce the illegal contract, so neither will it allow parties to enforce a security for purchase-money which by the original bargain was tainted with illegality' (*a*)

Dantis et accipientis turpitudo

It is an indisputable proposition that, as against an innocent party, 'no man shall set up his own iniquity as a defence, any more than as a cause of action' (*b*) Where, however, a contract or deed is made for an illegal purpose, a defendant

(*x*) 10 & 11 Will 3, c 23 (c 17, Ruff)

(*y*) 12 Geo 2, c 28 s 4

(*z*) See *Paxton* v *Popham* 9 East 408 *Gas Light Co* v *Turner* 6 Bing N C 324 and 5 Id 666

(*a*) *Fisher* v *Bridges* 3 E & B 642 (reversing judgment in same case 2 E & B 118) followed in *Geere* v *Mare* 2 H & C 339 See *A G* v *Hollingworth* 2 H & N 416, *O'Connor* v *Bradshaw* 5 Exch 882

(*b*) *Per* Ld Mansfield in *Montefiori* v *Montefiori*, 1 Black, W 363 (cited by Abbott C J in *Doe* d *Roberts* v *Roberts*, 2 B & Ald 367 It is a maxim that *jus ex injuria non oritur* see Arg, in *Bird* v *Holbrook*, 4 Bing 628 at p 639

against whom it is sought to be enforced may show the turpitude of both himself and the plaintiff, and a Court of justice will decline its aid to enforce a contract thus wrongfully entered into For instance, money cannot be recovered which has been paid *ex turpi causa, quum dantis atque et accipientis turpitudo versatur* (*c*) An unlawful agreement, it has been said, can convey no rights in any Court to either party and will not be enforced at law or in equity in favour of one against the other of two persons equally culpable (*d*) A person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is to be used for that purpose is precluded from recovering the price of the thing so supplied Nor can any distinction be made between an illegal and an immoral purpose, the rule which is applicable to the matter is *ex turpi causa non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated it comes equally within the terms of that maxim, and the effect is the same no cause of action can arise out of either the one or the other (*e*)

The principle on which the rule above laid down depends is, as stated by Chief Justice Wilmot, the public good "The objection," said Lord Mansfield (*f*), that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff—by accident, if I may so say The principle of public policy is this *ex dolo malo non oritur actio* No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act If, from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa* or the transgression of a positive law of this country, Principle of rule

(*c*) 1 Pothier Traite de Vente, 186

(*d*) *Per* Ld Brougham in *Armstrong* v *Armstrong* 3 My & K 43 at p 64

(*e*) *Pearce* v *Brooks* L R 1 Ex 213 at p 218 *Couan* v *Milbourn* L R 2 Ex 230

(*f*) *Holman* v *Johnson* Cowp 341 at 343 and *Lightfoot* v *Tenant* 1 B & P 551, at p 554 (both cited in *Hobbs* v *Henning* 17 C B N S 791 at p 819 as showing the distinction between a mere mental purpose that an unlawful act should be done, and a participation in the unlawful transaction itself) *Jackson* v *Duchaire* 3 T R 551, at 553 (cited in *Spencer* v *Handley*, 5 Scott, N R 546, at p 558)

there the Court says he has no right to be assisted It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis* (*q*)

Rule, how qualified

It may here be proper to notice, that, although a Court will not assist in giving effect to a contract which is expressly or by implication forbidden by the statute or common law, or which is "contrary to justice, morality, and sound policy," yet where the consideration and the matter to be performed are both legal, a plaintiff will not be precluded from recovering by an infringement of the law in the performance of something to be done on his part, such infringement not having been contemplated by the contracting parties (*h*)

Penal statute

In determining, moreover, the effect of a penal statute (*i*) upon the validity of a contract entered into by one who has failed in some respects to comply with its provisions, it is necessary to consider whether the object of the statute was merely to inflict a penalty on the offending party for the benefit of the revenue, or whether the legislature intended to prohibit the contract itself for the protection of the public In the former case, an action may lie upon the contract but in the latter case the maxim under consideration will apply, and even if the contract be prohibited for revenue purposes only, it will be altogether illegal and void, and no action will be maintainable upon it (*k*)

(*q*) See also *per* Tindal C J in *Fuaz* v *Nicholls* 2 C B 501, at p 512 *per* Lindley, L J in *Scott* v *Brown* [1892] 2 Q B 724 at p 728

(*h*) *Wetherall* v *Jones* 3 B & Ad 221 at pp 225 226 See *Redmond* v *Smith* 8 Scott N R 250

(*i*) With reference to a breach of the Revenue Laws Ld Stowell observed It is sufficient if there is a contravention of the law—if there is a *fraus in legem* Whether that may have arisen from mistaken apprehension from carelessness or from any other cause it is not material to inquire In these cases it is not necessary to prove actual and personal fraud (*The Reward* 2 Dod 265 at p 271)

(*k*) *D'Hiller* v *Jones* (Exch) 2 Jur N S 979 *Taylor* v *Crowland Gas Co*, 10 Exch 293 at p 296 *Bailey* v *Harris* 12 Q B 905 *Smith* v *Mawhood* 14 M & W 452 *Cope* v *Rowlands* 2 M & W 149 *Cundell* v *Dawson* 4 C B 376 *Pidgeon* v *Burslem* 3 Exch 465 *Oulds* v *Harrison* 10 Exch 572 *Jessopp* v *Lutwyche*, Id 614, *Rosewarne* v *Billing* 33 L J C P 35 *Johnson* v *Hudson*, 11 East 180 See *per* Holt C J in *Bartlett* v *Viner* Carth 251 (cited in *De Begnis* v *Armistead* 10 Bing 107 at p 110 and in *Fergusson* v *Norman* 5 Bing N C 76 at p 85 in connection with which latter case see the Pawnbrokers Act 1872 (35 & 36 Vict c 93) s 51) For

It must be observed that a contract, although illegal and void as to part, is not necessarily void *in toto* Thus, if a bond be given, with condition to do several things, and some are agreeable to law, and some against it, the bond shall be good as to doing the former, and only void as to doing the latter (*l*), and, if a deed, not founded upon an illegal consideration, contain two severable and independent covenants, of which the one is legal and the other not, the illegality of the one does not usually prevent the enforcement of the other (*m*) For 'the general rule is 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 by the common law, you may reject the bad part and retain the good (*n*) and this rule applies not only to covenants, but also to assignments (*o*), and to bye-laws (*p*)

Divisible contract

Divisible assignment

Divisible bye law

If, however, a contract be made upon a consideration part of which is illegal or upon several considerations one of which is illegal, the law clearly is that the whole promise, or every one of the promises dependent upon such consideration or considerations, is also illegal (*q*) for it is induced and affected by the whole consideration, or every one of the considerations, including what is illegal therein it is impossible to discriminate between the weight to be given to the several parts of the consideration or to the several considerations, and there can be no severance of that which is legal from that which is not whereas, where there is no illegality in the consideration, and some of the promises are legal and others are illegal, the illegality of those which are bad does not communicate itself to, or contaminate those which are good unless, indeed, they are inseparable from and dependent upon one another (*r*)

One illegal consideration taints whole contract

another instance illustrating the text see *per* Parke B in *Bodger* v *Arch* 10 Exch 333 at p 337 (cited in *Amos* v *Smith* 1 H & C 227 at p 241) And see *Jones* v *Giles*, 10 Exch 119 at p 144 and 11 Exch 393 *Ritchie* v *Smith* 6 C B 462 (*l*) *Chesman* v *Nainby* 2 Raym Ld 1456 at p 1459

(*m*) *Caskell* v *King* 11 East 164 *Mallan* v *May* 11 M & W 653 see *Baker* v *Hedgecock* 39 Ch D 520 *per* Lindley M R, in *Haynes* v *Doman* [1899] 2 Ch 13 at p 24

(*n*) *Per* Willes J in *Pickering* v *Ilfracombe Ry Co* L R 3 C P 235 at p 250 See *Robinson* v *Ommaney* 23 Ch D 285

(*o*) *Re Isaacson* [1895] 1 Q B 333

(*p*) See *per* Lindley L J in *Strickland* v *Hayes* [1896] 1 Q B 290 at p 292, upon which case see *Burnett* v *Berry* Id 641

(*q*) *Featherston* v *Hutchinson*, Cro Eliz 199 *Scott* v *Gillmore* 3 Taunt 226 *Harrington* v *Victoria Dock Co* 3 Q B D 549 with which cf *Shipway* v *Broadwood* [1899] 1 Q B 369

(*r*) *Kearney* v *Whitehaven Co* [1893] 1 Q B 700

Consideration merely void

One of several considerations which is not illegal, but is merely void, does not have this effect it is wholly nugatory, and the contract is enforceable if the other considerations are good (*s*) The distinction between considerations which are illegal and those which are only void is often of importance For instance, where a cheque is given for an illegal consideration, an indorsee for value who takes with notice of the illegality cannot maintain an action upon the cheque (*t*), but it is otherwise if the cheque be given for a consideration which is merely void (*u*)

Public policy

In connection with the question whether a particular contract is illegal on grounds of public policy, it has been observed that 'public policy is an unruly horse and dangerous to ride" (*x*), and that, although certain kinds of contracts have been held void at common law on the ground of public policy, this branch of the law "certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy" (*y*)

Non repudiation of fraudulent contract

The effect of fraud is not absolutely to avoid a contract induced by it, but to render it voidable at the option of the party defrauded, and the contract continues valid until the party defrauded has elected to avoid it (*z*) Thus if a party be induced to buy an article by fraudulent misrepresentations of the seller respecting it, and, after discovering the fraud, continue to deal with the article as his own, he cannot recover back the price from the seller, nor does there seem any authority for saying that a party must, in such a case, know *all* the incidents of a fraud before he deprives himself of the right of rescinding the proper and safe course is to repudiate the whole transaction at the time of discovering the fraud (*a*) "Where an agree-

(*s*) *Jones* v *Waite* 5 Bing N C 341 at p 351

(*t*) *Woolf* v *Hamilton* [1898] 2 Q B 337

(*u*) *Lilly* v *Rankin* 56 L J Q B 248

(*x*) *Per* Burrough, J in *Richardson* v *Mellish* 2 Bing 229 at p 252

(*y*) *Per* Cave J in *Re Mirams*, [1891] 1 Q B 594 see *per* Ld Bramwell in *Mogul S S Co* v *McGregor*, [1892] A C 25 at p 45 For cases in which the rule of public policy has been since extended to new circumstances, see *Wilson* v *Carnley*, [1908] 1 K B 729 (a promise of marriage by a man who was married at the time), and *In re Beard Beard* v *Hall* [1908] 1 Ch 383 (a condition in a will divesting the interest of a legatee if he entered the naval or military service of the Crown)

(*z*) *Reese River Mining Co* v *Smith* L R 4 H L 64

(*a*) *Campbell* v *Fleming*, 1 A & E 40, *Clarke* v *Dickson*, E B & E 148 (approved in *Urquhart* v *Macpherson*, 3 App Cas 831), *White* v *Garden*, 10 C B 919 *Harnor* v *Groves*, 15 C B 667, *Armstrong* v *Jackson*, [1917] 2 K B 822

ment has been procured by fraud," observed Maule, J (*b*), "the party defrauded may at his election treat it as void, but he must make his election within a reasonable time The party guilty of the fraud has no such election ' But the election once made by the party defrauded cannot be retracted by him *electio semel facta non patitur regressum* (*c*)

Presumption against illegality

Lastly, *ubi quid generaliter conceditur inest hæc exceptio si non aliquid sit contra jus fasque* (*d*), is a maxim of our law, and if an act which is the subject of a contract may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act the contrary is the proper inference (*e*) If the act is capable of being done legally, either party may enforce the contract unless he wickedly intended that the law should be broken (*f*) It is "a universal principle that every transaction in the first instance is assumed to be valid, and the proof of fraud lies upon the person by whom it is imputed ' (*g*) and where the omission to do an act would be a criminal neglect of duty, ' the burden of proving that it was not done, that is, of proving a negative, usually falls upon the party who alleges its omission (*h*)

Having in the preceding pages directed attention to some leading points connected with the *illegality* of the consideration for a promise or agreement and having selected from very many cases some only which seemed peculiarly adapted to throw light upon the maxim, *ex dolo malo non oritur actio*, we may further pray in aid of the above very cursory remarks respecting it, the observations already made upon the yet more general principle that *a man shall not be permitted to take advantage of his own wrong* (*i*), and shall at once proceed to offer some remarks as

(*b*) *E Anql Rys Co* v *E Cos Ry Co*, 11 C B 775 at p 803 (citing *Campbell* v *Fleming supra*) *Bwlch y Plwm etc Co* v *Baynes* L R 2 Ex 324 at p 326, *Oakes* v *Turquand* L R 2 H L 325 In *Pilbrow* v *Pilbrow s Ry Co* 5 C B 440 at p 453 Maule J, observed, It is not true that a *deed* that is obtained by fraud is therefore void The rule is that the party defrauded may at his election treat it as void

(*c*) Co Litt 146 a

(*d*) *Magdalen Coll Case*, 11 Rep 66 b, at 78 b

(*e*) *Per* Ld Abinger in *Lewis* v *Davison* 4 M & W 654

(*f*) *Waugh* v *Morris* L R 8 Q B 202, *Thwaites* v *Coulthwaite* [1896] 1 Ch 496 Upon the latter case see *Powell* v *Kempton Park Co* [1899] A C 143

(*g*) *Per* Parke B in *Shaw* v *Beck*, 8 Exch 392, at p 400, see *per* Ld Kenyon in *R* v *Fillongley* 2 T R 709, at 711

(*h*) See *per* Ld Ellenborough in *Williams* v *East Ind Co*, 3 East 192 at p 199 cf the maxim, *omnia præsumuntur rite esse acta*, *post* Chap X

(*i*) *Ante*, p 197

to the rule that a consideration is needed to support a promise, and as to the sufficiency and essential requisites thereof

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EX NUDO PACTO NON ORITUR ACTIO (*Voy, Max* 24)—*No cause of action arises from a bare promise*

Nudum pactum in Roman law

The maxim, as used by writers on our law of contracts, bears a meaning widely different from that which it bore in Roman jurisprudence *Nudum pactum* is defined by Ulpian, *ubi nulla subest causa propter conventionem* (*k*) By *causa* were meant the formal requisites necessary to obtain for an engagement legal recognition, that is, the ceremonial conditions which constituted *stipulatio, nexum,* &c (*l*) The *cause d'où naisse l'obligation* of the French civil code is nearer in meaning to our *consideration*, but is more extensive, and may denote a mere moral duty or a fancied duty based upon feelings of honour, and even the motive which may actuate a person in making a promise (*m*), to which the English word does not extend

Nudum pactum in English jurisprudence

The force of the above maxim, as used in English jurisprudence, is thus explained by Blackstone A consideration of some sort or other is so necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay something on one side, without any compensation on the other, will not at law support an action and a man cannot be compelled to perform it (*n*) The nakedness of a promise, in our system, consists in the absence of consideration, and not in the want of formal conditions, such as writing or registration Thus, our notion of a bare promise bears no analogy to the *nudum pactum* of the digest The law, it has been observed (*o*), supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient considera-

(*k*) D 2 14 7 § 4 *Sharington* v *Strotton* Plowd 299 at 309 n Vin Abr *Nudum Pactum* (A) See 1 Powell Contr 330 *et seq* As to the doctrine of *nudum pactum* in the civil law see *Pillans* v *Van Mierop* 3 Burr 1663 at 1670 *et seq* 1 Fonbl Eq 5th ed 335 (*a*)

(*l*) Pollock on Contr Chap III

(*m*) Ibid Chap IV

(*n*) 2 Bl Com 445 Nov Max 9th ed 348

(*o*) *Per* Skynner C B in *Rann* v *Hughes* 7 T R 350 n (*a*) See, *per* Ld Kenyon in *Petrie* v *Hannay* 3 T R 418 at 421 judgm in *Bank of Ireland* v *Archer* 11 M & W 383, at p 389 See *McManus* v *Bark*, L R 5 Ex 65

tion Such agreement is *nudum pactum ex quo non oritur actio*, and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law

Consideration

The modern English doctrine of consideration has been one of gradual development In the time of Henry VI the word does not seem to have been in vogue the equivalent found in cases of that period is *quid pro quo* (*p*), and that phrase conveys an accurate idea of the connotation of the modern word, except indeed as used by conveyancers in conjunction with *good* (*q*) Consideration could not be better defined than it is in the Indian Contract Act when at the desire of the promisor the promisee or any other person, has done or abstained from doing, or does or abstains from doing or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise (*r*) Accordingly, if I promise to pay a man £100 for nothing he neither doing nor promising anything in return or to compensate me for my money, my promise is *nudum pactum* and has no force in law (*s*) A gratuitous promise or undertaking may indeed form the subject of a moral obligation and may be binding in honour, but it does not create a legal responsibility (*t*)

Contract under seal

Where indeed a promise is made under seal, the solemnity of that mode of delivery is held to import, at law, that there was a sufficient consideration for the promise, so that the plaintiff is not in this case required to prove a consideration nor can the deed be impeached by merely showing that it was made without consideration, unless proof be given that it originated in fraud (*u*) Neither is a consideration necessary for the validity of a deed operating at common law Nevertheless if A made a feoffment in fee to another without consideration equity would presume that he meant it to the use of himself and would therefore raise an implied resulting use in his favour (*v*) Even if he should by express limitation of uses

(*p*) Pollock Contr Chap III (*q*) As to which see *ante* p 473

(*r*) Indian Contract Act (Act IX of 1872) s 2 All the definitions in this section should be carefully studied For the Act cf Pollock & Indian Contract Act 3rd ed

(*s*) 2 Bl Com 445 Vin Abr *Contract* (K)

(*t*) *Per* Ld Loughborough in *Parsons* v *Thompson* 1 Black H 322 at p 327 See *Balfe* v *West* 13 C B 466 *Flsee* v *Catuard* 5 T R 143 at 149

(*u*) 2 Bla Com 16th ed 446 n (4) *Per* Parke B in *Wallis* v *Day* 2 M & W 273 at p 277

(*v*) 1 Sand Uses, 92

"Good and 'valuable" consideration

prevent the estate from resulting at law, there would still in equity result a *trust* for his benefit Even in the case of a deed, moreover, it is necessary to observe the distinction between a *good* and a *valuable* consideration the former is such as that of blood, or of natural love and affection is when a man grants an estate to a near relative, being influenced by motives of generosity, prudence, or natural duty Deeds made upon this consideration are looked upon by the law as merely *voluntary*, and, although good as between the parties, are liable to be set aside in favour of creditors under the Bankruptcy Act, 1914, s 42, (*y*), or, if fraudulent within the meaning of the 13 Eliz c 5, under that Act (*z*) On the other hand, a valuable consideration is such as money, marriage, or the like, and this is esteemed by the law as an equivalent given for the grant (*a*)

Owing to the construction put upon the 27 Eliz c 4, a purchaser for valuable consideration of lands could, as a rule, avoid a prior voluntary conveyance of the lands, though in fact made *bona fide* and without any fraudulent intent (*b*) But this rule was altered by the Voluntary Conveyances Act, 1893 (*c*)

Consideration in simple contract

It is of the greatest importance to the student of our law to start with an accurate comprehension of the meaning of consideration in simple contracts We therefore add to what has already been said the definition of Parke, B "any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered, by the plaintiff with the consent, either express or implied, of the defendant" (*d*)

Consideration must have some value

The consideration for a promise must have *some* tangible

(*y*) 4 & 5 Geo 5 c 59

(*z*) See notes to *Twyne's Case*, 1 Smith L C 12th ed p 1

(*a*) 2 Bl Com 297, 444, *Gully* v *Bishp of Exeter* 10 B & C 584 at p 606

(*b*) See *Doe* d *Otley* v *Manning*, 9 East 59 at p 66, *Ramsay* v *Gilchrist*, [1892] A C 412

(*c*) 56 & 57 Vict c 21

(*d*) 1 Selw N P 10th ed 41 See *per* Ld Campbell in *Gerhard* v *Bates*, 2 E & B 476 at pp 487—488, *per* Parke, B, in *Moss* v *Hall* 5 Exch 46, *Bracewell* v *Williams* L R 2 C P 196 *Crowther* v *Farrer*, 15 Q B 677, at p 680 *Hulse* v *Hulse*, 17 C B 711 See also, *Nash* v *Armstrong*, 10 C B N S 259 *Shadwell* v *Shadwell*, 9 Id 159, *Davis* v *Nisbett*, 10 Id 752, *Surtees* v *Lister* 7 H & N 1, *Scotson* v *Pegg* 6 Id 295 *Westlake* v *Adams*, 5 C B N S 248, *Hartley* v *Ponsonby*, 7 E & B 872, *Carlile* v *Carbolic Smoke Ball Co*, [1893] 1 Q B 256, at p 271

value in the eye of the law (*e*) Where in an action of assumpsit the consideration for the defendant's promise was stated to be the release and conveyance by the plaintiff of his interest in certain premises, at the defendant's request, but the declaration did not show that the plaintiff had any interest in the premises except a lien upon them, which was expressly reserved by him, the declaration was held bad, as disclosing no legal consideration for the promise (*f*)

Adequacy not material

It is now well settled that, as long as the consideration for a promise has some value, its *adequacy* is not material (*g*) The value of all things contracted for 'is measured by the appetite of the contractors, and therefore the just value is that which they be content to give' (*h*) Moreover, the consideration may be contingent It may consist of something which a party does not undertake, and consequently is not bound to perform, but which being done renders the promise on the other side binding in law Thus, if a tradesman agree to supply on certain terms such goods as a customer may order during a future period, he cannot sue the customer for not ordering any goods, but if the customer order any goods, the consideration becomes effectual, and a contract binding upon the tradesman immediately arises (*i*) Not only is a promise to forbear an action a good consideration but so also is actual forbearance at request (*k*)

Value may be contingent,

Moreover, a consideration may be good in law, although there may be merely a chance, and that a remote one, of any benefit arising to one party or detriment to the other Thus, although a claim be wholly ill-founded, yet if it has been made

or problematical

(*e*) *Per* Patteson J in *Thomas* v *Thomas* 2 Q B 851 at p 859 see *Price* v *Easton* 4 B & Ad 433 *Tweddle* v *Atkinson* 1 B & S 393 *Edwards* v *Baugh* 11 M & W 641 *Bridgman* v *Dean* 7 Exch 199 *Wade* v *Simeon* 2 C B 548 *Llewellyn* v *Llewellyn* 15 L J Q B 4 *Crow* v *Rogers* 1 Stra 592, *Lilly* v *Hays* 5 A & E 548 (approved in *Noble* v *Nat Disc Co* 5 H & N 225 at p 228), *Galloway* v *Jackson* 3 Scott, N R 753, at p 763 *Thornton* v *Jenyns* 1 Id 52 *Jackson* v *Cobbin*, 8 M & W 790 *Cowper* v *Green* 7 M & W 633 1 Roll Abr 23 pl 29 *Fisher* v *Waltham* 4 Q B 889 *Wilson* v *Wilson* 1 H L Cas 538, *Hart* v *Miles* 4 C B N S 371 and cases *infra*

(*f*) *Kaye* v *Dutton* 7 M & Gr 807 (recognising *Edwards* v *Baugh*, 11 M & W 641), see *Lyth* v *Ault* 7 Exch 669, *Strickland* v *Turner* Id 208 *Fremlin* v *Hamilton* 8 Exch 308, *Cooper* v *Parker*, 14 C B 118 and 15 C B 822 *Millward* v *Littlewood*, 5 Exch 775, *Wild* v *Harris*, 7 C B 999, *Holmes* v *Penney* 9 Exch 584 at p 589 *Foakes* v *Beer* 9 App Cas 605

(*g*) *Per* Byles J, in *Westlake* v *Adams* 5 C B N S 248, at p 265

(*h*) Hobbes Leviathan, pt 1, Ch XV

(*i*) *G N Ry Co* v *Witham* L R 9 C P 16

(*k*) *Crears* v *Hunter*, 19 Q B D 341

in good faith, a promise to abandon it, or its abandonment at request, either before or pending an action upon it, constitutes a good consideration for a contract (*l*)

Consideration must be real, not illusory, must not fail through the act of the promisee

The consideration for a contract, although its adequacy will not be examined by the Courts, must not be colourable merely nor illusory (*m*), and it is open to the promisor to show, if he can, that the chance of his deriving benefit from that which is put forward as the consideration for his promise has been defeated by the act of the promisee In such a case there is said to be a *failure of consideration* In debt for money had and received, the defendant pleaded the execution and delivery to the plaintiff of a deed securing to the plaintiff an annuity and acceptance of the same by the plaintiff in discharge of the debt, replication, that no memorial of the deed had been enrolled pursuant to the statute, that, the annuity being in arrear, the plaintiff brought an action for the arrears that defendant pleaded in bar the non-enrolment and that plaintiff thereupon elected and agreed that the indenture should be void, and discontinued the action The replication was held to be a good answer to the plea, since it showed that the accord and satisfaction thereby set up had been rendered nugatory by the defendant's own act (*n*)

Consideration not to be confounded with motive

The definitions of consideration which have already been given are sufficient to preclude the possibility of its being confounded with the *motive* of a promise (*o*) Consideration may furnish the inducement for a promise, and that inducement may be a motive, but the motive is a mental fact subjective to the promisor, the consideration is objective and extraneous to his mind A common expression, which involves a leading principle of the law of contracts, is that "*the consideration must move from the plaintiff*" By this is meant not only that the consideration must be something external to the mind of the promisor, and therefore not a mere motive, but also that there must have been what is called '*privity of contract*" between the promisor and the person who seeks to enforce the promise In common parlance, the principle may be thus

Consideration must move from the plaintiff

(*l*) *Callisher* v *Bischoffheim*, I R 5 Q B 449 *Miles* v *New Zealand Co*, 32 Ch D 266

(*m*) *White* v *Bluett* 23 L J Exch 36 See *Gough* v *Findon* 7 Exch 48, *Frazer* v *Hatton*, 2 C B N S 512 *Gorgier* v *Morris* 7 C B N S 588

(*n*) *Turner* v *Browne* 3 C B 157 *Thomas* v *Thomas*, 2 Q B 851

(*o*) See *per* Ld Denman C J and *per* Patteson J in *Thomas* v *Thomas*, *supra*, at p 859, and compare *Thomas* v *Thomas* *supra*, at p 861, n (*a*)

stated he alone can exact performance of a promise, who has furnished or contributed to furnish the consideration (*p*)

Where plaintiff promised to discharge A from part of a debt due to himself, and to permit B to stand in his place as to that part, defendant promising, in return, that B should give plaintiff a promissory note, the consideration moving from plaintiff, and being an undertaking detrimental to him, was held sufficient to sustain the defendant's promise (*q*) Where, however, A being indebted to plaintiff in one sum, and B being indebted to A in another, the defendant, in consideration of being permitted by A to sue B in his name, promised to pay A's debt to the plaintiff, and A gave such permission, whereupon defendant recovered from B, judgment was arrested on the ground that plaintiff was a mere stranger to the consideration for the promise made by defendant, having done nothing of trouble to himself or of benefit to the defendant (*r*)

The question of privity of contract has been much discussed in connection with the relation of a country solicitor towards his client and town agent respectively It has been more than once subject of inquiry whether such privity exists between the client and town agent as would entitle one to sue the other Where B, the country attorney of A, sent money to the defendants, who were his London agents, to be paid to C, on account of A, and the defendants promised B to pay the money according to his directions, but afterwards, being applied to by C, refused to pay it, claiming a balance due to themselves from B on an account between them, it was held that an action for money had and received would not lie against the defendants at the suit of A (*s*) The general rule," observed Lord Denman (*t*), 'undoubtedly is, that there is no *privity* between

(*p*) See *Playford* v *U K Tele Co* L R 4 Q B 706 *Becher* v *G E Ry Co* L R 5 Q B 241 *Jennings* v *G N Ry Co* L R 1 Q B 7 *Alton* v *Mid Ry Co* 19 C B N S 213 *Watson* v *Russell* 5 B & S 968

(*q*) *Peate* v *Dicken* 1 Cr M & R 422 see also *Tipper* v *Bucknell* 3 Bing N C 710 *Harper* v *Williams* 4 Q B 219 and *Dashwood* v *Jermyn*, 12 Ch D 776

(*r*) *Bourne* v *Mason* 1 Ventr 6 *Lucrsidge* v *Broadbent* 4 H & N 603 at p 610 and *Tweddle* v *Atkinson* 1 B & S 393 also illustrate the maxim

(*s*) *Cobb* v *Becke* 6 Q B 930 See also *Robbins* v *Fennell* 11 Q B 248 *Bluck* v *Siddaway* 15 L J Q B 359 *Hooper* v *Treffry* 1 Exch 17 See *Litt* v *Martindale* 18 C B 314 where there seems to have been very slight (if any) evidence of privity *Johnson* v *R Mail S Pack Co*, L R 3 C P 38 *Moore* v *Bushell* 27 L J Ex 3, *Gerhard* v *Bates*, 2 E & B 476, *Brewer* v *Jones*, 10 Exch 655 *Barlworth* v *Ellerman*, 6 H & N 605, *Painter* v *Abel*, 2 H & C 113 *Collins* v *Brook* 5 H & N 700 (followed in *Holland* v *Kersley*, [1912] W N 64) (*t*) In *Cobb* v *Becke*, 6 Q B 930, at p 935

the agent in town and the client in the country, and the former cannot maintain an action against the latter for his fees, nor the latter against the former for negligence" (*u*)

A employs B, an attorney, to do an act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and C If, through the negligence or ignorance of B in transacting the business, C loses the benefit intended for him by A, C cannot maintain an action against B to recover damages for the loss If the law were otherwise, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested (*x*)

Moral obligation does not constitute consideration

As will shortly be seen, nothing done or suffered by the promisee *antecedently* to the promise constitutes a good consideration for the promise unless it was done or suffered at the request of the promisor In certain cases it was once thought that where the plaintiff voluntarily did that which the defendant was morally bound to do, and the defendant afterwards expressly promised to reward him, a previous request would be implied, so that the moral duty attaching to the defendant would be a valid consideration for his promise (*y*) It never was considered that every moral consideration was sufficient for this purpose (*z*) After considerable controversy it was finally settled in *Eastwood* v *Kenyon* (*a*), that a mere moral obligation arising from a past benefit not conferred at the request of the defendant is not a good consideration, and that the class of considerations derived from moral obligations includes only those cases in which there has been a legal right deprived of legal remedy In such cases, as will be seen, the defendant may be held liable, without putting moral duty on a par with legal consideration (*b*) It is now past controversy that mere moral feeling is not enough

(*u*) For later cases on this subject see *Lawrence* v *Fletcher*, 12 Ch D 858, *Vyse* v *Foster*, L R 10 Ch 236, *Ex p Edwards*, 8 Q B D 262, *Re Nelson*, 30 Ch D 1, *Macfarlane* v *Lister*, 37 Ch D 89, *Hannaford* v *Syms*, 79 L T 90

(*x*) *Per* Ld Campbell in *Robertson* v *Fleming*, 4 Macq 167, at p 177 As to privity in connection with the relation of attorney and client, see *Fish* v *Kelly*, 17 C B N S 194, *Helps* v *Clayton*, Id 553

(*y*) *Lee* v *Muggeridge*, 5 Taunt 36, *Watson* v *Turner*, B N P pp 129, 147, 281, *Trueman* v *Fenton*, Cowp 544, *Atkins* v *Banwell*, 2 East, 505

(*z*) *Per* Ld Tenterden in *Littlefield* v *Shee*, 2 B & Ad 811

(*a*) 11 A & E 438

(*b*) See *post*, p 497

to affect the legal rights of parties (*c*), nor can a subsequent express promise convert into a debt that which of itself was not a legal debt (*d*), and although the mere fact of giving a promise creates a moral obligation to perform it, yet the enforcement of such promises by law, however plausibly justified by the desire to effect all conscientious engagements, might be attended with mischievous consequences, one of which would be the frequent preference of voluntary undertakings to claims for just debts Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors (*e*)

Bills of exchange

As regards bills of exchange, cheques, and promissory notes, the rule is, that such instruments are presumed to be made upon, and *prima facie* import, consideration (*f*) And the words "value received" express only what the law implies from the nature of the instrument, and the relation of the parties apparent upon it (*g*), and then the maxim, *expressio eorum qua tacite insunt nihil operatur*, is applicable (*h*) In an action upon a bill or note between the immediate parties thereto, the consideration may be inquired into, and if it be proved that the plaintiff gave, and the defendant received, no value, the action will fail (*i*) And it may fail in part where the consideration is divisible and has failed in part, for where, observed Cresswell, J (*k*), there is a promise to pay a certain sum, the whole being supposed to be due, "each part of the money expressed to be due is the consideration for each part of the promise, and the consideration as to any part failing, the promise is *pro tanto nudum pactum*"

In actions not between immediate parties to a bill or note, the established rule is, that suspicion must be cast upon the

(*c*) *Per* Ld Denman, *Beaumont* v *Reeve*, 8 Q B 483 (cited and recognised in *Fisher* v *Bridges*, 3 E & B 642) *Eastwood* v *Kenyon*, 11 A & E 438, *Wennall* v *Adney*, 3 B & P 247, at 249 (*a*) In *Jennings* v *Brown*, 9 M & W 496 at p 501, Parke B, observes in reference to *Binnington* v *Wallis* (4 B & Ald 650), that the giving up of the annuity in the latter case was "a mere moral consideration, which is nothing

(*d*) *Per* Tindal, C J, in *Kaye* v *Dutton*, 7 M & Gr 807 at pp 811—812

(*e*) Judgm in *Eastwood* v *Kenyon*, 11 A & E 438, at pp 450, 451 See *Roberts* v *Smith*, 4 H & N 315

(*f*) *Per* Martin, B, in *Flight* v *Reed*, 1 H & C 703 at p 710, see the Bills of Exchange Act, 1882 (45 & 46 Vict c 61), s 30

(*g*) *Hatch* v *Trayes*, 11 A & E 702, see 45 & 46 Vict c 61, s 3 (4)

(*h*) *Ante*, p 431

(*i*) *Southall* v *Rigg*, and *Forman* v *Wright*, 11 C B 481, at p 492, see *Re Whitaker*, 42 Ch D 119

(*k*) 11 C B 494, see *Warwick* v *Nairn*, 10 Exch 762

plaintiff's title before he can be required to prove what consideration he gave for it But, if it be proved that the instrument was obtained by fraud, or is affected by illegality, such proof affords a presumption that the guilty party placed it in the hands of an accomplice to sue upon it, and consequently casts upon the plaintiff the burden of showing that he was a *bona fide* indorsee for value (*l*)

Different kinds of consideration

Having thus briefly shown the nature of the *consideration* and the *privity* necessary to a valid contract, we may proceed to specify the important distinctions which exist between considerations *executed, concurrent, continuing,* and *executory* These terms, as used to qualify consideration, are relative in point of time to the promise The following example will serve as an introductory illustration A declaration in assumpsit stated that in consideration of the plaintiff's *agreeing* to stay an action against B, the defendant promised to pay the amount upon a certain event, at the trial, the following agreement was proved 'In consideration of the plaintiff's *having agreed* to stay proceedings against B, &c , it was held that the contract was an executory contract, and a continuing agreement to stay proceedings, and that there was therefore no variance (*m*) In this case *having agreed* before the date of the promise would indicate an *executed* consideration, *agreeing* might constitute a *concurrent* consideration (*i e*, coincident in point of time with the promise), or *executory* (*i e*, to be performed after the promise)

Consideration must be moved by request

It will appear from the definitions of consideration above cited (*n*) that it is necessary that the service which is advanced as the consideration for a promise should be undertaken at the instance or request of the promisor This is the meaning of the decision in the leading case of *Lampleigh* v *Brathwait* (*o*) that a mere voluntary courtesy will not support an assumpsit but a courtesy moved by a previous request will In the case of a service which is not past or executed at the time of the promise, it is obvious that a request on the part of the promisor is a logical necessity To promise something in consideration

(*l*) *Per* Parke, B, in *Bailey* v *Bidwell*, 13 M & W 73 at p 76 see 45 & 46 Vict c 61, s 30 (2), *Tatam* v *Haslar* 23 Q B D 345 *Talbot* v *Van Boris* [1911] 1 K B 854, *Robinson* v *Benkel* 29 T L R 475

(*m*) *Tanner* v *Moore*, 9 Q B 1

(*n*) *Ante*, p 485

(*o*) Hob 105, noted 1 Sm L C 12th ed 69 see also *per* Parke J, in *Reason* v *Wirdnam* 1 C & P 434, 1 Wms Saund 264 (1)

that another will in the future do or suffer something (executory consideration), or will continue to do or suffer something (continuing), or will *hic et nunc* do or suffer something (concurrent), is itself a request

In case of past service request must be proved

Where, however, the service is past or executed at the date of the promise, it is, as a rule, necessary to show that the service was undertaken at the request of the promisor For, to take a simple illustration, if a man disburse money about the affairs of another, without request, and then afterwards the latter promise to repay him (*p*), there is wanting an essential element of valid legal consideration

Cases of executed service where it is not necessary to prove request

Although, generally speaking, in the case of *executed* considerations it is necessary that a request should be laid and proved, there are cases of past consideration, where, as in the case of executory service, the nature of the consideration itself imports a request (*q*) Thus, in an action of assumpsit for money *lent*, it was held unnecessary to allege that it was lent at the defendant's request, for there cannot be a claim for money lent unless there be a loan, and a loan implies an obligation to pay (*r*) In the case of money *paid*, however, the above doctrine will not apply because a gratuitous payment would not create a legal obligation, and 'no man can be a debtor for money paid unless it was paid at his request (*s*)

Request implied in certain cases

Moreover, there are circumstances under which the *law* will itself imply that the service has been undertaken by request of the promisor Such request is implied in the following cases

1 Where the defendant has adopted and enjoyed the benefit of the service, and the maxim, *omnis ratihabitio retrotrahitur et mandato priori aequiparatur* (*t*), is applicable, for instance, where A, purporting to act on behalf of B, but without his authority, orders goods from C, and pays the price, and A

(*p*) *Per* Tindal, C J in *Thornton* v *Jenyns* 1 Scott N R 52 at p 74 (citing *Hunt* v *Bate* Dyer 272 and 1 Roll Abr 11) See particularly *Roscorla* v *Thomas* 3 Q B 234

(*q*) See *Fisher* v *Pyne* 1 M & Gr 265 note (b) cited *per* Parke, B, in *Victors* v *Davies*, 12 M & W 758, at p 759

(*r*) *Victors* v *Davies*, *supra* *per* Pollock C B in *Flight* v *Reed* 1 H & C 703 at p 716 *M Gregor* v *Graves* 3 Exch 34

(*s*) *Per* Parke B in *Victors* v *Davies* 12 M & W 758 at p 760 *Brittain* v *Lloyd* 14 M & W 762 (cited in *Lewis* v *Campbell* 8 C B 541, at p 547 and *per* Parke B in *Hutchinson* v *Sydney* 10 Exch 439) *Hayes* v *Warren* 2 Strn 932 (cited 1 Wms Saund 264 (1)) See, in further illustration of the subject above touched upon *Dietrichsen* v *Gaubilet*, 14 M & W 845 *per* Parke, B in *King* v *Sears*, 2 Cr M & R 48, at p 53, *Emmens* v *Elderton* 4 H L Cas 624

(*t*) See *post*, p 557

afterwards adopts the contract by accepting the goods But it must be observed that a person cannot be said in law to adopt or ratify an act, unless it was in fact done on his behalf (*u*), and a request to do an act is not implied from the mere fact that a benefit is enjoyed by reason that the act was done This is shown by the cases where one of the parties interested in a life policy, who on his own account has kept it up by paying the premiums (*x*), or one tenant in common of a house, who on his own account has spent money on its repair (*y*), has failed to recover for his outlay from the others Again, where a builder contracts to erect buildings on the defendant s land for a lump sum, and, after part of the work has been done, abandons the contract, the defendant is not liable to pay for the work done merely by reason of his deriving benefit from it (*z*)

2 Where the service consists in the plaintiff having been compelled to do that which the defendant was legally compellable Thus, as a rule, a person, whose goods are lawfully seized for another's debt, is entitled to redeem them and to recover the amount paid from the debtor, or, if the goods be sold to satisfy the debt, he may recover their value (*a*) And upon this principle rests the right to indemnity of a surety who pays the debt of his principal, and the right to contribution of a joint debtor who pays the whole joint debt (*a*) This rule, however, may be excluded by contract and where the owner of the goods seized is, as between himself and the defendant, liable to pay the debt, the rule is inapplicable (*a*)

3 Where the plaintiff *voluntarily* does that which the defendant might have been legally compelled to do, and the defendant afterwards in consideration of the service *expressly* promises (*b*) It is to be noticed that in the case of such voluntary service, a subsequent express promise is necessary to

(*u*) See *per* Bowen, L J , in *Falcke* v *Scott Imp Ins Co* , 34 Ch D 234 at p 250, *Durant* v *Roberts*, [1900] 1 Q B 629

(*x*) *Leslie* v *French*, 23 Ch D 552, *Falcke* v *Scott Imp Ins Co* , 34 Ch D 234, *Re Winchilsea*, 39 Ch D 168 See also *The Gas Float Whitton*, [1896] P 42, at p 58

(*y*) *Leigh* v *Dickeson*, 15 Q B D 60 But see *Re Jones*, [1893] 2 Ch 461, *Re Cook*, [1896] 1 Ch 923

(*z*) *Sumpter* v *Hedges*, [1898] 1 Q B 673

(*a*) See *Edmunds* v *Wallingford*, 14 Q B D 811, at pp 814, 815, and the authorities there cited, *The Orchis*, 15 P D 38 As to what amounts to compulsion, see *Johnson* v *R Mail S P Co* , L R 3 C P 38, *Gebhardt* v *Saunders*, [1892] 2 Q B 452, at p 458, *Andrews* v *St Olave B of W* , [1898] 1 Q B 775

(*b*) *Wennall* v *Adney*, 3 B & P 247, at p 250, *in notis Wing* v *Mill*, 1 B & Ald 104, *Paynter* v *Williams*, 1 C & M 810, at p 818

support an action, whereas in the cases under the two former heads, the promise is implied as well as the request (*c*)

Where suspended right of action is revived by express promise

A distinction will be noted between the above cases and cases in which it has been held that an express promise may effectually revive a precedent good consideration, which might have afforded grounds for an action upon a promise implied from such consideration, were it not for the interference of some positive rule of law, which has suspended the action or remedy without destroying the right Thus a debt barred by the Statute of Limitations is still a good consideration for a promise in writing to pay (*d*), for the effect of a plea of the statute is to admit that the cause or consideration of the action still exists, but to show that the remedy is lost by lapse of time (*e*)

"The cases," said Lord Denman (*f*), 'in which it has been held, that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note to *Wennall* v *Adney* (*g*), and in *Eastwood* v *Kenyon* (*h*) They are cases of *voidable* contracts subsequently ratified, of debts barred by operation of law, but subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise"

At one time there was an inclination to explain the rule stated thus by Lord Denman, and previously laid down by Lord Mansfield (*i*), as depending upon the moral obligation arising from the previous agreement (*k*) It is not easy to see how such a theory was reconciled with the fact, that an express promise was ineffectual where the original contract to which it had reference was not merely suspended for a time or voidable at the option of the defendant, but absolutely void at law While, on the other hand, it was always understood that where the validity of an agreement is not affected by statute, but the remedy of one party is suspended, an express promise subsequently made

(*c*) *Atkins* v *Banwell*, 2 East, 505
(*d*) *La Touche* v *La Touche* 3 H & C 576, at p 588
(*e*) *Scarpellini* v *Atcheson*, 7 Q B 864, at p 878
(*f*) In *Roscorla* v *Thomas*, 3 Q B 234, see *Cocking* v *Ward*, 1 C B 858, at p 870
(*g*) 3 B & P 247, at p 249
(*h*) 11 A & E 438
(*i*) *Hawkes* v *Saunders*, Cowp 289, at p 290, *Atkins* v *Hill*, Id 284, at p 288
(*k*) Leake, Law of Contracts 615

will have relation back to the previous consideration, and will not be treated as *nudum pactum* (*l*)

Illustrations

Promises to pay a debt simply, or by instalments, or when the party is able, are all equally supported by the past consideration, and, when the debts have become payable *instanter*, may be given in evidence in support of the ordinary indebitatus counts So when the debt is not already barred by the statute, a promise to pay the creditor will revive it and make it a new debt, and a promise to an executor to pay a debt due to a testator creates a new debt to him But it does not follow that though a promise revives the debt in such cases, the debt will be a sufficient consideration to support a promise to do a collateral thing, as to supply goods or perform work and labour In such case it is but an accord unexecuted, and no action will lie for not executing it (*m*)

Infants

Formerly many contracts made by an infant, which are now void, were merely voidable at his option Accordingly an express promise made by him after full age revived the previous consideration so as to remove the subsequent promise from the category of *nuda pacta* (*n*), but since the Infant Relief Act, 1874 (*o*), this is no longer so, for s 2 of that statute expressly enacts that no action shall be brought to charge any one upon any such promise (*p*) The contract of a married woman was at one time absolutely void (*q*), and, therefore, if the record stated that goods were supplied to a married woman, who, after her husband's death, promised to pay, this was not sufficient, because the debt was never owing from her (*r*)

Married women

Debts discharged by bankruptcy

Another illustration, which would suffice, if it were necessary, to refute the theory of moral obligation, is afforded by the case of a person who promises to repay a debt from which he has been discharged by bankruptcy The Bankruptcy Act, 1849,

(*l*) See Pollock Contr Chap XII *Earle* v *Oliver* 2 Exch 71, at p 90, *Reeves* v *Hearne* 1 M & W 323

(*m*) *Earle* v *Oliver*, 2 Exch 71 at p 90 *per* Parke, B in *Smith* v *Thorne*, 18 Q B 134 at p 139

(*n*) *Per* Patteson, J in *Meyer* v *Haworth* 8 A & E 467 See note (*a*) to *Wennall* v *Adney* 3 B & P 247 at p 249

(*o*) 37 & 38 Vict c 62, *ante* p 453

(*p*) For the effect of this statute, see Pollock, Contr Ch II pt 1

(*q*) See *Neve* v *Hollands*, 18 Q B 262

(*r*) *Meyer* v *Haworth*, 8 A & E 467 In *Traver* v —— 1 Sid 57, a woman, after her husband's death, promised the plaintiff that if he would prove that her husband had owed him £20, she would pay it This was held a good consideration because it was a trouble and charge to the creditor to prove his debt See *Cope* v *Albinson*, 8 Exch 185

expressly annulled the efficacy of such promise which previously might have been enforced A similar provision was contained in the Act of 1861, but not in that of 1869, and, consequently, the question was more than once raised under the last-mentioned statute, whether the common law was revived in consequence of the omission It was, however, decided that the policy of the bankruptcy laws was sufficient without express statutory enactment to render ineffectual any attempt to resuscitate a debt from which a person had been discharged by bankruptcy (*s*), but such a debt may be revived by an appropriate instrument (*t*), or by a new contract (*u*)

Statute of Frauds

Again there are cases of agreements coming within the purview of s 4 of the Statute of Frauds, in which *no action can be brought* on account of the absence of a written memorandum, but in which a subsequent promise may nevertheless furnish a ground of action A verbal agreement was entered into between the plaintiff and defendants respecting the transfer of an interest in land The transfer was effected, and nothing remained to be done but to pay the consideration It was held, that the agreement, not being in writing, as required by the statute, could not be enforced by action, but that, as the transferee had, after the transfer, admitted to the transferor that he owed him the stipulated price, the amount might be recovered as money found to be due upon an account stated (*x*) Also bills of exchange given after the repeal of the usury law by the Usury Laws Repeal Act, 1854 (*y*), in renewal of bills given while that law was in force to secure payment of money lent at usurious interest, have been held valid, the receipt of the money being a sufficient consideration to support a new promise to pay it In the case referred to, this qualified proposition was sanctioned by the majority of the court "A man by express promise may render himself liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt" (*z*)

Usury laws

Promise express or implied

We must, in the next place, observe that the subsequent

(*s*) *Heather* v *Webb* 2 C P D 1
(*t*) *Re Bonacina*, [1912] 2 Ch 394
(*u*) *Aylmer*, 1 Mans 391, *Jakeman* v *Cook* 4 Ex D 26
(*x*) *Cocking* v *Ward* 1 C B 858, at p 870 See 1 Smith, L C , 12th ed p 359
(*y*) 17 & 18 Vict c 90
(*z*) *Flight* v *Reed*, 1 H & C 703, at p 716

promise, like the antecedent request, may, in many cases, be implied For instance, the very name of a loan imports that it was the intention of both parties that the money should be repaid (*a*), a promise to pay interest will be implied by law from the forbearance of money at the defendant's request (*b*), and from money being found due on accounts stated, the law implies a promise to pay it (*c*) but where the consideration has been executed, and a promise would, under the circumstances, be implied by law, it is clearly established that no express promise, made in respect of that prior consideration, but differing from that which by law would be implied, can be enforced (*d*) For, were it otherwise, there would be two co-existing promises on one consideration (*e*) It has, however, been said that the cases establishing this proposition may have proceeded on another principle, viz, that the consideration was exhausted by the promise implied by law from the very execution of it, and that, consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it (*f*) "But 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 (*g*)

Nature of implied promise

But, however this may be, it is quite clear that, where the consideration is past, the promise alleged, even if express, must be identical with that which would have been implied by law from the particular transaction, in other words, "a past and executed consideration will support no other promise than such as may be implied by law" (*h*), thus, in assumpsit, the declaration stated that, in consideration that plaintiff, at the request

(*a*) *Per* Pollock, C B, Id at p 716
(*b*) *Nordenstrom* v *Pitt* 13 M & W 723
(*c*) *Per* Crompton, J, in *Fagg* v *Nudd*, 3 E & B 650
(*d*) Judgm, *Kaye* v *Dutton* 7 M & Gr 807, at p 815, and cases there cited
(*e*) *Per* Maule B in *Hopkins* v *Logan* 5 M & W 241, at p 249
(*f*) See *Deacon* v *Gridley*, 15 C B 295
(*g*) Judgm in *Kaye* v *Dutton*, 7 M & Gr 807, at p 816
(*h*) *Per* Parke B, in *Atkinson* v *Stephens* 7 Exch 567, at p 572, Judgm, *Earle* v *Oliver*, 2 Exch 71, at p 89, *Lattimore* v *Garrard*, 1 Exch 809, 811

of defendant, *had bought* a horse of defendant at a certain price, defendant promised that the horse was *free from vice*, but deceived the plaintiff in that the horse was vicious This declaration was held bad, for the executed consideration, though laid with a request, neither raised by implication of law the promise charged in the declaration, nor supported such promise if express, and the Court observed that the only promise which would result from the consideration, as stated, and be co-extensive with it, would be to deliver the horse upon request (*i*)

In an action against the public officer of an insurance company, a count in the declaration stated that it was agreed between the company and the plaintiff that, from the 1st of January then next, the plaintiff, as the attorney of the company, should receive a salary of £100 per annum, in lieu of rendering an annual bill of costs for general business, and in consideration that the plaintiff had promised to fulfil the agreement on his part, the company promised to fulfil the same on their part, *and to retain and employ the plaintiff as such attorney* (*k*) The verdict being in favour of the plaintiff, the judgment was afterwards arrested by the Court of Common Pleas, upon this ground, that there was no sufficient consideration to sustain that part of the above count, which alleged a promise to retain and employ the plaintiff, the Court holding that the language of the agreement, as stated, imported an obligation to furnish actual employment to the plaintiff in his profession of an attorney, and that, inasmuch as the consideration set forth was in the past, that the plaintiff *had* promised to perform his part of the agreement, such consideration, being a past or executed promise, was exhausted by the like promise of the company to perform the agreement, and did not enure as a consideration for the additional part of the promise alleged, to retain and employ the plaintiff in the sense before mentioned, as also to perform the agreement The view thus taken, however, was pronounced erroneous by the Court of Exchequer Chamber, and by the House of Lords, who held that the averment as to retaining and employing the plaintiff was not to be understood as importing a contract beyond the strict legal effect of the agreement, whence it followed that the mutual promises to

(*i*) *Roscorla* v *Thomas*, 3 Q B 234, at p 237
(*k*) *Emmens* v *Elderton*, 4 H L Cas 624, 13 C B 495, 6 Id 160, 4 Id 479

perform such agreement, laid in the count objected to, were a sufficient legal consideration to sustain the defendant's promise

Concurrent consideration

A *concurrent* consideration is where the act of the plaintiff and the promise of the defendant take place at the same time, and here the law does not, as in the case of a bygone transaction, require that, in order to make the promise binding, the plaintiff should have acted at the request of the defendant (*l*) Thus, where it appeared from the whole declaration taken together, that, at the same moment, by a simultaneous act, a promise was made, that, on the plaintiff's accepting bills drawn by one of the parties then present, the defendants should deliver certain deeds to the plaintiff when the bills were paid, it was held that a good consideration was disclosed for the defendant's promise (*m*) So, where the promise of the plaintiff and that of the defendant are simultaneous, the one may be a good and sufficient consideration for the other (*n*), and where two parties, upon the same occasion, and at the same time, mutually promise to perform a certain agreement not then actually entered into, the consideration moving from the one party is sufficient to support the promise by the other (*o*)

Again, where, by one and the same instrument, it is agreed that one of the contracting parties shall pay a sum of money, and that the other shall at the same time execute a conveyance of an estate, the payment of the money and the execution of the conveyance may properly be considered concurrent acts, and, in this case, no action can be maintained by the vendor to recover the money until he executes, or offers to execute a conveyance (*p*) It may, indeed, be stated, generally, that neither party can sue on such an entire contract without showing a performance of, or an offer, or, at least, a readiness and willingness to perform his part of the agreement, or a wrongful discharge or prevention of such performance by the other party, in which latter case the party guilty of the wrongful act shall not, in accordance with a maxim already considered, be allowed

(*l*) *Per* Tindal, C J , in *Tipper* v *Bicknell* 3 Bing N C 710 at p 715

(*m*) *Tipper* v *Bicknell, supra*, *West* v *Jackson* 16 Q B 280

(*n*) As to *mutualsty* in contracts, see Broom s Com , 5th ed 307 *et seq* , *Bealey* v *Stuart*, 31 L J Ex 281, *Westhead* v *Sproson*, 6 H & N 728, *Whittle* v *Frankland*, 2 B & S 49

(*o*) *Thornton* v *Jenyns*, 1 M & Gr 166 See *King* v *Gillett*, 7 M & W 55, *Harrison* v *Cage*, 1 Raym Ld 386 (cited in *Smith* v *Woodfine*, 1 C B N S 660, at p 667)

(*p*) *Per* Ld Tenterden in *Spiller* v *Westlake*, 2 B & Ad 155, *Bankart* v *Bowers*, L R 1 C P 484

to take advantage of it, and thereby relieve himself from liability for breach of contract (*q*) Whether or not, in any given case, one *promise* be the consideration for another, or whether the *performance*, and not the mere promise, be the consideration, must be gathered from, and depends entirely upon, the words and nature of the agreement, and the intention of the contracting parties (*r*)

Continuing consideration

In addition to cases in which the consideration is concurrent, or is altogether past and executed, others occur wherein the consideration is *continuing* at the time of making the promise thus, it has been held that the mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner (*s*)

CAVEAT EMPTOR (*Hob* 99)—*Let a purchaser beware*

Rule of the Roman law,

It seems clear that, by the civil law, a warranty of title was, as a general rule, implied on the part of the vendor of land, so that he was answerable in damages to the buyer if evicted, *sive tota res evincatur, sive pars, habet regressum emptor in venditorem* (*t*) and again, *non dubitatur, etsi specialiter venditor evictionem non promiserit, re evicta, ex empto competere actionem* (*u*) With us, however, the above proposition does not hold, and it is laid down that, "if a man buy lands whereunto another hath title, which the buyer knoweth not, yet ignorance shall not excuse him" (*x*) By the civil law, as observed by Sir E Coke, every man is bound to warrant the thing that he sells or conveys, albeit there be no express warranty but the common law binds him not, *unless there be*

and of our common law

(*q*) *Ante* pp 197, *et seq* If a party does all he can to perform the act which he has stipulated to do but is prevented by the wrongful act of the other party, he is in the same situation as if the performance had been perfected (*Per* Holroyd J, in *Studdy* v *Sanders*, 5 B & C 628, at p 639) see also, *Caines* v *Smith*, 15 M & W 189, and notes to *Cutter* v *Powell*, 2 Sm L C p 1

(*r*) *Thorpe* v *Thorpe*, 1 Raym Ld 662, *per Cur* in *Stavers* v *Curling*, 3 Scott, 740, at pp 750, 754, *per* Williams, J in *Christie* v *Borelly* 7 C B N S 561 at p 567

(*s*) *Powley* v *Walker*, 5 T R 373 (recognised in *Beale* v *Sanders* 3 Bing N C 850, at p 859), *Massey* v *Goodall*, 17 Q B 310

(*t*) D 21, 2, 1

(*u*) C 8, 45, 6

(*x*) Doct and Stud, bk 2, ch 47

a warranty, either in deed (*y*), or in law, for *caveat emptor* (*z*) *qui ignorare non debuit quod jus alienum emit* (*a*)—let a purchaser, who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution

Sale of land.—As the maxim *caveat emptor* applies, with certain specific restrictions, not only to the quality of, but also to the title to land which is sold the purchaser is generally bound to view the land and to inquire after and inspect the title-deeds, at his peril if he does not He does not use common prudence, if he relies on any other security (*b*) The ordinary course, indeed, which is adopted on the sale of real estates is this the seller submits his title to the inspection of the purchaser, who exercises his own judgment, or such other as he confides in, on the goodness of the title (*c*), and if it should turn out to be defective, the purchaser has no remedy, unless he take special covenant or warranty, provided there be no fraud practised on him to induce him to purchase (*d*) Thus, if a regular conveyance is made, containing the usual covenants for securing the buyer against the acts of the seller and his ancestors only, and his title is actually conveyed to the buyer, the rule of *caveat emptor* applies against the buyer, so that he must, at his peril, perfect all that is requisite to his assurance, and, as he might protect his purchase by proper covenants, none can be added (*e*) An administrator found, among the papers of his intestate, a mortgage deed, purporting to convey premises to him, and without arrears of interest Not knowing it to be a forgery, he assigned it, covenanting, not for good title in the mortgagor, but only that nothing had been done

(*y*) See *Worthington* v *Warrington*, 5 C B 635 *Ellis* v *Rogers* 29 Ch D 661

(*z*) Co Litt 102, a I have always understood that in purchases of land the rule is *caveat emptor* (*Per* Lawrence J in *Gwillim* v *Stone*, 3 Taunt 433, at p 439) see *Stranks* v *St John*, L R 2 C P 376, at p 379 *Baynes Lloyd* [1895] 2 Q B 610, at p 616

(*a*) *Moore* v *Hussey*, Hob 93, at 99

(*b*) *Pasley* v *Freeman*, 3 T R 51, at 56, 65 *Roswell* v *Vaughan* Cro Jac 196, *Medina* v *Stoughton*, 1 Salk 210

(*c*) The Vendor and Purchaser Act 1874 (37 & 38 Vict c 78) s 1, substituted 40 for 60 years as a sufficient root of title, and see the Conveyancing Act, 1881 (44 & 45 Vict c 41), s 3

(*d*) *Per* Lawrence, J, in *Parkinson* v *Lee*, 2 East, 314, at p 323, Judgm in *Stephens* v *De Medina*, 4 Q B 422 at p 428 *per* Erle, C J, in *Thackeray* v *Wood*, 6 B & S 766, at p 773, *per* Martin B, Id 775

(*e*) See Judgm in *Johnson* v *Johnson*, 3 B & P 162, at p 170, Arg in *Hawkins* v *Kemp*, 3 East, 410, at p 446, *Kite's Case* 4 Rep 25 a, at 26 a, *Perryman's Case*, 5 Rep 84 a

by himself or by the intestate to encumber the property, and, as this precluded all presumption of any further security, the assignee was held bound to look to the goodness of the title, and failed to recover the purchase-money (*f*) The case of an ordinary mortgage, however, differs from that of a conveyance, because the mortgagor covenants that at all events he has a good title (*g*)

Landlord and tenant

That an evicted tenant may be without remedy against his landlord, by reason of the maxim *caveat emptor*, is well shown by the case of *Baynes* v *Lloyd* (*h*) The plaintiffs accepted from the defendants a lease under seal, the operative words whereof were "the landlords agree to let", the word "demise" was not used, and there were no express covenants for title The defendants had only a leasehold interest in the premises let, their lease expired during the plaintiffs' term, and thereupon the plaintiffs were evicted by the superior landlord It was held that they had no remedy in covenant against the defendants From the judgments given it appears that the weight of authority favours the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words if used in creating the lease (*i*), but if any covenant is implied from that relation (*k*), it is only a covenant for quiet enjoyment (*l*), determining, where the landlord has any estate, with the determination of that estate 'Whoever wants to be secure when he takes a lease should inquire after and examine the title-deeds" (*m*)

State of demised premises

As a general rule, there is no warranty, still less a condition, implied by law on the demise of real property, that it is fit for the purpose for which it is let For instance, on the lease of a house or farm there is usually no implied warranty that it is reasonably fit for habitation or cultivation (*n*) But to this

(*f*) *Bree* v *Holbech*, 2 Dougl 654 (cited in *Cripps* v *Reade* 6 T R 606, and by Gibbs, C J , in *Jones* v *Ryde*, 1 Marsh 157 at p 163), *Thackeray* v *Wood*, 6 B & S 766

(*g*) *Per* Ld Kenyon in *Cripps* v *Reade*, *supra*

(*h*) [1895] 1 Q B 820, 2 Id 610

(*i*) As to demise, see the authorities collected in the above case

(*k*) See *Bandy* v *Carturight*, 8 Exch 913 *Hall* v *City of Lond Brewery* 2 B & S 737 (cited in *Baynes* v *Lloyd*, [1895] 1 Q B 825 at p 826)

(*l*) As to this covenant, see *Harrison* v *Muncaster*, [1891] 2 Q B 680 *Manch , S & L Ry Co* v *Anderson* [1898] 2 Ch 394, *Tebb* v *Cave*, [1900] 1 Ch 642

(*m*) *Per* Ld Mansfield in *Keech* v *Hall*, 1 Dougl 21

(*n*) *Hart* v *Windsor*, 12 M & W 68 *Surplice* v *Farnsworth*, 7 M & Gr 576, see *Keates* v *Cadogan*, 10 C B 591

rule there are some exceptions, for on the letting of a ready-furnished house the lessor impliedly undertakes that the house is reasonably fit for habitation at the time when the tenancy commences, and if it be not so fit the tenant may at once quit it without notice (*o*) By statute, there is a similar condition implied on the letting of a house, though not furnished, for habitation by persons of the working classes (*p*)

The general rule that there is no such implied warranty is well illustrated by the decision in *Sutton* v *Temple* (*q*), where the eatage of a field, that is, the use of the herbage to be eaten by cattle, was let for a specific time at a specific rent Upon the tenant stocking the field with his beasts several of them died from the effects of a poisonous substance which had been spread over the field without the landlord's knowledge It was held that there was no implied warranty by the landlord that the eatage was wholesome food for cattle, and that the tenant was not entitled to throw up the lease The word "demise" it was observed, did not carry with it any warranty as to fitness of purpose

Fraud and misrepresentation

The question of warranty is distinct from that of fraud and also from that of material misrepresentation on the part of the vendor The effect of fraud will be considered later (*r*), when we deal with contracts for the sale of goods, it seems enough to say here that the general principles, there briefly referred to, apply equally to cases where contracts to purchase land are induced by fraud In the absence of fraud, the common law did not regard any misrepresentation as to the subject-matter of a contract, as a cause of action, unless such misrepresentation amounted to a warranty, or as a defence, unless either the misrepresentation was such as struck at the root of the contract or the contract was conditional upon the truth of the representation (*s*), but the rule of equity has long been otherwise, and consequently specific performance of contracts to purchase land can be resisted, or rescission of such contracts obtained, not

(*o*) *Smith* v *Marrable*, 11 M & W 5 *Wilson* v *Finch Hatton*, 2 Ex D 336, *Sarson* v *Roberts*, [1895] 2 Q B 395

(*p*) Housing of the Working Classes Act 1890 (53 & 54 Vict c 70), s 75 see *Walker* v *Hobbs* 23 Q B D 458

(*q*) 12 M & W 52

(*r*) **Post**, p 618

(*s*) *Chandelor* v *Lopus*, Cro Jac 4, *Cornfoot* v *Fowke*, 6 M & W 358 and see the judgments of Bowen, L J , in *Newbigging* v *Adam*, 34 Ch D 582, at p 592 and of Blackburn J in *Kennedy* v *Panama, etc , Mail Co* , L R 2 Q B 580, at p 587 See also *Derry* v *Peek*, 14 A C 337

only where they have been effected through fraud (*t*), but also where they have been brought about by a material misrepresentation, however innocent, of the vendor or his authorised agents (*u*) For instance, where a contract to purchase an hotel was entered into on the faith of a representation that the tenant, who was in fact insolvent, was "very desirable," specific performance was refused and rescission was decreed (*x*) It must be noticed, however, that, although completion by conveyance is not a bar to rescission on the ground of fraud, yet misrepresentation is not a ground for rescinding a contract for the purchase of land after completion, unless it was fraudulent and capable of supporting a common law action of deceit (*y*) After taking the conveyance and paying the purchase-money the purchaser, who has accepted the title, cannot call upon the vendor to take back the land and give back the money, merely because it turns out that the title, which the vendor innocently represented as good, is in fact bad otherwise there would be no use in taking covenants for title, or in restricting their scope (*z*)

Slight errors of description

Cases sometimes arise in which the vendor can perform his contract in its substance, but cannot perform it to the letter, owing to some very slight error of description In such cases, if the error does not amount to a material misrepresentation on the faith of which the purchaser contracted, the vendor may be able to obtain a decree for specific performance on the terms of making compensation for the error (*a*) The modern tendency, however, is to hold the vendor strictly to the bargain he in fact made, and a purchaser is never compelled to take with compensation something materially different from what he was induced by representations to believe that he was offered (*b*) For instance, a purchaser will not be compelled to accept an underlease, if it was misdescribed in the vendor's particulars of sale as a lease, and was bought as such (*c*)

Stipulations as to errors

Contracts for the sale of land often contain a stipulation that, if there be any misdescription in the particulars of the

(*t*) See *Attwood* v *Small*, 6 Cl & F 232
(*u*) See *Redgrave* v *Hurd*, 20 Ch D 1, at p 12
(*x*) *Smith* v *Land Corpn* 28 Ch D 7
(*y*) *Wilde* v *Gibson* 1 H L C 605 *Brett* v *Clowser*, 5 C P D 376, *Brownlie* v *Campbell*, 5 App Cas 925, at p 937, *Soper* v *Arnold* 37 Ch D 96, at p 102
(*z*) See *per* Cotton, L J in *Soper* v *Arnold*, 37 Ch D 96, at p 101
(*a*) See *Mortlock* v *Buller* 10 Ves 305 *Rudd* v *Lascelles* [1900] 1 Ch 815
(*b*) *Re Arnold*, 14 Ch D 270, at p 279
(*c*) *Re Beyfus & Masters's Contract*, 39 Ch D 110

sale, the contract shall not be annulled, but compensation shall be given Such a stipulation, however, is not construed as applicable to every misdescription, it does not apply to a fraudulent one, nor to one the compensation for which could not reasonably be estimated, and, where the misdescription, though not fraudulent, 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, then he may annul the contract, and is not bound to resort to compensation, notwithstanding the stipulation (*d*) Moreover, unless the stipulation be so expressed as to limit it to errors discovered before the conveyance, the right to compensation under the stipulation is not extinguished by the completion of the purchase, for the conveyance does not cover the whole ground covered by the contract (*e*)

Effect of completion

Where, however, there is no contract for compensation, a lessee or purchaser cannot, after completion, claim compensation for a defect of title which he might have discovered before completion, in the absence of fraud, he is without remedy, unless some express or implied covenant of the lease or conveyance has been broken and it may be observed that an express qualified covenant excludes the implication by law of any wider covenant (*f*)

Vendor retaining possession until completion

A vendor of land who retains possession until completion owes some duty to the purchaser to take reasonable care to preserve the property of which he thus retains possession, and to see that it does not become deteriorated Whilst a vendor was still in possession, a trespasser removed large quantities of soil from the land, the conveyance was afterwards executed, neither party being then aware of the trespass It was held that the conveyance did not extinguish the vendor's liability to the purchaser for his breach of duty (*g*)

An unpaid vendor of a house, or other building, who retains possession until completion, is, however, as a rule, not answerable to the purchaser, if in the interval the building be damaged or destroyed by accidental fire, the loss must fall upon the

see

(*d*) *Re Faucett & Holmes's Contract*, 42 Ch D 150, at p 156
(*e*) *Palmer* v *Johnson* 13 Q B D 351
and as *Clayton* v *Leech*, 41 Ch D 103, *Kelly* v *Rogers* [1892] 1 Q B 910
582, at *te*, p 420
L R *Clarke* v *Ramuz*, [1891] 2 Q B 456

purchaser, if bound by the contract of sale (*h*), and if the contract is silent as to insurances against fire effected by the vendor, the purchaser cannot, even after completion, maintain any claim against the vendor in respect of moneys received by him from the insurance offices (*i*)

We may here add that the maxim, *damnum sentit dominus*, or *res perit domino* (*k*), expresses the general rule applicable in our law to the case of the accidental destruction of goods contracted to be sold in the absence of any agreement to the contrary the loss usually falls on the buyer or on the seller according as the property in the goods has or has not passed (*l*) The above maxim, however, is affected by another, *mora debitoris non debet esse creditori damnosa* (*m*), for where delivery of the goods has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault (*n*)

Sale of personal chattels

Sales of personal property—We shall now consider shortly how far the maxim *caveat emptor* applies to sales of personalty, and what are the risks taken by a buyer in respect, first, of the quality of what he buys, and, secondly, of the title thereto Discussion of the subject, so far as goods are concerned, has been simplified by the Sale of Goods Act, 1893 (*o*), whereby the legislature codified the law relating to the sale of all chattels personal, except things in action and money The term 'goods," as used in the Act, includes "emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale" (*p*)

Distinction between conditions and warranties

To understand the subject, it is necessary at the outset to grasp the distinction drawn, as regards contracts of sale, between a condition and a warranty A warranty is but a collateral agreement with reference to the goods which are the

(*h*) *Paine* v *Meller*, 6 Ves 349

(*i*) *Rayner* v *Preston*, 18 Ch D 1, see *Collingridge* v *Roy Ex Ass Co*, 3 Q B D 173, *Castellain* v *Preston* 11 Q B D 380

(*k*) Cited by Blackburn J, in *Heilbutt* v *Hickson*, L R 7 Q B 438, at pp 453, 454

(*l*) See the Sale of Goods Act, 1893 (56 & 57 Vict c 71), s 21 cf s 7 and see also ss 32, 33

(*m*) See Pothier, C de Vente, § 58

(*n*) 56 & 57 Vict c 71, s 21

(*o*) 56 & 57 Vict c 71

(*p*) Ibid s 62 (1)

subject of the contract, and its breach, though it may give rise to a claim for damages, gives no right to reject the goods and treat the contract as repudiated (*q*), whereas the breach of a condition to be fulfilled by the seller, so long as it may be treated as a condition, gives this right (*r*) Whether a stipulation in the contract is a condition or a warranty is a question of construction, and it may be a condition, though called a warranty (*s*) The buyer may treat a breach of a condition as a breach of warranty (*t*), and, subject to the express or implied terms of the contract, that is his only remedy after he has accepted any of the goods under a contract which is not severable, or after the property in the goods has passed to him under a contract for specific goods (*u*) Specific goods are goods identified and agreed upon at the time of the contract (*x*)

Caveat emptor

Upon a sale of goods the general rule with regard to their nature or quality is *caveat emptor*, so that, in the absence of fraud, the buyer has no remedy against the seller for any defect in the goods, not covered by some condition or warranty, either express or implied It is beyond all doubt that, by the general rules of law, there is no warranty of quality arising from the bare contract of sale of goods, and that, where there has been no fraud, a buyer, who has not obtained an express warranty, takes all risk of defect in the goods, unless there are circumstances the law implies any warranty of quality upon a sale may be implied (*y*)

Implied warranties

It is, therefore, necessary to consider under what circumstances the law implies any warranty of quality upon a sale of goods, and the following appear to be the only cases in which, when goods are sold, there can be any implied condition or warranty as to either their nature or their quality (*z*) Quality of goods here includes their state or condition (*a*)

(*q*) 56 & 57 Vict c 71, s 62 (1)
(*r*) Ibid s 11
(*s*) Ibid s 11 (b)
(*t*) Ibid s 11 (a)
(*u*) Ibid s 11 (c) See *Perkins* v *Bell*, [1893] 1 Q B 193
(*x*) 56 & 57 Vict c 71, s 62 (1)
(*y*) *Springwell* v *Allen*, Alleyn, 91 and 2 East, 448, n *Williamson* v *Allinson* 2 East 446, *Early* v *Garrett*, 9 B & C 928, *Morley* v *Attenborough* 3 Ex 500 *Ormrod* v *Huth* 14 M & W 651 at p 664 *Hall* v *Conder*, 2 C B N S 22, *Hopkins* v *Tanqueray*, 15 C B 130 *Ward* v *Hobbs*, 4 App Cas 13
(*z*) The law on this subject now depends, mainly upon 56 & 57 Vict c 71 ss 13—15 For a classification of the cases on the subject as decided by the common law, see *Jones* v *Just*, L R 3 Q B 197, at p 202
(*a*) See 56 & 57 Vict c 71 s 62 (1)

Sale by description

1 Where there is a contract for the sale of goods by description (*b*) there is an implied condition that the goods shall correspond with the description (*c*) If the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description (*d*) With this rule, that where the sale is not merely a sale of a specific article, but is a sale of an article by description, the article must answer to that description, we may compare the statement of the civil law, *si aes pro auro veneat, non valet aliter atque si aurum quidem fuerit, deterius autem quam emptor existimarit tunc enim emptio valet* (*e*) Generally, if the article tendered agrees, in its nature, with the description, the buyer takes the risk as to its quality, and in this respect there appears to be no difference between a sale of victuals and a sale of any other commodity (*f*) There can be no implied warranty as to quality, unless the case falls within one of the classes of cases next to be mentioned

Sale, by description, of goods dealt in by seller

2 Where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality (*g*) If, however, the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed (*g*)

Sale by sample

3 In the case of a contract for sale by sample there are three implied conditions (*h*) 1, that the bulk shall correspond with the sample in quality (*i*) 2, that the buyer shall have a reasonable opportunity of comparing the bulk with the sample (*k*), and 3, that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the bulk (*l*)

Purchase for particular purpose known to seller

4 Where the buyer, expressly or by implication, makes

(*b*) See *Varley* v *Whipp*, [1900] 1 Q B 513
(*c*) 56 & 57 Vict c 71, s 13
(*d*) Ibid
(*e*) Cited in *Kennedy* v *Panama &c Mail Co*, L R 2 Q B 580 at p 588
(*f*) *Burnby* v *Bollett*, 16 M & W 644, *Emmerton* v *Mathews*, 7 H & N 586, *Smith* v *Baker*, 40 L T 261, *Ward* v *Hobbs*, 4 App Cas 13
(*g*) Sale of Goods Act, 1893 (56 & 57 Vict c 71), s 14 (2), *Wren* v *Holt*, [1903] 1 K B 610 (beer sold in a tied house), *Thornett* v *Beers*, [1919] 1 K B 486 (barrels of glue)
(*h*) Sale of Goods Act, 1893, s 15 (2)
(*i*) See *Wells* v *Hopkins*, 5 M & W 7
(*k*) See *Lorymer* v *Smith*, 1 B & C 1
(*l*) See *Drummond* v *Van Ingen*, 12 App Cas 284

known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, then there is an implied condition that the goods shall be reasonably fit for that purpose (*m*), unless the right to such is precluded by express agreement, course of dealing between the parties, or usage binding on both parties (*n*) Where, however, a contract is made for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose (*o*)

Usage of trade

5 An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade (*p*)

Act of Parliament

6 An implied warranty or condition may be annexed by the provisions of a statute (*q*) For instance, on the sale of a chain cable there is, usually, an implied warranty that it has been duly tested and proved (*r*)

In passing now from implied to express warranties, we may notice that, as a general rule, an express warranty or condition does not negative a warranty or condition implied by law, unless inconsistent therewith (*s*)

Express warranties

With regard to express warranties, the general rule is that every affirmation made at the time of sale is a warranty, provided it appears, on the evidence, to have been so intended, the question whether or not it was so intended being one of fact for the jury, and no special form of words is required to constitute a warranty, for if the seller assumes to assert a *fact* of which the buyer is ignorant, he will generally be taken to have intended a warranty, but it is otherwise, if he merely gives an opinion on a matter of which he has no especial knowledge,

(*m*) Sale of Goods Act, 1893, s 14 (1) See, for instance, *Brown* v *Edgington*, 2 M & Gr 279, *Randall* v *Newson*, 2 Q B D 102, *Frost* v *Aylesbury Dairy Co* [1905] 1 K B 608

(*n*) Sale of Goods Act, 1893, s 55 see *Contat* v *Myham*, [1914] W N 46

(*o*) Sale of Goods Act, 1893, s 14 (1) See, for instance, *Chanter* v *Hopkins*, 4 M & W 399

(*p*) Sale of Goods Act, 1893, s 14 (3) See *Jones* v *Bowden*, 4 Taunt 847

(*q*) Sale of Goods Act, 1893, s 14

(*r*) Anchors and Chain Cables Act, 1899 (62 & 63 Vict c 23), s 2

(*s*) Sale of Goods Act, 1893, s 14 (4), *Bigge* v *Parkinson*, 7 H & N 955 Cf the maxim, *expressio unius, &c*, *ante*, p 420

and on which the buyer may be expected also to have an opinion and to exercise his judgment (*t*)

Visible defects

It is, indeed, laid down by the older authorities that "defects, apparent at the time of a bargain, are not included in a warranty, however general, because they can form no subject of deceit or fraud, and, originally, the mode of proceeding for breach of warranty was by an action of deceit, grounded on a supposed fraud, and it may be presumed that there can be no deceit where a defect is so manifest that both parties discuss it at the time of the bargain A party, therefore, who should buy a horse, *knowing* it to be blind in both eyes, could not sue on a general warranty of soundness" (*u*) The maxim, *caveat emptor*, seems, therefore, to apply, as a rule in cases where the seller affirms that the subject-matter of the sale has not a defect, which is a visible defect and obvious to the senses, *ea quæ commendandi causâ in venditionibus dicuntur si palam appareant, venditorem non obligant* (*v*), in the absence of an express agreement to the contrary, a general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer (*y*) However, if without such knowledge on the part of the buyer, a horse is warranted sound, which, in reality, wants the sight of an eye, though this might be thought to be the object of one's senses, yet, as the discernment of such a defect is frequently matter of skill, it has been held that an action lies to recover damages for the imposition (*z*) 'The defect,' as Lord Campbell said (*a*), "was not one of which the purchaser with express warranty was bound to take notice, he might naturally exercise less vigilance than he would exercise where he had not a warranty to rely on"

Simple commendation

It is to be remarked that an express warranty will not necessarily result from a simple commendation of the quality of goods by the seller, for in this case the rule of the civil law, *simplex commendatio non obligat* (*b*), has been adopted

(*t*) *Per* Buller, J, in *Pasley* v *Freeman* 3 T R 51 at p 57, *Power* v *Barham*, 4 A & E 473, *Carter* v *Crick*, 4 H & N 412, *Stuckey* v *Baily* 1 H & C 405

(*u*) *Per* Tindal, C J in *Margetson* v *Wright*, 7 Bing 603 See *Liddard* v *Kain*, 2 Bing 183, *Holliday* v *Morgan*, 1 E & E 1

(*x*) D 18 1, 43, pr (*y*) See Benj on Sale, 6th ed p 763

(*z*) *Butterfield* v *Burroughs*, 1 Salk 211 *Holliday* v *Morgan*, 1 E & E 1

(*a*) In *Holliday* v *Morgan*, *supra*

(*b*) D 4 3, 37, *per* Byles, J, in *Mallan* v *Radloff*, 17 C B N S 588, at p 597

by our own, and such *simplex commendatio* will, in most cases, be regarded merely as an invitation to custom, since every seller will naturally affirm that his own wares are good (*c*), unless it appear on the evidence, or from the words used, that the affirmation at the time of sale was intended to be a warranty, or that such must be its necessary meaning (*d*) It is, therefore, laid down, that in a purchase without warranty, a man's eyes, tastes, and senses must be his protection (*e*), and that where the subject of the affirmation is mere matter of opinion (*f*), and the buyer may himself institute inquiries into the truth of the assertion, the affirmation must be considered a "nude assertion" and it is the buyer's fault from his own *laches* that he is deceived (*g*) Either party may, therefore, be innocently silent as to grounds open to both to exercise their judgment upon, and in this case, *aliud est celare, aliud tacere* (*h*) Silence is not equivalent to concealment (*i*)

Fraud

It may be recollected that our proposition was that a buyer of goods has no remedy against the seller for any defects not covered by some condition or warranty, in the absence of fraud We have already, in noticing the maxim as to *dolus malus* (*k*), observed generally upon the effect of fraud in vitiating transactions, and the remarks then made apply with peculiar force to the contract of sale

(*c*) See *per* Sir J Mansfield in *Vernon* v *Keyes* 4 Taunt 488 at p 493 Arg in *West* v *Jackson* 16 Q B 280, at pp 282 283 *Chandelor* v *Lopus* Cro Jac 4

(*d*) *Per* Buller, J , in *Pasley* v *Freeman* 3 T R 57 *Allan* v *Lake*, 18 Q B 560, *Jones* v *Clark* 27 L J Ex 165, *Vernede* v *Weber*, 1 H & N 311 *Simond* v *Braddon* 2 C B N S 924 *Shepherd* v *Kain* 5 B & Ald 240 *Freeman* v *Baker* 5 B & Ad 797, *Budd* v *Fairmaner* 8 Bing 52 *Coverley* v *Burrell* 5 B & Ald 257 (*e*) Fitz Nat Brev 94, 1 Roll Abr 96

(*f*) See *Power* v *Barham*, 4 A & E 473, *Jendwine* v *Slade* 2 Esp 572

(*g*) *Per* Grose, J , in *Pasley* v *Freeman* 3 T R 51 at pp 54 55 see *Bayley* v *Merrel*, 3 Bulst 94 (cited and distinguished in *Brass* v *Maitland*, 6 E & B 470, —which itself was followed in *Mitchell* v *Steel Bros* [1916] 2 K B 610, and in *G N Ry* v *L E P Depository, &c* [1922] 2 K B 742—at p 482), *Lysney* v *Selby*, 2 Raym Ld 1118 (recognised in *Dobell* v *Stevens*, 3 B & C 623) *per* Tindal, C J , in *Shrewsbury* v *Blount*, 2 Scott, N R 588, at p 594 As to the rule in equity, where specific performance or rescission is sought, see *Price* v *Macaulay* 2 De G M & G 339, at p 346, *Redgrave* v *Hurd*, 20 Ch D 1 at p 13 (*h*) Cicero, de Officiis l 3, c 12, 13

(*i*) *Per* Ld Mansfield in *Carter* v *Boehm*, 3 Burr 1905, at 1910, *per* Best, C J , in *Williams* v *Rawlinson*, 3 Bing 71, at p 77 See *per* Abbott, C J , in *Bowring* v *Stevens*, 2 C & P 337, at p 341

As to what will constitute fraudulent concealment in the view of a Court of equity, see *Cent Ry Co of Venezuela* v *Kisch*, L R 2 H L 99 By such a Court the maxim, *qui vult decipi decipiatur* is recognised, see *Reynell* v *Sprye*, 1 De G M & G 687, at p 710

(*k*) *Ante* p 471

Remedies for fraud

There are two courses, either of which is usually open to a buyer who has been induced to buy goods by the seller's fraud (*l*) He may either abide by the contract, and bring an action, usually called an action of deceit, for the damage sustained by the fraud or he may rescind the contract, returning the goods, if already accepted, and recovering the price, if already paid, by action after demand and refusal, but he cannot pursue the latter course after his own act has put it out of his power to restore the parties to their original condition (*m*)—"you cannot both eat your cake, and return your cake" (*n*) And a contract induced by fraud is not void, but only voidable at the election of the party defrauded (*o*) When once he has elected to abide by the contract, being aware of the fraud, he cannot afterwards rescind it—*quod semel placuit in electionibus amplius displicere non potest* (*p*), and in this, as in all cases of election, the election, if it be to rescind, must be made within a reasonable time, that is to say, within a reasonable time after the discovery of the fraud (*q*)

To establish his right to rescind a contract on the ground of fraud, or to recover damages on that ground, the buyer must be prepared to prove affirmatively the following matters 1, that the seller made a false representation of fact, 2, that in making it he was guilty of fraud, 3, that he made the fraudulent misrepresentation with the intention that the buyer should act upon it, 4, that the buyer believed it to be true, and 5, that he was thereby induced to enter into the contract In an action of deceit, the buyer must also prove that he has suffered damage arising out of the fraud, for fraud without damage or damage without fraud is insufficient these two must concur, to give this cause of action (*r*)

What is a misrepresentation

Upon the first of these matters which the buyer must prove, it should be noticed that a seller who knows of defects in his goods is under no legal obligation to disclose them to a buyer

(*l*) As to remedies for a breach of warranty in the sale of goods see 56 & 57 Vict c 71, s 53

(*m*) *Clarke* v *Dickson*, E B & E 148, *Urquhart* v *Macpherson*, 3 App Cas 831, 838

(*n*) *Per* Crompton, J , in *Clarke* v *Dickson*, E B & E 148, at p 152

(*o*) *Clough* v *L & N W Ry Co* , L R 7 Ex 26, at p 34

(*p*) Co Litt 146 a, *per* Ld Blackburn, in *Scarf* v *Jardine*, 7 App Cas 345 at p 360

(*q*) *Lindsay Petroleum Co* v *Hurd*, L R 5 P C 221

(*r*) *Per* Croke J , in *Bailey* v *Merrel*, 3 Bulst 94, see *Pasley* v *Freeman* 3 T R 51, and 2 Sm L C , 12th ed 71, and the notes thereto

who is ignorant of them (*s*), and an action cannot be maintained against a person for an alleged deceit, "charging merely his concealment of a material fact which he was morally, but not legally, bound to disclose" (*t*) The seller may know that the buyer believes the goods to be different in quality from what they really are, but if that belief has not been induced by the act of the seller, he is not chargeable with misrepresentation merely because he is silent (*u*) A seller, however, is, no doubt, guilty of a misrepresentation, if he does not merely keep silent but in some way actively fosters a mistaken belief which he knows that the buyer entertains Although simple reticence may not amount to fraud in law, however it might be viewed by moralists, yet a mere nod or shake of the head by the seller, with the intention of inducing the buyer to believe in the existence of a non-existing fact, must be treated as a misrepresentation (*x*), and with regard to misrepresentations it is clear that silence is an equivalent when the withholding of that which is not stated makes that which is stated absolutely false (*y*) Half a truth may amount to a real falsehood (*z*), and fraud may thus consist as well in the suppression of what is true, as in the representation of what is false (*a*) Again, a number of statements which, when taken together, necessarily give a false impression, are none the less false because it may be difficult to point out that any particular statement is untrue (*b*)

What is fraud

With regard to the proof of fraud, fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, without caring whether it be true or false The third case is probably but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states, and to prevent a false statement from being fraudulent there must always be an honest

(*s*) *Keates* v *Cadogan*, 10 C B 591

(*t*) *Per* Ld Chelmsford in *Peek* v *Gurney*, L R 6 H L 377, at p 390

(*u*) *Smith* v *Hughes*, L R 6 Q B 597, *Ward* v *Hobbs* 4 App Cas 13, *Turner* v *Green*, [1895] 2 Ch 205

(*x*) See *per* Ld Campbell in *Walters* v *Morgan*, 3 D F & J 718, at p 723 (cited in *Turner* v *Green*, [1895] 2 Ch 205, at p 209)

(*y*) See *per* Ld Cairns, in *Peek* v *Gurney*, L R 6 H L 377, at p 403

(*z*) See Id at p 392, *per* Ld Chelmsford, *Gluckstein* v *Barnes*, [1900] A C 240, at p 251, *per* Ld Macnaghten

(*a*) *Per* Chambre, J , in *Tapp* v *Lee* 3 B & P 367, at 371

(*b*) See *per* Ld Halsbury in *Aaron's Reef* v *Twiss*, [1896] A C 273, at p 281

belief in its truth If fraud be proved the motive of the person guilty of it is immaterial (*c*) The absence of reasonable grounds for making a statement does not make the statement fraudulent, if honestly believed in, and is material only in so far as it throws light on the question whether there was an honest belief in the statement (*d*) False representations, made without knowledge that they are false, are not rendered fraudulent by stupidity or carelessness, however gross, there must be some indifference to the truth amounting to dishonesty (*e*) The expression "legal fraud," which is said to have owed its origin to Lord Kenyon, is misleading Fraud has the same meaning when used in Courts of law as in ordinary parlance, and always implies moral turpitude

It is generally said that the misrepresentation to be proved must be one of fact (*f*), and this is so far correct that the expression of mere general hopes or expectations as to the benefits which may follow from making the contract is insufficient (*g*) The maxim *simplex commendatio non nocet*, to which we have already referred (*h*), is then applicable But expressions of opinion, whether as to the past or the future, may, and often do, involve statements of existing facts, for which a person will be held responsible (*i*), and so may expressions of opinion upon matters which, in one aspect, are matters of law (*k*)

Fraudulent intent

The intention with which a fraudulent misrepresentation is made is generally a matter of inference The law, however, as a rule, imputes to a man an intention to produce those consequences which are the natural result of his acts, and if a man knowingly uses language which in its natural sense conveys a wrong impression, he can scarcely be heard to say that he did not intend to deceive (*l*) To prove, in an action

(*c*) *Per* Ld Herschell, in *Derry* v *Peek*, 14 App Cas 337, at p 374, after an exhaustive review of the previous authorities

(*d*) Same case, at p 369 *per* Ld Herschell

(*e*) *Angus* v *Clifford*, [1891] 2 Ch 449

(*f*) See, for instance, *per* Ld Cairns, in *Peek* v *Gurney*, L R 6 H L 377, at p 409

(*g*) *Bellairs* v *Tucker*, 13 Q B D 562, at p 575

(*h*) *Ante*, p 511

(*i*) *Edgington* v *Fitzmaurice*, 29 Ch D 459 see *per* Bowen L J in *Smith* v *Land Corpn*, 28 Ch D 7, at p 15, *per* Lindley, L J, in *Karberg's Case*, [1892] 3 Ch 1, at p 11

(*k*) *West Lond Bank* v *Kitson*, 13 Q B D 360

(*l*) *Smith* v *Chadwick*, 9 App Cas 187, at p 190, *Arnison* v *Smith*, 41 Ch D 348, at p 372 A document must be read, as against its author, in the sense it was intended to convey (*Gluckstein* v *Barnes*, [1900] A C 240, at p 250)

of deceit, that he intended to deceive the plaintiff, it is not necessary to show that his misrepresentation was made to the plaintiff direct, it is enough that it was made to a third person with the direct intent that it should be communicated to the plaintiff, or to a class of persons of which the plaintiff was one, and should be acted upon by the plaintiff in the manner in which he in fact acted upon it (*m*)

The deceit

It is not sufficient for a buyer to prove that the seller intended to defraud him, he must also prove that the fraud "was an inducing cause to the contract, for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct" (*n*) Accordingly where an action of deceit was brought upon a statement in a prospectus, and that statement was ambiguous being true or false according as one or other of two possible meanings was attached to it, it was held that it was essential to the plaintiff's case that he should prove that he had interpreted the statement in the sense in which it was false, and had in fact been deceived by it (*o*)

It may be observed that, when an action is brought upon a fraudulent prospectus, it is an old expedient, which is seldom successful, to cross-examine the plaintiff, and ask him as to each particular statement in the prospectus what influence it had upon his mind, and how far it induced him to enter into the contract This is quite fallacious A person reading a prospectus generally looks at it as a whole, and on the whole forms his conclusion You cannot weigh the elements by ounces (*p*)

Seller's undertaking as to title

The second question which we proposed shortly to consider relates to the risks run by a buyer of goods with regard to the title thereto Before the Sale of Goods Act, 1893 (*q*), it was, at any rate at one time, a great question under what circumstances could any undertaking by the seller as to his title to sell be implied But the discussion of this question has been much limited by the rule laid down in that Act The rule which now obtains is that, in a contract of sale of goods, unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the seller's part

(*m*) See *Swift* v *Winterbotham* L R 8 Q B 244 at p 253, *Peek* v *Gurney*, L R 6 H L 377, *Andrews* v *Mockford*, [1896] 1 Q B 372
(*n*) *Per* Ld Selborne, in *Smith* v *Chadwick*, 9 App Cas 187, at p 190
(*o*) *Smith* v *Chadwick*, *supra*
(*p*) *Per* Ld Halsbury in *Arnison* v *Smith*, 41 Ch D 348, at p 369
(*q*) 56 & 57 Vict c 71

that, in the case of a sale, he has a right to sell, and that, in the case of an agreement to sell, he will have that right at the time when the property is to pass (*r*) Moreover, in the absence of circumstances showing a contrary intention, there is an implied warranty that the buyer shall enjoy quiet possession of the goods (*s*), and that the goods shall be free from any encumbrance in favour of a third party, not declared or known to the buyer before or at the time when the contract is made (*t*)

This rule limits discussion mainly to the point whether in a particular case an intention was shown that the buyer should take risks as to title, and its effect is that a person who buys goods in the ordinary way across the counter in a shop usually has a remedy against the seller, if the goods be subsequently claimed of right by some other person It must be remembered, however, that the above implied conditions and warranties may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage binding upon both (*u*)

If goods be sold by a person who is not the owner, and the owner be found and be paid for the goods, then, as a general rule, the person who sold them under pretended authority has no right to call upon the buyer to pay him also (*x*) For example, though an auctioneer, inasmuch as he has a lien on the purchase-money, may bring an action in his own name against the buyer for the price of goods sold, and the defendant has no right to plead payment to the auctioneer's employer, yet if the employer was not the true owner of the goods, the defendant may plead payment to or a claim by the true owner (*y*)

General rule as to transfer of title

Although the buyer of goods bought from a seller who had no title to sell them may have remedies against the seller, yet, as a rule, the sale gives him no title to the goods as against

(*r*) 56 & 57 Vict c 71 s 12 (1) which declares the law in accordance with the opinion of Mr Benjamin founded on the decision in *Eichholz* v *Bannister*, 17 C B N S 708, see Benj on Sale 4th ed 634 A seller sells in breach of the condition implied by s 12 (1) if he sells goods so labelled that they cannot in their then state be resold without an infringement of the right of a third party (*Niblett* v *Confectioners Co*, 37 T L R 653, overruling *Montforts* v *Marsden*, 12 R P C 266)

(*s*) 56 & 57 Vict c 71 s 12 (2)

(*t*) Ibid, s 12 (3)

(*u*) Sale of Goods Act, 1893 (56 & 57 Vict c 71), s 55

(*x*) *Allen* v *Hopkins*, 13 M & W 102 See *Walker* v *Mellor*, 11 Q B 478

(*y*) *Robinson* v *Rutter*, 4 E & B 954, *Dickenson* v *Naul*, 4 B & Ad 638, see also *Grice* v *Kenrick*, L R 5 Q B 340

the owner, and, as between the buyer and the owner, the maxim *caveat emptor* applies For the general principle is that where goods are sold by a person who is not the owner, and who does not sell under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had (*z*) *nemo dat quod non habet* (*a*) *nemo plus juris ad alium transferre potest quam ipse habet* (*b*) To this well-established principle, which applies to choses in action as well as to goods, there are, nevertheless, certain exceptions which, or some of which, will be briefly mentioned

Exceptions

1 Title by estoppel

1 The first exception occurs in cases where the owner of the goods is by his conduct precluded or estopped from denying the seller's authority to sell (*c*) Mere carelessness where there is no duty to be careful, creates no estoppel, for instance, a person who does not lock up his goods, which are consequently stolen, may be said to be negligent towards himself, but, since he neglects no duty which the law casts upon him, he is not estopped from denying the title of persons who may have, however innocently, bought the goods from the thief (*d*) But the case is otherwise, where the owner by his words or conduct caused the buyer to believe that the seller was the owner of the goods or had the owner's authority to sell them, and induced him to buy them in that belief, for then he cannot afterwards set up the seller's want of title or authority to sell (*e*)

2 Title under Factors Act

2 A second exception arises in cases which are governed by the Factors Act, 1889 (*f*), or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner (*g*) Under the Factors Act, where a mercantile agent is, with the owner's consent (*h*), in possession of goods

Sale by mercantile agent

(*z*) 56 & 57 Vict c 71 s 21 (1)

(*a*) *Per* Littledale J, in *Dixon* v *Yates* 5 B & Ad 313, at p 339, *per* Willes, J, in *Whistler* v *Foster*, 14 C B N S 248 at p 257

(*b*) D 50, 17, 54 Wing Max, p 56, 2 Pothier, Oblig 263, see *per* Parke, B, in *Awde* v *Dixon* 6 Exch 869

(*c*) Sale of Goods Act, 1893 (56 & 57 Vict c 71), s 21 (1)

(*d*) *Per* Blackburn, J in *Swan* v *N Brit Austral Co*, 2 H & C 175, at p 181 cf *per* Lord Halsbury in *Scholfield* v *Londesborough*, [1896] A C 514, at p 522

(*e*) See the general rule as to estoppels by conduct laid down by Ld Denman in *Pickard* v *Sears* 6 A & E 469, at p 474 and expounded by Parke, B in *Freeman* v *Cooke* 2 Exch 654

(*f*) 52 & 53 Vict c 45

(*g*) Sale of Goods Act, 1893 (56 & 57 Vict c 71), s 2 (a)

(*h*) For the purposes of this enactment there is "consent" where consent has been induced by fraud (*Folkes* v *King*, 39 T L R 77 (C A)), but there is not 'consent' where possession has been obtained from the owner by larceny or by a trick (*Mehta* v *Sutton*, 108 L T R 214)

or the documents of title to goods, a sale of the goods, made by him when acting in the ordinary course of business of a mercantile agent, is as valid as if he were expressly authorised by the owner to make it, provided that the buyer acts in good faith and has not at the time of the sale notice that the agent has not authority to make it (*i*) The owner's consent to the possession must be presumed in the absence of evidence to the contrary (*k*), and if it has been given, it cannot be determined as against a buyer who buys without notice of the determination (*l*)

Sale by seller or buyer in possession after sale

Moreover, under the provisions of this Act (*m*), where a person, having sold goods, continues in possession of the goods, or the documents of title thereto, his [subsequent] delivery of the goods, or documents, under a sale or agreement for sale, to a person receiving them in good faith and without notice of the previous sale, has the same effect as if the delivery were expressly authorised by the owner (*n*) And, again, where a person, having bought or agreed to buy goods, obtains with the seller's consent possession of the goods or the documents of title thereto, his delivery of the same under a sale or agreement for sale to a person receiving them in good faith, and without notice of any right of the original seller in respect of the goods, has the same effect as if the delivery were made by a mercantile agent in possession of the goods or documents with the owner's consent (*o*)

3 Sale under special power

3 A third exception comprises cases in which a sale is made under a special common law or statutory power of sale, or under the order of a Court of competent jurisdiction (*p*) Sales by

(*i*) 52 & 53 Vict c 45 s 2 (1) Mercantile agent means a mercantile agent having in the customary course of his business as such agent authority to sell goods or consign them for sale or buy them, or raise money on their security (Id s 1 (1)) see *Werner* v *Harris* [1910] 1 K B 285, overruling *Hastings* v *Pearson* [1893] 1 Q B 62), see also *Mehta* v *Sutton* 106 L T R 214, and 109 L T R 529

(*k*) Factors Act, 1889 (52 & 53 Vict c 45) s 2 (4)

(*l*) Ibid s 2 (2) see *Moody* v *Pall Mall Deposit*, 33 T L R 306

(*m*) Ss 8 & 9, see also the Sale of Goods Act, 1893 (56 & 57 Vict c 71), s 25

(*n*) But where a merchant first sells goods stored with a warehouseman and then pledges them to the warehouseman to secure money lent without notice of the sale, the warehouseman acquires no title (*Nicholson* v *Harper*, [1895] 2 Ch 415)

(*o*) See *ante*, p 304 See, as to hire purchase agreements, *Lee* v *Butler*, [1893] 2 Q B 318, *Helby* v *Matthews*, [1895] A C 471 *Payne* v *Wilson*, [1895] 1 Q B 653, and 2 Id 537, *Belsize Co* v *Cox*, [1914] 1 K B 244, following *Helby* v *Matthews*, *supra* and distinguishing *Lee* v *Butler*, *supra*, and, as to auctioneers, *Shenstone* v *Hilton* [1894] 2 Q B 452

(*p*) 56 & 57 Vict c 71, s 21 (2) (b) As to sales by order of Court, see

pawnees (*q*), sheriffs (*r*), masters of ships in case of necessity (*s*), landlords distraining for rent (*t*), or innkeepers realising their lien (*u*), are examples of this exception

4 Sale in market overt

4 A fourth exception relates to sales in market overt, for where goods are sold in market overt according to the usage of the market, the buyer acquires a good title thereto, if he buy in good faith and without notice of any defect or want of title on the part of the seller (*v*) This exception does not affect an unauthorised sale of goods belonging to the Crown (*y*), and it protects only the buyer, and not the seller, however innocent (*z*) It applies only to sales in an open, public, and legally constituted market or fair (*a*) though it seems that a sale in a modern statutory market is as much protected as a sale in an ancient market held by charter or prescription (*b*) The buyer is not protected, unless the sale was according to the usage of the market Hence, he is not protected, unless the whole transaction took place in the market (*c*), and a sale by sample in the market of goods lying outside the market-place affords him no protection (*d*) It seems that the onus of showing that the usages of the market, as to payment of toll or otherwise, were complied with lies upon the buyer (*e*)

By the custom of the city of London, every shop in the city which is open to the public is market overt, between sunrise and

R S C 1883, O 50, r 2, C C R 1889 O 12 r 2 See also the Conveyancing Act 1881 (44 & 45 Vict c 41) s 70

(*q*) See *Pothonier* v *Dawson* Holt 385 *Tucker* v *Wilson* 1 Peere Wms 261, *Lockwood* v *Ewer*, 9 Mod 273 *Martin* v *Read* 11 C B N S 730, *Johnston* v *Stear*, 15 Id 330 (applied in *Belsize Co* v *Cox* [1914] 1 K B 244), *Pigot* v *Cubley*, Id 701 *Halliday* v *Holgate* L R 3 Ex 299 As to pawnbrokers see the Pawnbrokers Act 1872 (35 & 36 Vict c 93)

(*r*) *Anon* 3 Dyer, 363 a *Doe* d *Stevens* v *Donston* 1 B & Ald 230

(*s*) *Kaltenbach* v *Mackenzie*, 3 C P D 467 at p 473

(*t*) Sale of Distress Act, 1689 (2 W & M, sess 1 c 5) s 2 Law of Distress Amendment Act, 1888 (51 & 52 Vict c 21)

(*u*) Innkeepers Act 1878 (41 & 42 Vict c 38) see *Chesham* v *Birchington Hotel* 29 T L R 584

(*x*) Sale of Goods Act 1893 (56 & 57 Vict c 71) s 22 (1) which agrees with the common law see 2 Blac Com 449, Pease on Markets 120 The sale of horses is still regulated by the common law as amended by the statutes 2 & 3 Ph & M c 7, and 31 Eliz c 12 s 22 (2) of the Sale of Goods Act 1893 provides that such sale shall not be affected by anything in that section

(*y*) 2 Inst 713

(*z*) *Peer* v *Humphrey* 2 A & E 495, *Ganly* v *Ledwidge* 10 I R C L 33

(*a*) *Lee* v *Bayes* 18 C B 599

(*b*) *Ganly* v *Ledwidge* *supra* but see *Moyce* v *Newington* 4 Q B D 32

(*c*) 2 Inst 713, Roll Abr Market, E, *Anon* 1 Dyer 99 b

(*d*) *Hill* v *Smith*, 4 Taunt 520, at p 532 *Crane* v *Lond Dock Co*, 5 B & S 313.

(*e*) *Moran* v *Pitt*, 42 L J Q B 47, see *Comyns* v *Boyer*, Cro Eliz 485

sunset on all days, save Sundays and holidays, but only so for such goods as the shopkeeper professes to trade in, and the custom does not apply where the shopkeeper is buyer, and not seller (*f*)

In the case of stolen goods, the title acquired by buying in market overt is liable to be defeated Where goods have been stolen, and the offender is prosecuted to conviction the property in the goods revests in the owner, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise (*g*) None but stolen goods, however, now so revest Goods obtained by fraud or other wrongful means not amounting to larceny do not revest by reason only of the conviction of the offender (*h*)

Although the conviction of the thief revests the property in stolen goods, yet until such conviction a title gained by purchase in market overt continues good Hence the owner cannot maintain trover against the buyer if he disposed of the goods before the conviction, and it is immaterial that the buyer disposed of them with notice of the theft (*i*) The buyer, on the other hand, cannot recover from the owner the cost of keeping the goods before they revested (*k*)

5 Transfer of negotiable instruments

5 The fifth and last exception which we shall mention to the general rule, that a good title to personal property cannot be acquired from a person who has none, relates to money, bank-notes and negotiable instruments In a leading case on this subject, it was decided that the property in a bank-note, like that in cash, passes by delivery, and that a party taking it in good faith and for value, as money, is entitled to retain it as against a former owner from whom it was stolen (*l*) And it is well-established law that a person who takes a negotiable instrument in good faith and for value, obtains a valid title,

(*f*) *Hargreave* v *Spink* [1892] 1 Q B 25 *Lyons* v *De Pass*, 11 A & E 326, see *Case of Market Overt* 5 Rep 83 b *Palmer* v *Wolley* Cro Eliz 454, *Bishop of Worcester's Case* Moore (K B) 360 *Taylor* v *Chambers*, Cro Jac 68, *Anon*, 12 Mod 521 *Wilkinson* v *King* 2 Camp 335

(*g*) Sale of Goods Act 1893 (56 & 57 Vict c 71) s 24 (1) This section applies to horses, as well as other goods

(*h*) Ibid s 24 (2), amending the Larceny Act 1861 (24 & 25 Vict c 96) s 100 as the latter section was construed in *Bentley* v *Vilmont* 12 App Cas 471

(*i*) *Horwood* v *Smith* 2 T R 750

(*k*) *Walker* v *Matthews* 8 Q B D 109

(*l*) *Miller* v *Race*, 1 Burr 452 The reader is referred, for some further information on the subject of negotiable instruments, to the note appended to this case, 1 Sm L C, 12th ed, p 525

although he takes from one who had none (*m*) It must be noticed, however, that, if the signature of any person is necessary to render any instrument negotiable, it does not become negotiable by the forgery of his signature, and the general rule is that no title can be obtained through a forgery (*n*) Moreover, if a person is induced by fraud to sign a negotiable instrument under the belief that he is signing an entirely different instrument, his signature is a nullity, provided that in so signing he acted without negligence (*o*)

Meaning of good faith

A negotiable instrument is taken in good faith when it is taken honestly, whether it be taken negligently or not (*p*) A person who takes such an instrument for value, honestly believing that the person from whom he takes it has a right to dispose of it, acquires a good title to it and his knowledge that the person disposing of it is only an agent does not compel him to inquire into the extent of such agent's authority (*q*) But, although carelessness or foolishness in not suspecting that there is something wrong in the transaction is not dishonesty, yet it is dishonesty, and not good faith, to take a negotiable instrument, suspecting that there is something wrong, and carefully refraining from further inquiry, lest such suspicion of *mala fides* may be converted into knowledge (*r*)

Holder for value

Value is given for a negotiable instrument if it is accepted in accord and satisfaction of a liability The manager of a bank stole therefrom certain negotiable bonds, and the plaintiffs became the holders for value without notice of any fraud Afterwards the bank manager, by a fraud upon the plaintiffs, obtained from them some of the bonds, and also others similar to, though not the same as, the remainder of the stolen bonds All the bonds, so obtained by him, were placed in the possession of the bankers, were shown to the bank's auditors, and treated

(*m*) *Gorgier* v *Mieville*, 3 B & C 45, *Lond J S Bank* v *Simmons*, [1892] A C 201, *Fuller* v *Glyn*, [1914] 2 K B 168 As to bills of exchange promissory notes, and cheques, see the Bills of Exchange Act, 1882 (45 & 46 Vict c 61), ss 29, 38

(*n*) *Johnson* v *Windle*, 3 Bing N C 225 at p 229 45 & 46 Vict c 61, s 24

(*o*) *Foster* v *Mackinnon*, L R 4 C P 704 (as to which see *Carlisle, &c , Bank* v *Bragg*, [1911] 1 K B 489, at pp 493, 497), *Lewis* v *Clay*, 67 L J Q B 224

(*p*) See 45 & 46 Vict c 61, s 90

(*q*) *Lond J S Bank* v *Simmons*, *supra* As to acceptances and indorsements *per pro*, see *Bryant* v *Banque du Peuple* [1893] A C 170, 45 & 46 Vict c 61, s 25

(*r*) *Lond J S Bank* v *Simmons*, *supra*, at p 221, *per* Ld Herschell, *Raphael* v *Bank of England* 17 C B 161, *Jones* v *Gordon*, 2 App Cas 616, see *Tatam* v *Haslar*, 23 Q B D 345

as the bank's securities, before the theft had been discovered In an action brought by the plaintiffs against the bankers to recover the bonds, it was held that, in the absence of evidence to the contrary, the presumption was that the bankers had accepted the bonds in discharge of their manager's civil obligation to make restitution in respect of his theft, and that they were entitled to retain the bonds, as *bona fide* holders for value (*s*)

Money

With regard to money, we may here notice the following case (*t*) A thief stole a five-pound gold piece which was current coin of the realm, and in exchange for it a dealer in curiosities gave him five sovereigns, upon the subsequent conviction of the thief, the convicting justices made an order, under the Larceny Act, 1861, s 100 (*u*), for the restitution of the coin by the dealer to the original owner, and this order was upheld by a Divisional Court The Court was of opinion that the coin would not have revested upon the conviction, if it had passed, as current money, to a person innocently taking it in discharge of a debt, but that the order was good in the particular case on the ground that the coin was passed to the dealer, not in its character as coin of currency, but as the subject of a sale as an article of virtu With deference, this ground of decision (*x*) does not seem wholly satisfactory, it is, at any rate, not easy to see how the nature of the transaction can be made to depend upon what the person who takes the coin intends to do with it when the transaction has been completed

Another rather peculiar case may here be mentioned, which is not only illustrative of the general legal doctrines regulating the rights of buyers, but likewise of another principle (*y*), which we have already considered in connection with criminal law, viz, where a man buys a chattel which, unknown to himself and to the seller, contains valuable property (*z*) A person

(*s*) *Lond & Co Bank* v *Lond & R P Bank*, 21 Q B D 535 See *Nash* v *De Freville*, [1900] 2 Q B 72

(*t*) *Moss* v *Hancock*, [1899] 2 Q B 111 Cf *Clarke* v *Shee* 1 Cowp 197

(*u*) 24 & 25 Vict c 96

(*x*) Channell, J, drew the inference that the coin was not taken *bona fide* The onus probably lay on the dealer of proving that it was so taken see the rule as to bills of exchange (*per* Parke, B, in *Bailey* v *Bidwell*, 13 M & W 73 *Tatam* v *Haslar*, 23 Q B D 345) It was stated that the coin in question had never been in circulation, " but the meaning of this phrase does not seem to have been adequately discussed

(*y*) *Actus non facit reum nisi mens sit rea* see *ante*, p 216

(*z*) Cf *Elwes* v *Brigg Gas Co*, 33 Ch D 562, where, after land had been demised, a prehistoric boat was found buried in the land

bought, at a public auction, a bureau, in a secret drawer of which he afterwards discovered money, which he appropriated to his own use At the time of the sale, no person knew that the bureau contained anything whatever The Court held (*a*) that, although there was a delivery of the bureau, and a lawful property in it thereby vested in the buyer, yet that there was no delivery so as to give him a lawful possession of the money, for the seller had no intention to deliver it, nor the buyer to receive it, both were ignorant of its existence, and when the buyer discovered that there was a secret drawer containing the money, it was a simple case of finding, to which the law applicable to all cases of finding applied It was further observed that the old rule (*b*), that "if one lose his goods and another find them, though he convert them, *animo furandi*, to his own use, it is no larceny," has undergone in more recent times, some limitations (*c*) One is, that, if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the taking of the chattel, with a guilty intent, and the subsequent fraudulent conversion to the taker's own use, constitutes a larceny To this class of decisions the case under consideration was held to belong, *unless* the buyer had reason to believe that he bought the contents of the bureau, if any, and consequently had a *colourable* right to the money

In the preceding remarks upon the maxim *caveat emptor*, we have confined our attention to those classes of cases to which alone it appears to be *strictly* applicable, and in connection with which reference to it is, in practice, most frequently made To consider all the applications of the maxim which is invoked so frequently in discussions relating to the rights and duties of a purchaser would not have been possible within the limit of this treatise

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(*a*) *Merry* v *Green* 7 M & W 623
(*b*) 3 Inst 108
(*c*) See Pollock & Wright, Possession, p 180, *R* v *Flowers*, 16 Q B D 643

QUICQUID SOLVITUR, SOLVITUR SECUNDUM MODUM SOLVENTIS (*per* Lord Cowper in *Manning* v *Westerne*, 2 Vern 606)—QUICQUID RECIPITUR, RECIPITUR SECUNDUM MODUM RECIPIENTIS (Halk M, p 149)—*Money paid is to be applied according to the intention of the party paying it, and money received, according to that of the recipient*

The question upon what terms was money paid and received often resolves itself into one merely of fact, or of inference to be drawn by a jury from the facts For instance, where the dispute is whether money offered in satisfaction of a claim was so taken, it is a question of fact whether the payee agreed to take it in satisfaction or took it merely on account of his claim, and an inference may be drawn in his favour from what he said when he took the money (*d*), or against him from his taking it in silence and without objection (*e*) Again, where money is both paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt (*f*), but still it is a question of fact whether the money was received as rent (*g*)

With these observations, we pass to consider briefly the maxim before us, which is frequently cited in cases where, a debtor having made a payment on account to a creditor to whom he owes several distinct debts, the question arises, from which one or more of the debts does the payment operate as a total or partial discharge (*h*) Appropriation of payments

The general rule of our law upon this subject is that "the debtor may, in the first instance, appropriate the payment *solvitur in modum solventis*, if he omit to do so, the creditor may make the appropriation *recipitur in modum recipientis*, but if neither make any appropriation, the law appropriates the payment to the earlier debt" (*i*) General rule

The debtor may appropriate the payment, in the first instance, that is, at the time when he makes the payment, but Appropriation by debtor

(*d*) *Day* v *McLea*, 22 Q B D 610

(*e*) *Kitchin* v *Hawkins* L R 2 C P 22, see *Webb* v *Weatherby*, 1 Bing N C 502, at p 505, *per* Tindal C J

(*f*) *Davenport* v *The Queen*, 3 App Cas 115, at p 132

(*g*) See *per* Ld Wensleydale in *Croft* v *Lumley*, 6 H L Cas 672, at p 744

(*h*) For further information upon the maxim, see an article by Ld Lindley in the Law Mag for Aug, 1855, p 21

(*i*) *Per* Tindal, C J, in *Mills* v *Fowkes*, 5 Bing N C 455, at p 461

not afterwards (*k*) It was long ago established that a debtor who owes distinct debts to one creditor may, as a rule, discharge first whichever he prefers (*l*) A tender of part of one entire debt is bad (*m*) the creditor may stand on his rights and refuse it, but if he accept the money as offered, the debt is discharged to the extent of the payment An appropriation by the debtor at the time of payment need not be express it may be inferred from the circumstances of the transaction (*n*) For instance, where a security for a particular debt is sold and the proceeds paid to the creditor, they are, *prima facie*, applied in discharge of that debt (*o*) There is a presumption, until the contrary appear, that a man pays his own money on account of what he alone, and not another, owes, and that he pays on account of what he owes to the payee alone, and not of what he owes to the payee and others (*p*)

Appropriation by creditor

If the debtor does not make any appropriation at the time when he makes the payment, the right of application devolves on the creditor (*q*), and this right then continues "up to the very last moment" that is, until he communicates an appropriation to the debtor, for his election, whilst not so communicated, remains incomplete (*r*) or until he brings an action (*s*), or the case comes before a jury (*t*) "He is not bound to declare his election in express terms, he may declare it by bringing an action, or in any other way that makes his meaning and intention plain Where the election is with the creditor, it is always his intention expressed, implied or presumed, and not any rigid rule of law, that governs the application of the money" (*u*)

A creditor, having the right to appropriate, may elect between an earlier and a later debt (*v*), between a specialty and a simple contract debt (*x*), between a debt which is guaranteed

(*k*) *The Mecca*, [1897] A C 286, at p 293
(*l*) *Anon*, Cro Eliz 68
(*m*) *Dixon* v *Clark*, 5 C B 365
(*n*) *Peters* v *Anderson*, 5 Taunt 596, *Newmarch* v *Clay*, 14 East, 239, at p 244, *Thompson* v *Hudson*, L R 6 Ch 320
(*o*) *Brett* v *Marsh*, 1 Vern 468
(*p*) *Nottidge* v *Prichard*, 2 Cl & F 379, at p 393, *Burland* v *Nash*, 2 F & F 687
(*q*) *The Mecca*, [1897] A C 286
(*r*) *Simson* v *Ingham*, 2 B & C 65, at p 74
(*s*) *Mills* v *Fowkes*, 5 Bing N C 455, at p 462
(*t*) *Per* Taunton, J , in *Philpott* v *Jones*, 2 A & E 41, see *Friend* v *Young*, [1897] 2 Ch 421, at p 437
(*u*) *Per* Ld Macnaghten in *The Mecca*, [1897] A C 286, at p 294
(*x*) *Peters* v *Anderson*, 5 Taunt 596

and one which is not (*y*), between a debt which bears interest and one which bears none (*z*), between a purely equitable and a legal debt (*a*), between a debt incurred through marriage and a debt personally contracted (*b*), between a debt which is founded and one which is not founded on an illegal consideration (*c*) He may appropriate the payment to a debt barred by the Statute of Limitations, but his appropriation to part of a debt so barred does not revive the debt so as to entitle him to sue for the balance, the debt, if revived, is revived, not by the creditor's appropriation, but by the payment being made under circumstances evidencing a promise by the debtor to pay the whole of that debt (*d*)

A creditor, however, has no right to appropriate a payment to a debt which arises after, or the amount of which is not ascertained until after, the time of the payment (*e*), and it has been laid down generally that "there must be two debts the doctrine never has been held to authorise a creditor, receiving money on account, to apply it towards satisfaction of what does not, nor ever did, constitute any legal or equitable demand against the party making the payments" (*f*) The law will not appropriate a payment to a demand which it prohibits as illegal (*g*) Moreover, the creditor's right of appropriation does not extend to all moneys of the debtor which come to the creditor's hands, if he receive money to his debtor's use without the debtor's knowledge, he cannot at once appropriate it to a statute-barred debt, the debtor must be given an opportunity of electing how the money should be applied (*h*)

Entire account

The rule which we have been considering is "that where there are *distinct* accounts and a general payment, and no appropriation made, at the time of such payment, by the debtor, the creditor may apply such payment to which account he

(*y*) *Kirby* v *Marlborough*, 2 M & S 18, *Williams* v *Rawlinson*, 3 Bing 71, *Re Sherry*, 25 Ch D 692 at p 704

(*z*) *Chase* v *Box*, 2 Freem 261, *Manning* v *Westerne*, 2 Vern 606

(*a*) *Bosanquet* v *Wray*, 6 Taunt 597

(*b*) *Goddart* v *Cox*, 2 Str 1194, see the Married Women's Property Act, 1882 (45 & 46 Vict c 75), s 14

(*c*) See *Friend* v *Young*, [1897] 2 Ch 421, and cases there collected See also *Smith* v *Betty*, [1903] 2 K B 317 (where the creditor in special circumstances had lost the right to appropriate)

(*d*) *Seymour* v *Pickett*, [1905] 1 K B 715

(*e*) *Hammersley* v *Knowlys*, 2 Esp 666, *Goddard* v *Hodges*, 1 Cr & M 33, see *Re Harrison*, 33 Ch D 52, at p 67

(*f*) *Lamprell* v *Billericay Union*, 3 Exch 283, at p 307

(*g*) *Wright* v *Laing*, 3 B & C 165, at p 171

(*h*) *Waller* v *Lacy*, 1 Man & Gr 54, at p 70

pleases But where the accounts are treated as *one entire* account by all parties, that rule does not apply" (*i*)

Clayton's Case

For instance, in the case of a current account between banker and customer, as a rule, all the sums paid in form one blended fund, the parts of which have no longer any distinct existence, the customer draws upon the entire fund In this case there is generally "no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried to the account *Presumably*, it is the sum first paid in that is first drawn out, it is the first item on the debit side of the account that is discharged or reduced by the first item of the credit side the appropriation is made by the very act of setting the two items against each other" (*k*)

This doctrine, with regard to current accounts, which is known as the rule in *Clayton's Case*, has been often applied in cases where a current account to which a partnership firm is party, is continued without break, after a change in the constitution of the firm If such a change is effected by a partner's death at a time when the firm is indebted on such an account, and the account is continued as an unbroken account between the new firm and the creditor, payments by the new firm, when brought into the account, usually discharge or reduce the liability of the deceased partner's estate (*l*) But an incoming partner is not liable for the debts of the old firm in the absence of an express or implied agreement by him to answer for them (*m*)

The above doctrine, however, ought not to be applied to defeat a creditor's right of appropriation, as already explained, in cases where there is no current account between the parties (*n*) Even in cases *prima facie* falling within that doctrine, an account between the parties, however kept and rendered, is not conclusive on the question of appropriation accounts rendered are evidence of the appropriation of payments to earlier items, but that evidence may be rebutted by other evidence to the contrary each case must be decided according to its own circumstances (*o*)

(*i*) *Per* Bayley, J, in *Bodenham* v *Purchas* 2 B & Ald 39

(*k*) *Per* Grant, M R, in *Clayton's Case*, 1 Mer 572, at p 608

(*l*) *Clayton's Case supra Hooper* v *Keay*, 1 Q B D 178 For further illustrations, see Lindley on Partnership

(*m*) See the Partnership Act, 1890 (53 & 54 Vict c 39), s 17, *Rolfe* v *Flower*, L R 1 P C 27 (*n*) *The Mecca* [1897] A C 286

(*o*) Ibid, *per* Ld Macnaghten see *City Dis Co* v *McLean*, L R 9 C P 692, *Henniker* v *Wigg*, 4 Q B 792

Following trust money

A person holding money as trustee mixes it with his own money by paying it into his private current account with his bankers, he afterwards from time to time draws upon the account, and makes payments into it, in the ordinary manner In favour of the *cestui que trust* seeking to follow the trust money, the law presumes that, so far as the trustee had money of his own to draw upon, he drew upon that, and not upon the trust money (*p*)

Interest

Where both principal and interest are due, sums paid on account are, as a rule, applicable first to interest, but this rule does not extend to interest which, by express or implied agreement, has been added to and become part of the principal debt (*q*)

Payment by bill

Where a bill of exchange or promissory note has been given by a debtor to his creditor, the question sometimes arises, whether the giving of such instrument should be considered as payment, and as operating to extinguish the original debt or merely as security for its payment, and as postponing the period of payment until the bill or note becomes due Upon this subject the general rule was thus laid down by Lord Langdale — "The debt may be considered as actually paid if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if, from the conduct of the creditor, or the special circumstances of the case, such a payment is legally to be implied But in the absence of any special circumstances throwing the risk of the note upon the creditor, his receiving the note in lieu of present payment of the debt is no more than giving extended credit, postponing the demand for immediate payment, or giving time for payment on a future day, in consideration of receiving this species of security Whilst the time runs, payment cannot legally be enforced, but the debt continues till payment is actually made, and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given If payment be

(*p*) *Re Hallett*, 13 Ch D 696, the principle governing the decision in which case was applied in *Sinclair* v *Brougham*, [1914] A C 398, while the case was followed in *Re Diggle*, [1915] 2 Ch 483, distinguished in *Roscoe* v *Winder*, [1915] 1 Ch 62, and discussed in *Banque Belge* v *Hambrouck*, [1921] 1 K B 321 See also *Hancock* v *Smith*, 41 Ch D 456, *Re Hallett*, [1894] 2 Q B 237, at p 245

(*q*) *Parr's Bank* v *Yates* [1898] 2 Q B 460

made at or before the expiration of the extended time allowed, it is then for the first time that the debt is paid" (*r*)

QUI PER ALIUM FACIT PER SEIPSUM FACERE VIDETUR (*Co Litt* 258 *a*)—*He who does an act through another is deemed in law to do it himself*

General rule

This maxim enunciates the general doctrine on which the law relative to the rights and liabilities of principal and agent depends It can, however, in this volume be but briefly considered

Where a contract is entered into with A *as agent for* B, it is deemed, in contemplation of law, to be entered into with B, and the principal is, in most cases, the proper party to sue (*s*) or be sued for a breach of such contract—the agent being viewed simply as the medium through which it was effected (*t*) *Qui facit per alium facit per se*

Examples of rule

The following instances, which are of ordinary occurrence, illustrate the rule, which, for certain purposes, identifies the agent with the principal —Payment to an authorised agent (*u*), as an auctioneer, in the regular course of his employment (*x*), is payment to his principal (*y*), and generally payment to an

Payment to agent

(*r*) *Sayer* v *Wagstaff*, 5 Beav 415, at p 423, see *Re Romer*, [1893] 2 Q B 286, see also *Peacock* v *Purssel*, 14 C B N S 728, *Davis* v *Reilly*, [1898] 1 Q B 1, *Bence* v *Shearman* [1898] 2 Ch 582, *Felix* v *Hadley* [1898] 2 Ch 680

(*s*) To entitle a person to sue upon a contract it must be shown that he himself made it, or that the contract was made on his behalf by an agent authorised to act for him at the time, or whose act has been subsequently ratified and adopted by him (*Watson* v *Swann*, 11 C B N S 756)

(*t*) Thus, in *Depperman* v *Hubbersty* 17 Q B 766 Coleridge, J, observed Here an avowed agent of a principal sues another avowed agent of the same principal, and the action must fail for want of privity of contract between the two parties to the suit See *Lee* v *Everest* 2 H & N 285, at p 291, *Coombs* v *Brist & Ex Ry Co*, 3 H & N 1

(*u*) *Bostock* v *Hume* 8 Scott, N R 590

(*x*) See *Mews* v *Carr*, 1 H & N 484, *Bell* v *Balls*, [1897] 1 Ch 663

(*y*) *Sykes* v *Giles*, 5 M & W 645 (approved in *Williams* v *Evans* L R 1 Q B 352 which latter case shows that an auctioneer has no authority to receive payment by a bill of exchange)

The general rule of law is, that where a creditor's agent is bound to pay the whole amount over to the principal, he must receive it in cash from the debtor, and that a person who pays such agent, and who wishes to be safe, must see that the mode of payment does enable the agent to perform this his duty' (*per* Bovill, C J, in *Bridges* v *Garrett*, L R 4 C P 580, at pp 587—588) see the cases there cited, and *Catterall* v *Hindle*, L R 2 C P 368, *Stephens* v *Badcock* 3 B & Ad 354 (cited, Arg, *Whyte* v *Rose*, 3 Q B 493, at p 498), *Parrott* v *Anderson*, 7 Exch 93

agent, if made in the ordinary course of business, operates as payment to the principal (*z*), but such payment, in the absence of a custom of trade to the contrary, must be made in *cash* (*a*), if made by a bill, cheque, or note, it may be a good payment if such bill is subsequently honoured, or the cheque or note paid (*b*)

In connection with the subject of payment it may here be noticed that, where an agent has bought goods on credit for his principal, a subsequent payment by the principal to his own agent does not, as a rule, discharge the principal from his liability to the seller for the price of the goods It is clear that if the seller knew, when the contract was made, that the agent was acting for a principal, whether disclosed or undisclosed, the subsequent payment by the principal to his agent does not affect the seller, unless, indeed, the payment was made in the belief that the seller's claim had been already satisfied, and it was the seller's own conduct that misled the principal into that belief (*c*) It has been held that, where the seller has given credit to the agent as a principal in ignorance of the fact that there was a principal behind him, a payment by the principal to the agent may discharge the principal as against the seller (*d*), but the correctness of this decision has been doubted (*e*)

Tender

The receipt of money by an authorised agent will charge the principal (*c*), and in like manner, a tender made to an authorised agent will in law be regarded as made to the principal Thus, where the plaintiff directed his clerk, who was in the habit of receiving money for him, not to receive certain money from his debtor if it should be offered to him, and the clerk, in pursuance of these directions, refused to receive the money when offered upon the principle *qui facit per alium facit per se*, the tender to the servant was held to be a good tender to the master (*f*)

Payment by agent

Payment also by an agent as such is equivalent to payment by the principal Where, for example, a covenant was "to pay or cause to be paid," it was held that the breach was sufficiently assigned by stating that the defendant

(*z*) *Williams* v *Deacon*, 4 Ex 397, *Underwood* v *Nicholls*, 17 C B 239

(*a*) *Barker* v *Greenwood* 2 Y & C 414 at p 419, *Sweeting* v *Pearce*, 9 C B N S 534 See *Pape* v *Westacott* [1894] 1 Q B 272

(*b*) *Bridges* v *Garrett*, L R 5 C P 451, at p 456, *per* Blackburn, J , in *Williams* v *Evans*, L R 1 Q B 352

(*c*) *Irvine* v *Watson* 5 Q B D 414 *Dawson* v *Donaldson*, 9 Q B D 623

(*d*) *Armstrong* v *Stokes*, L R 7 Q B 598

(*e*) See *Thompson* v *Bell* 10 Exch 10

(*f*) *Moffat* v *Parsons*, 5 Taunt 307

had not paid, without saying, ' or caused to be paid ", for had the defendant caused to be paid, he had paid, and, in such a case, the payment might be pleaded in discharge (*g*) So payment to an agent, if made in the ordinary course of business, will operate as payment to the principal (*h*)

Delivery of goods

On the same principle, the delivery of goods to a carrier's servant is a delivery of them to the carrier (*i*), and the delivery of a cheque to the agent of A is a delivery to A (*k*) Railway companies, moreover, are not to be placed in a different condition from all other carriers They will be bound in the course of their business as carriers by the contract of the agent whom they put forward as having the management of that branch of their business So that, where it appeared from the evidence, that certain goods were undoubtedly received by a railway company, for transmission on some contract or other, and that the only person spoken to respecting such transmission was the party stationed to receive and weigh the goods, it was held that this party must have an implied authority to contract for sending goods, and that the company were consequently bound by that contract (*l*) It has been held that the stationmaster of a railway company has not, though the general manager of the company has (*m*), implied authority to bind the company by a contract for surgical attendance on an injured passenger (*n*)

Agent for sale of goods

When an agent for the sale of goods contracts in his own name, and *as a principal*, the general rule is, that an action may be maintained, either in the name of the party by whom the contract was made, and privy to it, or of the party on whose behalf and for whose benefit it was made (*o*) Even when the

(*g*) *Gyse* v *Ellis*, 1 Stra 228

(*h*) See *Williams* v *Deacon*, 4 Exch 397, *Kaye* v *Brett*, 5 Exch 269, *Parrott* v *Anderson*, 7 Exch 93 and cases cited *ante* p 590

(*i*) *Dawes* v *Peck*, 8 T R 330, *Brown* v *Hodgson* 2 Camp 36, *per* Ld Ellenborough in *Griffin* v *Langfield*, 3 Camp 254, *Fragano* v *Long*, 4 B & C 219, *G W Ry Co* v *Goodman*, 12 C B 313 Moreover a delivery to the carrier may be in law a delivery to the consignee, see the above cases, and *Dunlop* v *Lambert*, 6 Cl & F 600 But an acceptance by the carrier is not an acceptance by the consignee (*per* Parke, B , in *Johnson* v *Dodgson*, 2 M & W 653, at p 656)

(*k*) *Samuel* v *Green*, 10 Q B 262

(*l*) *Pickford* v *Grand Junc Ry Co* , 12 M & W 766 *Heald* v *Carey*, 11 C B 977

(*m*) *Walker* v *G W Ry Co* , L R 2 Ex 228

(*n*) *Cox* v *Mid Cos Ry Co* , 3 Exch 268 (applied in *Houghton* v *Pilkington*, [1912] 3 K B 408) See *Poulton* v *L & S W Ry Co* , L R 2 Q B 534, *Ormston* v *G W Ry Co* [1917] 1 K B 598

(*o*) *Per* Bayley J , in *Sargent* v *Morris*, 3 B & Ald 277, *Sims* v *Bond*, 5 B & Ad 389, at p 393, *Norfolk* v *Worthy*, 1 Camp 337, *Cothay* v *Fennell*, 10 B & C 671, *Bastable* v *Poole*, 1 Cr M & R 410, at p 413, *per* Ld Abinger

agent is a factor, receiving a *del credere* commission, the principal may, at any period after the contract of sale, demand payment to himself of the sum agreed on, unless such payment has previously been made to the factor, in due course, and according to the terms of the contract (*p*) The following rules, respecting the liability of parties on a contract to buy goods, are likewise illustrative of the doctrine under consideration, and are here briefly stated on account of their general importance —1st, an agent, contracting as principal, is liable in that character, and if the real principal was known to the seller at the time when the contract was entered into by the agent, dealing in his own name, and credit is afterwards given to such agent, the latter only can be sued on the contract (*q*), 2ndly, if the principal be unknown at the time of contracting, whether the agent represent himself as such or not, the seller may, within a reasonable time after discovering the principal, debit either at his election (*r*) But, 3rdly, if a person act as agent without authority, no one but he himself can be liable, and if he exceed his authority, the principal is not bound by acts done beyond the scope of his legitimate authority (*s*) If A employ B to work for C, without warrant from C, A alone can be liable to pay for the work done (*t*), and C is not liable merely because

in *Sykes* v *Giles* 5 M & W 645 at p 650 *Garrett* v *Handley*, 4 B & C 664 (distinguished in *Ignacio* v *Forbes* 14 Moo P C 160 at pp 170, 171) see *Ramazotti* v *Bowring*, 7 C B N S 851 *Ferrand* v *Bischoffsheim* 4 Id 710 *Higgins* v *Senior* 8 M & W 834 at p 844

(*p*) *Hornby* v *Lacy* 6 M & S 166 at p 172 *Morris* v *Cleasby* 4 M & S 566, at p 574 *Sadler* v *Leigh* 4 Camp 195 *Grove* v *Dubois*, 1 T R 112 (considered by C A in *Gabriel* v *Churchill*, [1914] 3 K B 1272) *Scrimshire* v *Alderton* 2 Strı 1182

(*q*) *Paterson* v *Gandasequi* 15 East 62, *Addison* v *Gandasequi* 4 Taunt 574 *Franklyn* v *Lamond* 4 C B 637 See *Smith* v *Sleap*, 12 M & W 585 at p 588

(*r*) *Thomson* v *Davenport* 9 B & C 78 (cited *per* Martin, B, in *Barber* v *Pott*, 4 H & N 759, at p 767) *Smethurst* v *Mitchell* 1 E & E 622 at p 631, *Heald* v *Kenworthy* 10 Exch 739 *Risbourg* v *Bruckner*, 3 C B N S 812, *per* Park, J in *Robinson* v *Gleadow* 2 Bing N C 156, at pp 161, 162, *Paterson* v *Gandasequi* 15 East 62, *Wilson* v *Hart*, 7 Taunt 295, *Higgins* v *Senior*, 8 M & W 834 *Humfrey* v *Dale* 7 E & B 266, and E B & E 1004

(*s*) *Woodin* v *Burford* 2 Cr & M 391 *Wilson* v *Barthrop* 2 M & W 863 *Fenn* v *Harrison*, 3 T R 757 *Polhill* v *Walter* 3 B & Ad 114, *per* Ld Abinger, C B, in *Acey* v *Fernie*, 7 M & W 151, *Davidson* v *Stanley*, 3 Scott N R 49 *Harper* v *Williams*, 4 Q B 219 See *Downman* v *Williams*, 7 Q B 103 (where the question was as to the construction of a written undertaking), *Cooke* v *Wilson* 1 C B N S 153 *Gillet* v *Offor* 18 C B 905, *Green* v *Kopke*, Id 549, *Parker* v *Winlow*, 7 E & B 942, at p 949, *Wake* v *Harrop* 1 H & C 202 and 6 H & N 768, *Oglesby* v *Iglesias* E B & E 930, *Williamson* v *Barton*, 7 H & N 899

(*t*) *Per* Ld Holt C J, in *Ashton* v *Sherman*, Holt, 308 (cited in *Thomas* v *Edwards*, 2 M & W 215, at p 218)

B believed A to be in truth the agent of C, for, in order to charge C, there must be proof of a contract with him, either express or implied, and with him in the character of a principal, directly, or through the intervention of an agent (*u*)

Husband's non liability for wife's torts

Where a wife, by falsely representing that she acted with her husband's authority and on his behalf, borrowed money which she used for her own purposes, it was held (*x*) that her husband was not liable in tort for fraud, inasmuch as that fraud was directly connected with, and was the means of carrying into effect, her contract for the loan (*y*), although the lender was entitled to judgment, as against her separate estate for money lent Where a wife fraudulently, and without her husband's authority, signed his name to a document authorising the use of a policy of insurance as a security for money lent to a third party, it was, for the same reason, held (*z*) that the husband was not liable in tort for his wife's fraud, and it was further held (*a*) that the husband was entitled to a return of the policy

Liability for acting as agent without authority

There has been much discussion as to what is the liability of a person who professes to contract as an agent, when he has in fact no authority to make the contract and the result of the discussion appears to be as follows —

1 He is not liable, as a rule, upon the contract itself as a party to it, for he professes to bind not himself, but another (*b*) To this rule, however, there appears to be an exception in certain cases where a person contracts as agent for a non-existent principal For where goods were ordered on behalf of a company which had not been formed at the date of the order, and were supplied pursuant to the order, and subsequently consumed in the company's business it was held that the person who gave the order was personally liable upon the contract for the price of the goods (*c*)

2 Although he be not personally liable on the contract, yet a person who professes to contract as agent when he in fact has no authority, usually incurs a liability If he knows that he

(*u*) *Thomas* v *Edwards*, 2 M & W 215

(*x*) *Edwards* v *Porter* [1923] 1 K B 268 affirmed by C A at [1923] 2 K B 598

(*y*) See *Liverp Adelphi Loan Assoc* v *Fairhurst*, 9 Ex 422, at p 429

(*z*) *McNeal* v *Hawes*, [1923] 2 K B 538 reversing (on this point) the decision of Lush, J, at [1923] 1 K B 273

(*a*) *McNeal* v *Hawes*, [1923] 1 K B 273

(*b*) *Jenkins* v *Hutchinson*, 13 Q B 744, *Lewis* v *Nicholson*, 18 Id 503

(*c*) *Kelner* v *Baxter*, L R 2 C P 174, where the maxim, *ut res magis valeat quam pereat*, was applied

has no authority, but induces a person to contract on the faith of his representation that he has authority, he is liable for the damage resulting from his fraud, in an action of deceit (*d*) And even if he represent himself as an agent innocently, in the mistaken belief that he is such, he is generally liable, in damages, for the breach of his warranty of authority By professing to contract as agent, a person usually warrants his authority, either expressly or impliedly, and it is a good consideration for the warranty that the contract is entered into on the faith of it (*e*) The measure of damages is, as a rule, the actual loss sustained by the plaintiff in consequence of his not having the benefit of the contract warranted (*f*), and costs *reasonably* incurred in attempting to enforce the contract against the supposed principal are recoverable (*g*)

3 It is open however, to a person who professes to contract as agent to stipulate expressly that he does not warrant his authority (*h*), and such a stipulation may be inferred by necessary implication (*i*), or from usage of trade (*k*) It seems that no warranty of authority will be *implied* in cases where a public servant purports to contract on behalf of the Crown (*l*)

4 A person who continues to act as agent, in ignorance that his authority has been determined by his principal's death or lunacy, may be liable as having impliedly warranted the continuance of his authority (*m*)

On the maxim, *qui facit per alium facit per se*, depends also the liability of persons in partnership for the acts of a member of the firm The law of partnership, as it stood at common law, was frequently stated to be a branch of the law of principal and agent (*n*), and that doctrine is expressly recognised by

Liability of partners

(*d*) *Polhill* v *Walter* 3 B & Ad 114

(*e*) *Collen* v *Wright* 8 E & B 647 at p 658 *Cherry* v *Colon Bank of Australasia* L R 3 P C 24, *West Lond Commer Bank* v *Kitson*, 13 Q B D 360 See also *Firbank's Executors* v *Humphreys* 18 Q B D 54, 60 *Starkey* v *Bank of England* [1903] A C 114 *Longe* v *Toynbee*, [1910] 1 K B 215

(*f*) *Simons* v *Patchett* 7 E & B 568 *Meek* v *Wendt*, 21 Q B D 126

(*g*) *Collen* v *Wright supra Richardson* v *Dunn* 8 C B N S 655

(*h*) *Halbot* v *Lens*, [1901] 1 Ch 344

(*i*) *Smout* v *Ilbery*, 10 M & W 1, 12

(*k*) *Lilly* v *Smales* [1892] 1 Q B 456

(*l*) *Dunn* v *Macdonald*, [1897] 1 Q B 401 and 555

(*m*) *See* *Longe* v *Toynbee*, [1910] 1 K B 215, which seems in effect to over rule *Smout* v *Ilbery* 10 M & W 1, and *Salton* v *New Beeston Cycle Co* [1900] 1 Ch 43 But see the Conveyancing Act, 1881 (44 & 45 Vict c 41), s 47, as to agents acting under a power of attorney

(*n*) See *per* Abbott, C J , in *Sandilands* v *Marsh*, 2 B & Ald 673, 678, *per* Ld Wensleydale in *Ernest* v *Nicholls*, 6 H L Cas 401, at pp 417, 418, and in *Cox* v *Hickman*, 8 Id 268, at p 312

the Partnership Act, 1890 (*o*), which declared and amended the law of partnership Every partner is an agent of the firm, and his other partners, for the purpose of the business of the partnership, and the acts of every partner, who does any act for carrying on in the usual way business of the kind carried on by the firm, bind the firm and his partners, unless the partner has in fact no authority to act for the firm in the particular matter, and the person with whom he deals either knows that he has no authority, or does not know or believe him to be a partner (*p*) And where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to strangers, the firm is liable therefor to the same extent as the partner (*q*) Again, the firm is liable to make good the loss where one partner, acting within the scope of his apparent authority, receives money or property of a third person and misapplies it, or where the firm in the course of its business receives such money or property and it is misapplied by a partner while it is in the firm's custody (*r*)

These rules are well illustrated by the decision in *Marsh* v *Keating* (*s*) There a partner in a firm of bankers caused a customer's stock in the firm s custody to be sold under a forged power of attorney, the proceeds, having been paid into the firm's account with their agent, were drawn out by the partner by means of a cheque signed in the firm s name (*t*), and were then appropriated by him for his own private purposes The other partners were ignorant of these transactions, but it was held that the customer was entitled to adopt the sale, and sue the firm for the proceeds, as money had and received

General remarks as to agency

Without entering at length upon the subject of partnership liabilities incurred through the act of a member of the firm, we may observe that, wherever a contract is alleged to have been made through the medium of a third person, whether a co-partner or not, the real and substantial question is, with whom was the contract made? and, to answer this question, the jury usually have to consider whether the party through whose instrumentality the contract is alleged to have been made, had in fact authority to make it "It would," however, "be very dangerous to hold, ' as matter of law, "that a person who allows an agent

(*o*) 53 & 54 Vict c 39
(*p*) S 5
(*q*) S 10
(*r*) S 11
(*s*) 2 Cl & F 250
(*t*) See s 6

to act as a principal in carrying on a business, and invests him with an apparent authority to enter into contracts incidental to it, could limit that authority by a secret reservation" (*u*)

Application of maxim to committee men of railway companies

Barnett v *Lambert*

Where an action is brought by a creditor against a member of the managing or provisional committee of a railway company, the question of liability ordinarily resolves itself into the consideration, whether the defendant did or did not authorise the particular contract upon which he is sued In *Barnett* v *Lambert* (*v*) the defendant consented, by his letter to the secretary of a railway company, that his name should be placed on the list of its provisional committee His name was accordingly published as a provisional committee-man, and on one occasion he attended and acted as chairman at a meeting of the committee It was held that he was liable for the price of stationery supplied on the secretary's order and used by the committee, after the date of his letter—the question for decision being one of fact, and matter of inference for the jury, to be drawn from the defendant's conduct, as showing that he had constituted the secretary his agent to pledge his credit for all such things as were necessary for the working of the committee, and to enable it to go on" 'Where,' observed Alderson, B, "a subscription has been made, and there is a fund, it is not so, because if you give money to a person to buy certain things with, the natural inference is that you do not mean him to pledge your credit for them" (*y*)

Reynell v *Lewis*

In *Reynell* v *Lewis* and *Wylde* v *Hopkins* (*z*), decided shortly after *Barnett* v *Lambert*, the Court of Exchequer laid down the principles applicable to such cases, and it may probably be better to give the substance of this judgment at some length, as it affords important practical illustrations of that maxim, "which,' in the words of Tindal, C J (*a*), 'is of almost universal application" *qui facit per alium facit per se*

With whom was contract made

"The question," observed the Court, "in all cases in which the plaintiff seeks to fix the defendant with liability upon a contract, express or implied, is, whether such contract was made

(*u*) *Per* Mellor J, in *Edmunds* v *Bushell*, L R 1 C P 97, at p 100 See *Watteau* v *Fenwick*, [1893] 1 Q B 34, *Howard* v *Sheward*, L R 2 C P 148, *Baines* v *Ewing* L R 1 Ex 320

(*v*) 15 M & W 489 (where *Todd* v *Emly* 8 M & W 505 *Flemyng* v *Hector*, 2 M & W 172, and *Tredwen* v *Bourne*, 6 M & W 461 were cited)

(*y*) *Huggins* v *Hopkins*, 3 Exch 163, *Burnside* v *Dayrell*, Id 224

(*z*) 15 M & W 517 See also *Collingwood* v *Berkeley*, 15 C B N S 145, *Cross* v *Williams*, 7 H & N 675, *Barker* v *Stead*, 16 L J C P 160

(*a*) In *Cuming* v *Toms*, 8 Scott, N R 827, at p 830

by the defendant, by himself or his agent, with the plaintiff or his agent, and this is a question of fact for the decision of the jury upon the evidence before them The plaintiff, on whom the burthen of proof lies in all these cases, must, in order to recover against the defendant, show that the defendant contracted *expressly* or *impliedly*, *expressly*, by making a contract with the plaintiff, *impliedly*, by giving an order to him under such circumstances as show that it was not to be gratuitously executed and, if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorised (*b*), and that it was made as his contract In these cases of actions against provisional committee-men of railways, it often happens that the contract is made by a third person, and the point to be decided is, whether that third person was in agent for the defendant for the purpose of making it, and made the contract as such (*c*)

Agency how constituted

The agency may be constituted by an express limited authority to make such a contract, or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any, or it may be proved by showing that such a relation existed between the parties as by law would create the authority, as, for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent In all these cases, if the agent in making the contract acts on that authority, the principal is bound by the contract, and the agent's contract is his contract, but not otherwise This agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency, or it may be created by the representation of the defendant to the plaintiff that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such, and if the plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound—he is estopped from disputing

(*b*) See *Cooke* v *Tonkin*, 9 Q B 936

(*c*) See *Riley* v *Packington*, L R 2 C P 536 *Maddick* v *Marshall*, 17 C B N S 829, *Burbidge* v *Morris*, 3 H & C 664

the truth of it with respect to that contract, and the representation of an authority is, *quoad hoc*, precisely the same as a real authority given by the defendant to the supposed agent This representation may be made directly to the plaintiff, or made publicly, so that it may be inferred to have reached him and may be made by words and conduct Upon none of these propositions is there, we apprehend, the slightest doubt, and the proper decision of all these questions depends upon the proper application of these principles to the facts of each case, and the jury are to apply the rule with due assistance from the judge" In the course of the judgment from which we have made so long an extract, the Court further observed, that an agreement to be a provisional committee-man is merely an agreement for carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and thus promoting the scheme, but constitutes no agreement to share in profit or loss, which is the characteristic of a partnership, although if the provisional committee-man subsequently acts he will be responsible for his acts They likewise remarked that, where the list of the provisional committee has appeared in a prospectus, published with the defendant's consent, knowledge, or sanction, the context of such prospectus must be examined, to see whether or not it contains any statement affecting his liability, as, for instance, the names of a managing committee, in which case it will be a question whether the meaning be that the acting committee shall take the whole management of the concern, to the exclusion of the provisional committee, or that the provisional committee-men have appointed the acting committee, or the majority of it, as their agents (*d*) In this latter case, moreover, it must further be considered whether the managing and delegated body is authorised to pledge the credit of the provisional committee, or is merely empowered to apply the funds subscribed to the liquidation of expenses incurred in the formation and carrying out of the concern (*e*)

The authority of the master of a ship is very large Under Master of ship

(*d*) See Judgm in *Reynell* v *Lewis*, 15 M & W 517, at pp 530 531 *Wilson* v *Curzon*, Id 532, *Williams* v *Pigott*, 2 Exch 201

(*e*) *Dawson* v *Morrison* 16 L J C P 240, *Rennie* v *Clarke* 5 Exch 292 See also as to the liability of a provisional committee man, *Patrick* v *Reynolds*, 1 C B N S 727, or member of a committee of visitors, *Moffatt* v *Dickson* 13 C B 543, *Kendall* v *King*, 17 Id 483, at p 508 As to the authority of a resident agent, or the directors of a mining company, to borrow money on the credit of the company, see *Ricketts* v *Bennett*, 4 C B 686, and cases there cited, *Burmester* v *Norris*, 6 Exch 796

the general authority which he has, "he may make contracts and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent who can personally interfere to do the thing required" (*f*) He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free With regard also to goods put on board the ship, the master may sign a bill of lading, and acknowledge thereby the condition of the goods, but his authority to give bills of lading is limited to such goods as have been put on board (*g*)

Agency of wife

A wife, from the mere fact of marriage, has no authority to pledge her husband's credit, except in the particular case of necessity, this necessity arises when the wife is living apart from the husband, through his fault, and is not properly provided for, but not, as a rule, when they are living together (*h*)

The question whether a wife has authority to pledge her husband s credit, while they live together, is a question of fact, to be determined upon all the circumstances of the particular case The ordinary state of cohabitation between husband and wife gives rise to a presumption of an authority in the wife to do things which, in the ordinary circumstances of cohabitation, it is usual in a wife to do This presumption can be rebutted, but, since the management of certain departments of the household expenditure is usually entrusted to the wife, it may be presumed, until the contrary be shown, that she has authority to pledge her husband's credit in respect of necessaries, falling within those departments, and suitable to his station in life and style of living (*h*)

Sheriff

To the general principle under consideration may also be referred the decisions which established that the sheriff is liable

(*f*) *Arthur* v *Barton*, 6 M & W 138, *Gunn* v *Roberts*, L R 9 C P 331

(*g*) *Grant* v *Norway*, 10 C B 665, at p 687, *Hubbersty* v *Ward* 8 Exch 330, *Jessel* v *Bath*, L R 2 Ex 267, *Valseri* v *Boyland*, L R 1 C P 382 *Barker* v *Highley* 15 C B N S 27 Cf *Comp Nav Vasconzada* v *Churchill*, [1906] 1 K B 237 (followed in *Martineau* v *R M S Packet Co*, 17 Com Cas 176) See, further, as to the authority of the master, or ship's husband, to pledge the owner s credit, *The Great Eastern*, L R 2 A & E 88, *The Karnak*, L R 2 P C 505

(*h*) *Debenham* v *Mellon*, 6 App Cas 24, *Manby* v *Scott*, 1 Siderf 109 and 2 Smith, L C 12th ed, p 432 See also *Gray* v *Cathcart*, 38 T L R 562, *Callot* v *Nash*, 39 T L R 292

for an illegal or fraudulent act committed by his bailiff, even if he were not personally cognisant of the transaction (*i*), and such decisions are peculiarly illustrative of this principle, because there is a distinction to be noticed between the ordinary cases and those in which the illegal act is done under such circumstances as constitute the wrong-doer the special bailiff of the party at whose suit process is executed, for, where the plaintiff's attorney requested of the sheriff a particular officer, delivered the warrant to that officer, took him in his carriage to the scene of action, and there encouraged an illegal arrest, it was held that the sheriff was not liable for a subsequent escape (*k*) Nor will the sheriff be liable if the wrong complained of be neither expressly sanctioned by him, nor impliedly committed by his authority, as, where the bailiff derived his authority, not from the sheriff, but from the plaintiff, at whose instigation he acted (*l*), and it is not competent to one whose act produces the misconduct of the bailiff, to say, that the act of the officer done in breach of his duty to the sheriff, and which he has himself induced, is the act of the sheriff (*m*)

But, notwithstanding the almost universal applicability of the maxim under consideration, cases may occur in which, by reason of express provisions of a statute, it will not apply Thus it was held that, under the Statute of Frauds Amendment Act, 1828 (9 Geo 4, c 14) s 1, an acknowledgment signed by the debtor's agent did not revive a debt barred by the Limitation Act, 1623 (21 Jac 1, c 16) (*n*) But the law upon this point was altered by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict c 97), s 13 Exceptions to rule

Before terminating our remarks as to the legal consequences Delegated authority

(*i*) *Per* Ashhurst, J , in *Woodgate* v *Knatchbull*, 2 T R 148, at 154, *Gregory* v *Cotterell* 5 E & B 571 *Raphael* v *Goodman*, 8 A & E 565, *Sturmy* v *Smith* 11 East 25, *Price* v *Peck*, 1 Bing N C 380, *Crowder* v *Long*, 8 B & C 598, at p 602, *Smart* v *Hutton*, 8 A & E 568, n See *Peshall* v *Layton*, 2 T R 712, *Thomas* v *Pearse*, 5 Price, 578, *Jarmain* v *Hooper*, 7 Scott, N R 663, *Morris* v *Salberg* 22 Q B D 614

(*k*) *Doe* v *Trye*, 5 Bing N C 573 see also *Ford* v *Leche*, 6 A & E 699, *Wright* v *Child* L R 1 Ex 358, *Alderson* v *Davenport*, 13 M & W 42, *per* Buller, J , in *De Moranda* v *Dunkin*, 4 T R 119, *Botten* v *Tomlinson*, 16 L J C P 138

(*l*) *Cook* v *Palmer* 6 B & C 739, *Crowder* v *Long*, 8 B & C 598, *Tomp kinson* v *Russell*, 9 Price, 287 *Bowden* v *Wasthman*, 5 Moore, 183, *Stuart* v *Whittaker*, R & M 310, *Higgins* v *M Adam*, 3 Y & J 1

(*m*) *Per* Bayley, J , in *Crowder* v *Long*, 8 B & C 598, at pp 603, 604

(*n*) *Hyde* v *Johnson*, 2 Bing N C 776 See, also, *Toms* v *Cuming*, 8 Scott, N R 910, *Cuming* v *Toms*, Id 827, *Davies* v *Hopkins*, 3 C B N S 376

which flow from the relation of principal and agent in transactions founded upon contract, we may briefly refer to a kindred principle which limits the operation of the maxim *qui facit per alium facit per se* This principle is, that a delegated authority cannot be re-delegated *delegata potestas non potest delegari* (*o*), or, as it is otherwise expressed, *vicarius non habet vicarium* (*p*)—one agent cannot lawfully appoint another to perform the duties of his agency (*q*) This rule applies wherever the authority involves a trust or discretion in the agent for the exercise of which he is selected, but does not apply where it involves no matter of discretion, and it is immaterial whether the act be done by one person or another, and the original agent remains responsible to the principal (*r*) Thus, a principal employs a broker from the opinion which he has of his personal skill and integrity, and the broker has no right, without notice, to turn his principal over to another, and, therefore, a broker cannot, without authority from his principal, transfer consignments made to him, in his character of broker, to another broker for sale (*s*) On the same principle, where an Act for building a bridge required that any notice to be given by the trustees appointed under the Act should be signed by three of the trustees, it was held that a notice, signed with the names of the clerks to the trustees, but signed, in fact, not by such clerks, but by a clerk employed by them, was insufficient, as being an attempt to substitute for a deputy his deputy (*t*) But where the act is purely ministerial, as, for example, the signing of a name, the discretionary part of the agency having been exercised by the proper party to whom it was entrusted, it may in general be delegated to and performed by the hand of another (*u*), and

(*o*) 2 Inst 597, Arg in *Fector* v *Beacon*, 5 Bing N C 302 at p 310

(*p*) Branch, Max, 5th ed 380

(*q*) See *per* Ld Denman in *Cobb* v *Becke* 6 Q B 930 at p 936, *Combe's Case*, 9 Rep 75, *Gwillam* v *Twist*, [1895] 2 Q B 84 (distinguished in *Ricketts* v *Tilling*, [1915] 1 K B 644, at p 648) See *R* v *Newmarket Ry Co*, 15 Q B 702, *R* v *Dulwich College*, 17 Q B 600, at p 615, where Ld Campbell incidentally observes that 'the Crown cannot enable a man to appoint magistrates

(*r*) See Leake on Contracts, pp 482—483, and *Hemming* v *Hale*, 7 C B N S 487, at p 498, see as slightly bearing on the question, *Johnson* v *Raylton*, 7 Q B D 438

(*s*) *Cockran* v *Irlam*, 2 M & S 301, n (*a*), *Solly* v *Rathbone*, 2 M & S 298, *Catlin* v *Bell*, 4 Camp 183, *Schmaling* v *Thomlinson*, 6 Taunt 147, *Coles* v *Trecothick*, 9 Ves 234, at p 251, *Henderson* v *Barnewall*, 1 Yo & J 387

(*t*) *Miles* v *Bough*, 3 Q B 845 (cited, Arg, *Allan* v *Waterhouse*, 8 Scott, N R 68, at p 76)

(*u*) Leake on Contracts, p 483, *Johnson* v *Osenton*, L R 4 Ex 107

an agent can employ another in respect of such acts as are usually, and in the ordinary course of the business for which the agent is employed, done by others (*r*), or which the agent must necessarily do through the agency of other persons (*y*)

It may, likewise, be well to observe that delegated jurisdiction, as distinguished from proper jurisdiction, is that which is communicated by a judge to some other person, who acts in his name, and is called a deputy, and this jurisdiction is, in law, held to be that of the judge who appoints the deputy, and not of the deputy, and in this case the maxim holds, *delegatus non potest delegare* the person to whom any office or duty is delegated—for example, an arbitrator—cannot lawfully devolve the duty on another, unless he be expressly authorised so to do (*z*) Nor can an individual, clothed with judicial functions, delegate the discharge of those functions to another, unless, as in the case of a County Court judge, he be expressly empowered to do so (*a*) For the ordinary rule is that, although a *ministerial* officer may appoint a deputy, a *judicial* officer cannot (*b*)

A magistrate, as observed by Lord Camden, can have no assistant nor deputy to execute any part of his employment "The right is personal to himself, and a trust that he can no more delegate to another, than a justice of the peace can transfer his commission to his clerk" (*c*)

Although, however, a deputy cannot, according to the above rule, transfer his entire powers to another, yet a deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act, provided, of course, that such act be within the scope of his own legitimate authority For instance, the steward of a manor, with power to make a deputy, made B his deputy, and B , by writing under his hand and seal, made

Rule how qualified

(*x*) Leake on Contracts, 483, *Ex p Sutton*, 2 Cox, Eq Cas 84

(*y*) *Rossiter* v *Trafalgar Life Ass Assocn*, 27 Beav 377

(*z*) See Bell, Dict and Dig of Scots Law, 280, 281 292, *Whitmore* v *Smith* 7 H & N 509 (cited in *Thorburn* v *Barnes*, L R 2 C P 384, at p 404) *Little* v *Newton* 2 Scott N R 509, *R* v *Jones*, 10 A & E 576, *Hughes* v *Jones* 1 B & Ad 388, *Wilson* v *Thorpe* 6 M & W 721, Arg , *Fector* v *Beacon*, 5 Bing N C 302 at p 310 *White* v *Sharpe*, 12 M & W 712, *Rutter* v *Chapman*, 8 M & W 1 See *The Case of the Masters' Clerks*, 1 Phill 650 See also *R* v *Perkin*, 7 Q B 165, *Smeeton* v *Collier*, 1 Exch 457, *Sharp* v *Nowell*, 6 C B 253

(*a*) County Courts Act 1888 (51 & 52 Vict c 43), ss 18—21 See *R* v *Lloyd*, [1906] 1 K B 22

(*b*) See *per* Parke, B , in *Walsh* v *Southworth*, 6 Exch 150, at p 156 See also *Baker* v *Cave*, 1 H & N 674

(*c*) *Entick* v *Carrington*, 19 Howell, St Trials, 1030, at p 1063

C his deputy, to the intent that he might take a surrender of G, of copyhold lands It was held that the surrender taken by C was a good surrender (*d*), and Lord Holt, insisting upon the distinction above pointed out, compared the case before him to that of an under-sheriff, who has power to make bailiffs and to send process all over the kingdom, and that only by virtue of his deputation (*e*)

The rule as to delegated functions must, moreover, be understood with this necessary qualification, that, in the particular case, no power to re-delegate such functions has been given (*f*) Such an authority to employ a deputy may be either *express* or *implied* by the recognised usage of trade as in the case of an architect or builder, who employs a surveyor to make out the quantities of the building proposed to be erected, in which case the maxim of the civil law applies, *in contractis tacite insunt quæ sunt moris et consuetudinis* (*g*)—terms which are in accordance with and warranted by custom and usage may, in some cases, be tacitly imported into contracts (*h*)

RESPONDEAT SUPERIOR (4 *Inst* 114)—*Let the principal be held responsible*

Respective liability of master and servant

The doctrine enunciated in this maxim has been carried in English law very far, and in the opinion of a learned judge, quite as far as it should be (*i*) It is more usually and appropriately applied to actions *ex delicto*, than to such as are founded in contract Where, for instance, an agent commits a tortious act, under the direction or with the assent of his principal, each is liable at suit of the party injured the agent is liable, because the authority of the principal cannot justify his wrongful acts, and the person who directs the act to be done is likewise liable, according to the maxim, *respondeat superior* (*k*) "If the servant commit a trespass by the command

(*d*) *Parker* v *Kett*, 1 Raym Ld 658 (cited in *Bridges* v *Garrett*, L R 4 C P 480, at p 591)

(*e*) *Parker* v *Kett* (*supra*) at p 659 *Leak* v *Howell*, Cro Eliz 533

(*f*) See 2 Prest Abs Tit 276

(*g*) *Per* Tindal, C J, in *Moon* v *Witney Union*, 3 Bing N C 814, at p 818

(*h*) *De Bussche* v *Alt*, 8 Ch D 286, at p 310

(*i*) *Per* Jessel, M R, in *Smith* v *Keal*, 9 Q B D 340, at p 351

(*k*) 4 Inst 114, *Sands* v *Child*, 3 Lev 351, *Jones* v *Hart*, 1 Raym Ld 738, *Britton* v *Cole*, 1 Salk 408, *Gauntlett* v *King* 3 C B N S 59, *per* Littledale, J, in *Laugher* v *Pointer*, 5 B & C 547, at p 559, *Perkins* v *Smith*,

or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful" (*l*), and "all persons directly concerned in the commission of a fraud are to be treated as principals" (*m*)

Employment to do unlawful act

It is well established that a person who has employed another to do an act is responsible for the act if it be in itself unlawful, and it is immaterial that he employed, not a servant, but an independent contractor A company which apparently had no right to break up a street employed a contractor to break it up, lay pipes in it, and re-instate its surface, the contractor's servants did not re-instate the surface properly, but left a heap of stones in the street it was held that the company were liable for damage caused by the nuisance (*n*) Again, "if I agree with a builder to build me a house according to a certain plan, he would be an independent contractor, and I should not be liable to strangers for any wrongful act unnecessarily done by him in the performance of his work (*o*), but clearly I should be jointly liable with him for a trespass on the land, if it turned out that I had no right to build upon it" (*p*) It would be immaterial that I did not enter the land myself, for if I merely give a man leave to go on land over which I have no right, and he goes, that will not make me a trespasser, but if I request him to go, then he goes by my authority, and I am liable (*q*)

Employment of contractor to do lawful work

On the other hand, the general rule is that a person who employs, not his own servant but an independent contractor, to do a lawful act is not answerable for wrongful or negligent acts unnecessarily committed by the contractor, or his servants, in the performance of the contract In other words, 'ever since *Quarman* v *Burnett* (*r*), it has been considered settled law that

1 Wils 328 (cited in *Cranch* v *White* 1 Bing N C 414 at p 418), *Stephens* v *Elwall*, 4 M & S 259 Com Dig, *Trespass* (C 1) See *Collett* v *Foster*, 2 H & N 356 *Bennett* v *Bayes*, 5 H & N 391

A person who deals with the goods of a testator as agent of the executor cannot be treated as executor *de son tort*, whether the will has been proved or not (*Sykes* v *Sykes*, L R 5 C P 113)

(*l*) 1 Blac Com 429, *per* Platt, B, in *Stevens* v *Mid Cos Ry Co* 10 Exch 352, *East Cos Ry Co* v *Broom*, 6 Exch 314

(*m*) *Per* Ld Westbury in *Cullen* v *Thomson's Trustees*, 4 Macq 424, at pp 432—433

(*n*) *Ellis* v *Sheffield Gas Co* 2 E & B 767

(*o*) *E g*, if his carter, in bringing the materials to the land, drove over a stranger in the street

(*p*) *Per* Willes, J, in *Upton* v *Townend*, 17 C B 51, at p 71

(*q*) *Per* Alderson, B, in *Robinson* v *Vaughton*, 8 C & P 252, at p 255

(*r*) 6 M & W 499

one employing another is not liable for his *collateral* negligence, unless the relation of master and servant existed between them" (*s*) For instance, a butcher who employs a drover, exercising an independent calling, to drive a bullock through the streets is not liable for the negligent driving of the drover's boy (*t*)

Relation of master and servant how constituted

It, therefore, often becomes necessary to determine whether the relation between a defendant and a person actually engaged upon work was that of master and servant, or whether such person was an independent contractor or the servant of such, and the general rule is that the relation of master and servant exists if the defendant has the right at the moment to determine or control the manner in which the work shall be done (*u*), whereas a person who undertakes to produce a given result in such manner as he may think fit is an independent contractor, and the workmen whom he employs to produce the result are his servants, and not the defendant's Nor are they the defendant's servants merely because he stipulated for the right to require the removal of incompetent workmen (*v*), or for the employment of particular workmen (*y*), or agreed with the contractor to pay to the workmen their wages (*y*) The fact that he stipulated for the execution of the work under the supervision of his own surveyor does not of itself make him the workmen's master, but he may be responsible for the consequences of the workmen obeying a particular order given by the surveyor (*z*)

Job master providing driver

In conformity with this rule, where the owner of a carriage jobs a horse to draw it and the job-master provides the driver, the driver is generally the servant of the job-master, and the owner of the carriage is not responsible for the driver's negligent management of the horse, so long as he merely directs where the driver is to take him and does not make himself *dominus pro tempore* by directing how the horse is to be driven (*a*) But where a job-master supplies merely the driver to the owner

(*s*) *Per* Ld Blackburn, in *Dalton* v *Angus* 6 App Cas 740, at p 829

(*t*) *Milligan* v *Wedge* 12 A & E 737 see *post*, p 547

(*u*) *Sadler* v *Henlock* 4 E & B 570 578 *Donovan* v *Laing*, [1893] 1 Q B 629, 634, and cases there collected, *Bain* v *Cent Vermont Ry Co* [1921] 2 A C 412, *Soc Marit Francaise* v *Shanghai Dock Co*, Id, 417, n

(*v*) *Reedie* v *L & N W Ry Co* 4 Ex 244

(*y*) *Quarman* v *Burnett*, 6 M & W 499, *Rourke* v *White Moss Co*, 2 C P D 205

(*z*) *Steel* v *S E Ry Co*, 16 C B 550, *Hardaker* v *Idle Dist Council*, [1896] 1 Q B 335, at pp 343, 344

(*a*) *Quarman* v *Burnett*, 6 M & W 499, *Jones* v *Liverpool Corpn*, 14 Q B D 890

of a horse and carriage, it may be proper to infer that the driver while in charge of the horse is the servant of its owner, for the owner has a right to direct how the horse shall be driven (*b*)

Special Statute

Although the relation between two persons be such that, at common law, it would be improper to treat them as master and servant, yet to treat them as such may be proper owing to some statute Thus, under the London Hackney Carriages Act, 1843 (6 & 7 Vict c 86), the registered proprietor of a cab in London is answerable for the driver while plying for hire, as if the driver were his servant, whatever may in fact be the relation between them (*c*)

Employment of contractor upon work lawful but dangerous

Notwithstanding the general rule to which we have adverted, that a person is not liable for the collateral negligence of an independent contractor whom he has employed upon lawful work, there is an important class of cases in which a person may incur liability through his contractor's negligence Where a person, having a right which he is not entitled to exercise except upon the terms of his performing a duty, delegates to a contractor the exercise of the right and performance of the duty, he is answerable if the right be exercised, but through the contractor's negligence the duty is not performed "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor" (*d*)

Thus, where a statute authorised a company to make a swing-bridge across a river, but required them to open the bridge for the purpose of letting vessels pass, it was held that the company were liable by reason of the negligence of their contractor who made the bridge so that it would not open properly (*e*) And, similarly, where a statute authorised a company to cut a trench across a road, but required them to re-instate the road when their drain-pipes had been inserted, it was held that the company were liable on account of their contractor's negligence in not re-instating the road properly (*f*)

(*b*) *Jones* v *Scullard* [1898] 2 Q B 565

(*c*) *King* v *Lond Cab Co* 23 Q B D 281 *Keen* v *Henry* [1894] 1 Q B 292

(*d*) *Per* Ld Blackburn in *Dalton* v *Angus*, 6 App Cas 740 at p 829 see *Hardaker* v *Idle Dist Council* [1896] 1 Q B 335, at p 342, and cases there collected

(*e*) *Hole* v *Sittingbourne Ry Co* 6 H & N 488

(*f*) *Gray* v *Pullen*, 5 B & S 970

Nor is the rule confined to cases where both the right and duty are statutory For instance, the common law requires a district council, when it causes a street to be sewered under statutory powers, to take some care that, in the execution of that work, gas-pipes known to be lying under the street be not broken, and if such pipes get broken through the negligence of the contractor employed upon the work, and an explosion follows, the council are liable for the ensuing damage (*g*) Again, the law allows a man to make an artificial reservoir on his land, but imposes on him the duty, if he make the reservoir, of keeping the water in He may employ a contractor to make the reservoir, but he remains liable, if, through the contractor's negligence, the walls of the reservoir are made too weak, and the water escapes and damage results (*h*)

Employer answerable for breach of his own duty

The above cases show that where a contractor is employed to do work lawful in itself, but of a dangerous character, the employer's duty is to take proper care that the danger is avoided (*i*) The employer, however, is not liable for casual or collateral acts of negligence on the part of the contractor or his servants, which do not involve a breach of the employer's duty In truth, in the cases referred to, the basis of the employer's liability is, not the contractor's negligence, but his own, whether brought about by the contractor's negligence or not A company, having statutory powers to build a bridge across a road, employed a contractor to build it In the course of the delivery of material for the work, a workman of the contractor negligently let a stone fall upon a person in the road, and it was held that the company were not liable (*k*) This was considered to be a mere collateral act of negligence

Master's liability for servant's acts

Where the relation of master and servant exists, 'the principle upon which the master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant is that the act of the servant is in truth his own act If the master is himself driving his carriage, and from want of skill causes injury to a passer-by, he is of course responsible for that want of skill If, instead of driving the

(*g*) *Hardaker* v *Idle Dist Council* [1896] 1 Q B 335

(*h*) *Fletcher* v *Rylands* L R 1 Ex 265, and L R 3 H L 330

(*i*) See also *Pickard* v *Smith*, 10 C B N S 470 *Bower* v *Peate*, 1 Q B D 321 (approved in *Dalton* v *Angus* 6 App Cas 740 at p 791), *Percival* v *Hughes*, 8 App Cas 443 *Penny* v *Wimbledon U C*, [1899] 2 Q B 72, *Holliday* v *Nat Telephone Co*, [1899] 2 Q B 392 *The Snark* [1900] P 105

(*k*) *Reedie* v *L & N W Ry Co*, 4 Exch 244

carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master, and whatever the servant does in order to give effect to the master's wish may be treated as the act of the master *qui facit per alium facit per se* ' (*l*) And the general rules are that a master is responsible for all acts done by his servant in the course of his employment, though without particular directions (*m*) that ' where a servant is acting within the scope of his employment and in so acting does something negligent or wrongful, the master is liable, even though the act done may be the very reverse of that which the servant was actually directed to do " (*n*) for the law casts upon the master a liability for the act of the servant in the course of his employment, and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability (*o*)

On the other hand the rule is that ' the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant (*p*) for ' where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it " (*q*) It is often difficult to decide whether or not a servant, in doing a particular act in which he was guilty of a wrong or of negligence, was acting within the scope of his employment The question must be determined according to the facts of the particular case it is usually a question of fact, to be left, where the trial is by jury, to the jury's determination (*r*)

It is not only for the negligence of his servant while acting Servant's torts

(*l*) *Hutchinson* v *Yoil &c Ry Co* 5 Exch 343 at p 350

(*m*) *Per* Ld Holt in *Turberville* v *Stampe* 1 Raym Ld 266

(*n*) *Per* Kelly C B in *Bayley* v *Manchester &c Ry Co*, L R 8 C P 148, at p 152

(*o*) *Per* Willes J, in *Limpus* v *Lond G Omnibus Co* 1 H & C 526 at p 539

(*p*) *Per* Cockburn C J in *Storey* v *Ashton* L R 4 Q B 476

(*q*) *Per* Maule, J in *Mitchell* v *Crassweller* 13 C B 237 at p 247 see *Rayner* v *Mitchell*, 2 C P D 357, *Stevens* v *Woodward* 6 Q B D 318, *Sanderson* v *Collins* [1904] 1 K B 628 *Beard* v *Lond Gen Omnibus Co* [1900] 2 Q B 530 *Hanson* v *Waller*, [1901] 1 K B 390

(*r*) *See Bank of N S Wales* v *Owston*, 4 App Cas 270 *Abrahams* v *Deakin* [1891] 1 Q B 516 and *Radley* v *Lond &c C* 29 T L R 480 in both of which last mentioned cases it was held that there was no evidence to go to the jury

within the scope of his employment a master is liable, for the rule is that "the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved, and 'no distinction can be drawn between fraud and any other intentional wrong" (*s*), nor does the master escape civil liability because the wrong is a criminal act (*t*) A master is, moreover, answerable for his servant's fraud, even if committed, not with a view to benefit the master, but for the servant's own private ends (*u*), provided always that the servant commits the fraud while acting within the scope of his employment (*x*), and it seems that this limitation upon a master's liability obtains, whatever be the nature of the wrong committed by the servant (*y*) For instance, "if a servant, driving a carriage, in order to effect some purpose of his own, wantonly strike the horse of another person, and produce an accident, the master will not be liable" (*z*) To render the master liable for the servant's wilful act of wrong, it is sufficient and necessary to show that the servant did it in the prosecution of his master's business and acting within the scope of his employment (*a*)

Where a servant had in his own physical possession a fraudulent measure for his own fraudulent purposes as distinguished from the interests of his master his possession was deemed to be his own possession, and not the possession of his master, within the meaning of an Act which imposes penalties on any person who has in his possession for use for trade any measure which is false or unjust (*b*) But the King's Bench Division said that their decision was not to be taken as governing future cases, and it was, moreover, given upon the authority

(*s*) *Barwick* v *English J S Bank*, L R 2 Ex 259 at p 265, see also *Mackay* v *Commercial Bank*, L R 5 P C 394 *Swire* v *Francis* 3 App Cas 106, *Houldsworth* v *Glasgow Bank* 5 App Cas 317 at p 326

(*t*) *Dyer* v *Munday* [1895] 1 Q B 742

(*u*) *Lloyd* v *Grace* [1912] A C 716, overruling *Brit Mut Bank* v *Charnwood For Ry Co* 18 Q B D 714

(*x*) See *Thorne* v *Heard*, [1895] A C 495 at p 502 and *Cheshire* v *Bailey*, [1905] 1 K B 237 (thefts by servants)

(*y*) *Richards* v *West Middlesex W Co* 15 Q B D 660, at p 664

(*z*) *Croft* v *Alison*, 4 B & Ald 590, at p 592

(*a*) *Seymour* v *Greenwood*, 7 H & N 355 *Lloyd* v *Grace* [1912] A C 716, at p 738

(*b*) *Anglo American Oil Co* v *Manning*, [1908] 1 K B 536

of the *Brit Mut Bank* v *Charnwood For Ry Co* (*c*), now overruled by *Lloyd* v *Grace* (*d*)

Corporations

The general principles which render a private individual liable for his servants' acts apply to render a corporation, which can only act through agents, liable for its agents' acts (*e*), provided that such agents act within the scope of their employment (*f*) It is the duty of a railway company, being a trading corporation, to keep on the spot an agent having authority to act on their behalf in all emergencies likely to arise there in the course of their business (*g*), and the fact that there is a person on the spot who acts as if he had such authority is evidence that he has it (*h*) If the company have statutory powers to arrest for a particular offence, and such agent makes an arrest in the mistaken belief that the offence has been committed, the company is liable (*i*) So, too, where a railway company was empowered to employ special constables as its servants, the company was held responsible for an arrest for felony made by a special constable without reasonable grounds for believing that a felony had been committed (*k*) If, however, such agent makes an arrest for an imagined offence for the actual commission of which the company has no statutory power to arrest, an authority from the company to make the arrest cannot be implied (*l*)

Doctrine of common employment

An important limitation to the maxim *respondeat superior* is imposed, at common law, by the principle generally known as the doctrine of common employment A series of decisions, following in the train of *Priestly* v *Fowler* (*m*), established the principle that, at the common law, a servant, when he engages to serve a master, undertakes, as between himself and the master, to run all the *ordinary* risks of the service, including the risk of injury, not only from his own negligence, but also

(*c*) 18 Q B D 714
(*d*) [1912] A C 716
(*e*) See *Cornford* v *Carlton Bank* [1899] 1 Q B 392, and [1900] 1 Q B 22 *Citizens Life Ass Co* v *Brown* [1904] A C 423
(*f*) See *Aitken* v *Cal Ry Co* [1913] S C 66
(*g*) *Giles* v *Taff Vale Ry Co* 2 F & B 822, see *The Apollo*, [1891] A C 499, at p 507
(*h*) *Goff* v *G N Ry Co* 3 E & E 672
(*i*) Id , *Moore* v *Metr Ry Co*, L R 8 Q B 36, *Percy* v *Glasgow Corpn* [1922] 2 A C 299
(*k*) *Lambert* v *G E Ry*, [1909] 2 K B 776
(*l*) *Poulton* v *L & S W Ry Co*, L R 2 Q B 534 *Ormiston* v *G W Ry Co* [1917] 1 K B 598
(*m*) 3 M & W 1

from the negligence of a fellow-servant, whilst the servant is acting in discharge of his duty as servant to him who is the common master of both (*n*) Apart from statute, therefore, a master is not, as a rule, answerable to his servant for the negligence of a fellow-servant, provided that the master has taken due care to associate the servant only with persons of ordinary competence (*o*), for it is usually the duty of the master to be reasonably careful that the servant is not exposed to *unnecessary* risks, whether from incompetent fellow-servants (*o*), or from defective machinery, or from improper methods of using sound machinery (*p*) And the doctrine of common employment cannot be applied unless there be both a common master and a common employment (*q*) For instance, if a person carry on the business of a banker in one place and also the business of a brewer in another, a clerk employed at the bank and a drayman employed at the brewery are not in a common employment, and the doctrine would not protect the common master from liability to the clerk when run over by the drayman's negligence, though both were engaged at the time on their master's service (*r*) Servants may, however, be engaged in a common employment, though the duties they have to perform are different Accordingly, the driver and the guard of a coach, or the steersman and the rowers of a boat, are generally engaged in a common employment (*s*), and servants do not cease to be fellow-servants because they are not all equal in point of authority Thus, it was held that the manager of a mining pit was a fellow-workman engaged in a common employment with the actual miners (*t*)

The rule at common law may accordingly be summed up in the words of Lord Cairns (*u*), who said that "the master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do The master has not contracted or undertaken to execute in person the work con-

(*n*) *Johnson* v *Lindsay* [1891] A C 371 377 and cases there cited

(*o*) *Hutchinson* v *York &c Ry Co* 5 Exch 343 at p 353 *Wigmore* v *Jay* Id 354 *Bartonshill Co* v *Reid* 3 Macq 266 at p 276 *per* Ld Cranworth *Johnson* v *Lindsay* [1891] A C 371, at p 382 *per* Ld Watson *Jones* v *C P Ry*, 83 L J (P C) 13

(*p*) *Smith* v *Baker* [1891] A C 325 at p 353 see also *Groves* v *Wimborne*, [1898] 2 Q B 402 *Pursell* v *Clement Talbot* 111 L T 827

(*q*) *Swainson* v *N E Ry Co*, 3 Ex D 348

(*r*) See *The Petrel* [1893] P 320, at p 326

(*s*) *Bartonshill Co* v *Reid* 3 Macq 266, at p 295

(*t*) *Wilson* v *Merry* L R 1 Sc and Div 326

(*u*) Id at p 332

nected with his business" "But," "the master, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work'

Statutory modifications of doctrine

The liability, however, of employers to their workmen in respect of personal injuries received in the course of their employment has been considerably extended by the Employers Liability Act, 1880 (*x*), and the Workmen's Compensation Act 1906 (*y*) but it must not be forgotten that the doctrine of common employment still exists and affords a good defence in a common law action for negligence The last-mentioned Acts merely provide special remedies in the cases to which they apply

Landlord's responsibility for nuisance

The maxim *respondeat superior* cannot be applied to render a landlord answerable for a nuisance committed during the term upon the demised premises by the occupying tenant unless it be shown that the landlord authorised the nuisance (*z*) But an occupier of premises who licenses another to commit a nuisance thereon is liable for the act of his licensee (*a*) Where demised premises adjoin a highway, the landlord is not liable to a passer-by for injuries from defects in the premises, such as an insecure chimney-pot or dangerous grating, which arose during the term, and which the landlord was not bound, as between himself and the tenant, to remedy (*b*) nor is he liable, if the defects existed at the time of the demise, but the duty of remedying them was expressly cast, by the terms of the demise, upon the tenant (*c*) He is liable, however, if the defects existed at the time of the demise and the tenant did not agree to remedy them (*d*)

The duty to take care that premises are reasonably safe for persons coming to them by invitation is primarily the duty of the occupying tenant (*e*), and the landlord is, as a rule, under

(*x*) 43 & 44 Vict c 42

(*y*) 6 Edw 7 c 58

(*z*) *Rich* v *Basterfield* 4 C B 783, see *Harris* v *James* 45 L J Q B 545

(*a*) *White* v *Jameson* L R 18 Eq 303 *Jenkins* v *Jackson* 40 Ch D 71

(*b*) *Nelson* v *Liverpool Brew Co* 2 C P D 311

(*c*) *Gwinnell* v *Eamer*, L R 10 C P 658 *Pretty* v *Bickmore* L R 8 C P 401

(*d*) *Payne* v *Rogers* 2 H Bl 350 *Todd* v *Flight*, 9 C B N S 377 *Bowen* v *Anderson* [1894] 1 Q B 164

(*e*) *Indermaur* v *Dames* L R 1 C P 274 and 2 C P 311 (followed in *Pritchard* v *Peto* [1917] 2 K B 173 and applied in *Mercer* v *S E & Chat Ry* [1922] 2 K B 549) See also p 191, *ante*

no duty save such as he may owe to his tenant by the terms of his contract (*f*) There may be cases where a landlord, by undertaking with his tenant to repair some part of the premises (such as a common staircase to a block of flats), is liable for the consequences of non-repair to persons coming thereon by the implied invitation of the tenant (*g*) but such liability can exist only if the non-repair creates a concealed danger, which cannot, with ordinary care, be discovered by persons coming to the premises (*h*)

Public functionaries

With respect to public functionaries having authority, such as judges civil or ecclesiastical, or magistrates, these parties are, in general, protected from the consequences of an illegal and wrongful act done by an officer or other person employed in an inferior ministerial capacity, provided that the principal himself acted in the discharge of his duty, and within the scope of his jurisdiction, and of the authority delegated to him The principle, however, on which a private person or a company is liable for damage caused by the neglect of servants has been held applicable to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of such works, although those tolls, unlike the tolls received by the private person or the company, are not applied to the use of the corporation but are devoted to the maintenance of the works (*i*)

"The law requires that the execution of public works by a public body shall be conducted with a reasonable degree of care and skill, and if they, or those who are employed by them, are guilty of negligence in the performance of the works entrusted to them, they are responsible to the party injured" (*k*)

In an ordinary case, however, where public commissioners

(*f*) *Lane* v *Cox* [1897] 1 Q B 415 *Cavalier* v *Pope* [1906] A C 428 (applied in *Dobson* v *Horsley* [1915] 1 K B 634 in *Middleton* v *Hall*, 108 L T 804 and in *Ryall* v *Kidwell* [1913] 3 K B 123) *Huggett* v *Miers*, [1908] 2 K B 278 (followed in *Lucy* v *Bawden* [1914] 3 K B 318, and in *Dobson* v *Horsley* *supra*), but see *Hargroves* v *Hartopp* [1905] 1 K B 472

(*g*) See *Miller* v *Hancock* [1893] 2 Q B 177 (explained in *Huggett* v *Miers*, [1908] 2 K B 278, in *Dobson* v *Horsley* *supra* in *Lucy* v *Bawden* *supra* in *Hart* v *Rogers* [1916] 1 K B 646 virtually overruled in *Fairman* v *Perpet Invest Co*, [1923] A C 74)

(*h*) *Fairman* v *Perpet Invest Co*, [1923] A C 74, at p 98, *per* Ld Carson

(*i*) *Mersey Docks Trustees* v *Gibbs*, L R 1 H L 93, where the cases are reviewed See *R* v *Selby Dam Commrs*, [1892] 1 Q B 348

(*k*) *Per* Erle, C J, in *Clothier* v *Webster*, 12 C B N S 790 at p 796 See *Brownlow* v *Metr B of W*, 16 C B N S 546 *Gibson* v *Mayor of Preston* L R 5 Q B 218 *Parsons* v *St Matthew, Bethnal Green* L R 3 C P 56, *Hyams* v *Webster*, L R 4 Q B 138

in execution of their office enter into a contract for the performance of work, it seems clear that the person who contracts to do the work 'is not to be considered as a servant, but as a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing them" (*l*) And the person thus employed may himself, by virtue of an express statutory clause, be protected from liability whilst acting under the direction of the commissioners (*m*), provided there be no personal negligence on his part or that of his servants, since a negligent execution of the work will make him liable to those injured thereby (*n*) A shipowner is not responsible at common law for injuries occasioned by the unskilful navigation of his vessel whilst under the control of a pilot whom the owner was compelled to take on board, and in whose selection he had no voice (*o*) The Merchant Shipping Act, 1894 (57 & 58 Vict c 60), s 633, was to the same effect as the common law, but now that section is repealed, and the common law is overridden, by the Pilotage Act, 1913 (2 & 3 Geo 5 c 31), s 15, which makes the shipowner liable while his ship is under compulsory pilotage just as he is at other times

Rule inapplicable to the Crown

It is clear, also, that a servant of the Crown, contracting in his official capacity, is not personally liable on the contracts so entered into In such cases, therefore, the rule of *respondeat superior* does not apply, such exceptions to it resulting from motives of public policy, for no prudent person would accept a public situation at the hazard of exposing himself to a multiplicity of suits by parties thinking themselves aggrieved (*p*)

Again, the maxim, *respondeat superior*, does not apply in the case of the sovereign for, as we have before seen, the sovereign is not liable for personal negligence, and, therefore, the principle, *qui facit per alium facit per se*—which is applied to render the master answerable for the negligence of his servant, because this has arisen from his own negligence or imprudence in selecting or retaining a careless servant—is not applicable to

(*l*) *Allen* v *Hayward* 7 Q B 960 at p 975 See *ante*

(*m*) *Ward* v *Lee*, 7 E & B 426 *Newton* v *Ellis* 5 E & B 115

(*n*) Addison on Torts 8th ed p 1006

(*o*) *The Halley*, L R 2 P C 193, at pp 201, 202

(*p*) *Per* Dallas, C J, in *Gidley* v *Palmerston* 3 B & B 275, at pp 286, 287, per Ashhurst, J, in *Macbeath* v *Haldimand*, 1 T R 172 at 181, 182 *Palmer* v *Hutchinson* 6 App Cas 619, *Mitchell* v *R*, [1896] 1 Q B 121, n, but see *Graham* v *Public Works Commrs*, [1901] 2 K B 781

the sovereign, in whom negligence or misconduct cannot be implied, and for which, if it occurs in fact, the law affords no remedy Nor can a public servant in his official capacity be held liable for the torts of his subordinates, in carrying on the business of the department, unless he has himself personally directed and ordered the commission of the wrongful act complained of (*q*) Accordingly, in a case already alluded to, it was observed by Lord Lyndhurst that instances have occurred of damage occasioned by the negligent management of ships of war, in which it has been held that, where an act is done by one of the crew without the participation of the commander, the latter is not responsible, but that if the principle contended for in the case then before the Court were correct, the negligence of a seaman in the service of the Crown would, in such a case, render the Crown liable to make good the damage, a proposition which certainly could not be maintained (*r*)

Rule inapplicable to servants of the Crown

(*q*) *Raleigh* v *Goschen* [1898] 1 Ch 73 *Bainbridge* v *Postmaster General* [1906] 1 K B 178 *China Mut S Navig Co* v *MacLay* [1918] 1 K B 33

(*r*) *Canterbury* v *A G*, 1 Phill 306 *Feather* v *R*, 6 B & S 257 at pp 294 *et seq* *Tobin* v *R* 16 C B N S 310 *R* v *Prince* L R 1 C C 150 See *Hodgkinson* v *Fernie* 2 C B N S 415

It seems almost superfluous to observe that the above remarks upon the maxim *respondeat superior* are to some considerable extent applicable in criminal law On the one hand a party employing an innocent agent is liable for an offence committed through this medium on the other if the agent had a guilty knowledge he will be responsible as well as his employer See Bac Max reg 16 Though it is a rule of criminal law that a person cannot be criminally liable for acting as the agent of another without any knowledge that he was acting wrongly (*per* Crompton J in *Hearne* v *Garton* 2 E & E 66 at p 76)

In *Coleman* v *Riches* 16 C B 104 at p 118 Jervis C J specifies various cases in which criminal responsibility will be entailed on a master for the acts of his servants in the ordinary course of their employment

There are moreover many acts of a servant for which though criminal the master is civilly responsible by action (*per* Jervis, C J in *Dunkley* v *Farris* 11 C B 457) see *Roberts* v *Preston* 9 C B N S 208

Upon the above subject Ld Wensleydale thus observes — I take it to be a clear proposition of law that if a man employs an agent for a perfectly legal purpose and that agent does an illegal act that act does not affect the principal unless a great deal more is shown unless it is shown that the principal directed the agent so to act or really meant he should so act or afterwards ratified the illegal act or that he appointed one to be his general agent to do both legal and illegal acts (*Cooper* v *Slade*, 6 H L Cas 746, at p 793) and see *Parkes* v *Prescott* L R 4 Ex 169

Also in *Wilson* v *Rankin*, 6 B & S 208, at p 216 the Court thus remark — It is a well established distinction, that while a man is civilly responsible for the acts of his agents when acting within the established limits of his authority he will not be criminally responsible for such acts, unless express authority be shown, or the authority is necessarily to be implied from the nature of the employment, as in the case of a bookseller held liable for the sale by his shopman of a libellous publication Under ordinary circumstances the authority of the agent is limited to that which is lawful If in seeking to carry

A subject sustaining a legal wrong at the hands of a minister of the Crown is not, however, without a remedy, for as the sovereign cannot authorise wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown (*s*)

Lastly, assuming that an act which would *prima facie* be a trespass is done by lawful order of the government, the party who commits the act is clearly exempted from liability, and where the injury "is an act of state without remedy except by appeal to the justice of the state which inflicts it, or by application of the individual sufferer to the government of his country to insist upon compensation from the government of this—in either view, the wrong is no longer actionable" (*t*)

OMNIS RATIHABITIO RETROTRAHITUR ET MANDATO PRIORI EQUIPARATUR (*Co Litt* 207 *a*)—*A subsequent ratification has a retrospective effect, and is equivalent to a prior command*

General rule

It is a rule of very wide application, and one repeatedly laid down in the Roman law, that *ratihabitio mandato comparatur* (*u*), where *ratihabitio* means "the act of assenting to what has been done by another in my name" (*x*)

It is, then, true, as a general rule, that a subsequent ratification and adoption by a person of what has been already done in his name or as on his behalf, but without his authority, has a retrospective effect, and is equivalent to his previous command For instance, if a stranger pays a debt without the debtor's authority, but acting as his agent and on his behalf and the debtor subsequently ratifies the payment, it operates as a good payment made by the debtor on the date when it was

out the purpose of his employment he oversteps the law he outruns his authority and his principal will not be bound by what he does See also *R* v *Stephens* L R 1 Q B 702 and *per* Ld Russell of Killowen in *Comrs of Police* v *Cartman* [1896] 1 Q B 655 at p 657

The principles governing the question as to the criminal liability of a master for the acts of his servant are discussed in O'Connor's Irish Justice of the Peace 2nd ed, vol I at pp 424, 425, and a large number of cases in point are digested at pp 426—433 of the same work

(*s*) Judgm, *Feather* v *R* 6 B & S 257, at p 296 see *ante* p 41

(*t*) *Vide per* Parke, B in *Buron* v *Denman* 2 Exch 167 at p 189 (explained in *Feather* v *R* 6 B & S 257 at p 296)

(*u*) D 46 3, 12 § 4, D 50 17 60 D 3, 5 6, § 9, D 43, 16 1, § 14

(*x*) Brisson ad verb *Ratihabitio* The operation of the maxim with reference to the law of principal and agent, is considered at length in Story on Agency

actually made (*y*) And if an action is brought in a person's name and for his benefit, but without his knowledge, his subsequent ratification of the proceedings in the action renders them as much his own as if he had originally authorised them (*z*)

Without multiplying instances of the doctrine, it seems sufficient to state the general proposition, that the subsequent assent by the principal to his agent's conduct not only exonerates the agent from the consequences of a departure from his orders, but likewise renders the principal liable on contracts made in violation of such orders, or even where there has been no previous retainer or employment, and this assent may be inferred from the conduct of the principal (*a*) The subsequent sanction is considered the same thing, in effect, as assent at the time, the difference being, that, where the authority is given beforehand, the party giving it must trust to his agent, if it be given subsequently to the contract, the party knows that all has been done according to his wishes (*b*) 'That 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, is the known and well-established rule of law In that case, the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority" (*c*)

Act must be done on ratifier's behalf

The principal limitation to the doctrine that a person can, by ratifying another's act, render that act his own in law, lies in the rule that a person cannot be said in law to ratify another's act, unless that other, in doing the act, purported, or assumed, or intended (*d*) to do it as such person's agent, and this rule applies equally whether the doctrine of ratification is invoked to enable a person to take the benefit of an act, or to render him liable therefor as a principal, or to justify an act as done by lawful authority

Contracts

Thus, with regard to contracts, it is a well-established

(*y*) *Simpson* v *Eggington* 10 Exch 845
(*z*) *Ancona* v *Marks* 7 H & N 686
(*a*) Smith, Merc Law 11th ed p 159, and cases there cited
(*b*) *Per* Best, C J , in *Maclean* v *Dunn* 4 Bing 722, at p 727
(*c*) *Wilson* v *Tumman* 6 M & Gr 236, at p 242
(*d*) *Keighley* v *Durant*, [1901] A C 240

principle that 'to entitle a person to sue upon a contract, it must be clearly shown that he himself made it or that it was made *on his behalf* by an agent authorised to act for him at the time, or whose act has been subsequently ratified and adopted by him' (*e*)

Torts

Again, with regard to torts, it is laid down that, by the common law, 'he that receiveth a trespasser, and agreeth to a trespass after it be done is no trespasser, unless the trespass was done *to his use or for his benefit*, and then his agreement subsequent amounteth to a commandment' (*f*) The question of liability for a tort by ratification accordingly depends upon whether the act was originally intended to be done to the use or for the benefit of the party who is afterwards said to have ratified it (*g*) Therefore, if A wrongfully seize my gun to his own use, B does not become answerable for that trespass, because he afterwards receives the gun from A and refuses my demand for its return (*h*) And, similarly, if the sheriff, acting under a valid writ by the command of the Court and as the servant of the Court, seizes the wrong person's goods, a subsequent declaration by the execution creditor of his approval of the seizure does not make the seizure a wrongful seizure by him to render him answerable for the seizure, it is necessary to show that it was done under his previous direction (*i*)

Justification

It has long been settled that a person who does an act on his own behalf cannot afterwards justify it as done on behalf of another or rely on that other's subsequent assent to the act On this point it is sufficient to cite the words of Anderson, C J (*k*) 'If one have cause to distrain my goods, and a stranger of his own wrong, without any warrant or authority given him by the other take my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself, by saying that he did it as bailiff or servant? Can he so father his misdemeanors upon another? He cannot, for once he was a trespasser, and his intent was manifest But if one distrain as bailiff, although, in truth, he is not bailiff

(*e*) *Watson* v *Swann*, 11 C B N S 756 at p 771

(*f*) 4 Inst 317 (cited by Parke, J in *Wilson* v *Barker*, 4 B & Ad 614, and by Willes J in *Stacey* v *Whitehurst*, 18 C B N S 344, at p 356)

(*g*) Judg, *East Cos Ry Co* v *Broom*, 6 Exch 314, at p 327, citing 4 Inst 317

(*h*) *Wilson* v *Barker*, 4 B & Ad 614

(*i*) *Wilson* v *Tumman*, 6 M & Gr 236, at p 242, *Morris* v *Salberg*, 22 Q B D 614

(*k*) *Anon* Godbolt, 109

if after he in whose right he doth it doth assent, he shall not be punished as a trespasser, for that assent shall have relation unto the time of the distress taken '

Wrongful sale

It must be observed, however, that there is one class of cases in which a person may, perhaps, be said to adopt or ratify an act, although it was done without any pretence of doing it on his behalf For it is well established that a person whose goods are wrongfully seized and sold may waive the tort, affirm the sale as a sale by his authority, and recover the proceeds as money had and received to his use (*l*)

Criminal acts

Whether a criminal act can be so ratified as to make it in law the criminal act of the person ratifying it is a question on which there seems to be no clear decision In *R* v *Woodward* (*m*) it seems that the opinion of some of the Judges was that a person is guilty of knowingly receiving stolen goods, if, with knowledge of the felony, he ratifies their receipt by a person who assumed to receive them on his behalf, the acts of ratification being an agreement with the thief for the price of the goods and payment thereof The main ground, however, of the decision in this case appears to have been that the receipt of the goods was not complete until the price was agreed and paid

Forgery

It seems safe to say that a person whose signature is forged cannot ratify the act so as to protect the forger from the charge of forgery (*n*), and it has been held that, where a person's signature is forged to a promissory note, the doctrine of liability by ratification cannot be invoked against him in an action on the note, the forger's pretence having been, not that the signature was authorised, but that it was genuine (*o*) The person whose signature is forged may, indeed, become estopped by his conduct from setting up that it is not genuine (*p*), but a contract by him that he will not dispute the signature in consideration of the forger not being prosecuted is illegal, and creates no estoppel as between the parties thereto (*q*)

Incapacity to ratify

The principle, it will be noticed, is that a ratification is

(*l*) *Lamine* v *Dorrell*, 2 Raym Ld 1216, *Smith* v *Hodson* 4 T R 211 (noted 2 Smith, L C 12th ed, p 139), *Rodgers* v *Mau* 15 M & W 444 at p 448 see *ante* p 202

(*m*) L & C 122 see 1 Smith L C, 12th ed p 406

(*n*) See *per* Ld Blackburn in *McKenzie* v *Brit Linen Co*, 6 App Cas 82, at p 99

(*o*) *Brook* v *Hook* L R 6 Ex 89

(*p*) See the Bills of Exchange Act, 1882 (45 & 46 Vict c 61) s 24

(*q*) *Brook* v *Hook*, *supra*

equivalent to a prior command, and it has no greater force A person cannot ratify an act, if at the time of the act he had no capacity to command or to do it (*r*), and there can be no ratification of an act by a person who when the act was done had no existence actually or in contemplation of law (*s*) Thus a corporation cannot ratify a contract which a person purported to make on its behalf before its incorporation (*t*) On the other hand, as the title of an administrator, when he has been appointed, relates back to the time of the intestate's death, it has been held that an administrator can ratify a sale of the intestate's property made before his appointment by a person purporting to sell as agent for whatever person might happen to be the intestate's legal representative (*u*)

Ratification, when too late

Although the subsequent ratification of an act done as agent is, as a rule, equivalent to a prior command there are cases in which a ratification is of no effect, because it comes too late For, where the time within which a person has power to do an act is limited, he cannot ratify the act, if done without his previous authority, unless he ratify it before his power to do the act has ceased (*x*) Thus, a landlord cannot rely upon an unauthorised notice to his tenant to quit, unless he ratify it before the time for giving the notice has passed (*y*), and a person who stops goods in transitu, as agent for the seller, but without his authority, cannot justify the act, unless it be ratified before the seller's right of stoppage is lost (*z*) And the rule has been stated to be that an estate once vested cannot be divested, nor can an act lawful at the time of its performance be rendered unlawful, by the application of the doctrine of ratification (*a*) Moreover, it must be observed that a ratification is an election to confirm an act, and that, being an election, it must be made within a reasonable time, the standard of reasonableness depending in each case upon its circumstances (*b*)

(*r*) *Riche* v *Ashbury Co* L R 7 H L 653 (explained in *Bonanza Co* v *R* [1916] A C 566, at p 577)

(*s*) *Per* Willes, J in *Charlton* v *Tonge* L R 7 C P 178 at p 184

(*t*) *Re Empress Engineering Co* 16 Ch D 125 *Re Northumberland Av Hotel Co* 33 Id 16 see *Howard* v *Patent Ivory Co*, 38 Id 156

(*u*) *Foster* v *Bates* 12 M & W 226 see *Re Watson* 19 Q B D 234, *post*, pp 582 3

(*x*) *Ainsworth* v *Creeke* L R 4 C P 476 *Dibbins* v *Dibbins* [1896] 2 Ch 348, *Grover* v *Matheus* [1910] 2 K B 401

(*y*) *Doe* d *Lyster* v *Goldwin* 2 Q B 143

(*z*) *Bird* v *Brown*, 4 Exch 786

(*a*) *Per* Cotton, L J , in *Bolton* v *Lambert*, 41 Ch D 295, at p 307

(*b*) *Per* Bowen, L J , in *Re Portuguese Consol Mines*, 45 Ch D 16 at p 34

Again, if a person pay another's debt, acting as his agent, but without his authority, it is open to such person and the creditor, so long as the payment remains unratified, to agree to cancel it, and, after it has been so cancelled, the debtor cannot take the benefit of the payment by ratifying it (*c*) But upon the acceptance, though not authorised, of an offer of purchase, the person who made the offer cannot, by his mere withdrawal of it, render the acceptance incapable of ratification (*d*)

Conditions of valid ratification

From what has been already said the reader will gather that to constitute a valid ratification three conditions must, as a rule, be satisfied first, the agent whose act is sought to be ratified must have professed to act for the principal (*e*), secondly at the time the act was done the agent must have had a competent principal, and thirdly, at the time of the ratification the principal must be legally capable of doing the act himself (*f*) Moreover, in order to render the ratification of an act binding "the ratification must be either with full knowledge of the character of the act to be adopted, or with the intention to adopt it at all events and under whatever circumstances" (*g*) Where the supposed ratification relates to acts as to which there is no pretence of any previous authority, 'full knowledge of the facts and unequivocal adoption after such knowledge must be proved, or, in the alternative the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's acts, whatever they were or however culpable they were" (*h*)

Without discussing at length by what acts a ratification may be shown, we may point out here that where work is done to property, such as repairs to a ship, under an order not authorised by the owner, the mere fact that the owner afterwards takes possession of the property and deals with it as his own is not evidence that he has ratified the order it is not like the

(*c*) *Walter* v *James*, L R 6 Ex 124

(*d*) *Bolton* v *Lambert*, 41 Ch D 295

(*e*) It is enough if he professed to act on behalf of the principal though his real intention may have been to contract on his own behalf (*Re Tiedmann & Leder mann* [1899] 2 Q B 66)

(*f*) See *per* Wright, J in *Firth* v *Staines* [1897] 2 Q B 70, at p 75

(*g*) *Per* Willes, J in *Phosphate Co* v *Green*, L R 7 C P 43, at p 57 see *Freeman* v *Rosher*, 13 Q B 780 *E Cos Ry Co* v *Broom* 6 Exch 314, *La Banque Jacques Cartier* v *La Banque de Montreal* 13 App Cas 111

(*h*) *Marsh* v *Jones*, [1897] 1 Ch 213, at p 247

case of an acceptance of goods which were not previously the acceptor's property (*i*)

Ratification by Crown

The doctrine that ratification is equivalent to prior command is applicable to persons, not only when they act on behalf of private individuals, but also when they act on behalf of the Crown (*k*) For instance, in 1841, Captain Denman, having been sent to the Gallinas to rescue two British subjects, detained there as slaves, took upon himself, without previous orders, to break up a slave-dealing establishment, and when its owner subsequently brought an action against him it was held that he could justify his acts by showing that the British Government had ratified them, and that they were consequently acts of State, the responsibility for which rested with the Crown alone (*l*)

NIHIL TAM CONVENIENS EST NATURALI ÆQUITATI QUAM UNUMQUODQUE DISSOLVI EO LIGAMINE QUO LIGATUM EST (*2 Inst* 360)—*Nothing is so consonant to natural equity as that every contract should be dissolved by the means which rendered it binding*

Rule and reason of the rule

It is an old rule of the common law that every contract ought to be dissolved by matter of as high a nature as that which first made it obligatory (*m*) It was considered to be "inconvenient that matters in writing, made by advice and consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory' (*n*), and it was therefore laid down, that, "an obligation is not made void but by a release, for *naturale est quidlibet dissolvi eo modo quo ligatur* a record by a record a deed by a deed, and a parol promise or agreement is dissolved by parol, and an Act of Parliament by an Act of Parliament This reason and this rule of law are always of force in the common law" (*o*)

(*i*) See *Forman* v *The Liddesdale*, [1900] A C 190

(*k*) *Phillips* v *Eyre*, L R 6 Q B 1, at pp 23, 24

(*l*) *Buron* v *Denman*, 2 Exch 167, see also *Sec of State for India* v *Sahaba* 13 Moo P C 22, at p 86

(*m*) Jenk Cent 166, Id 74

(*n*) *Countess of Rutland's Case*, 5 Rep 25b, at 26a That which is gained by marriage may be lost by marriage *eodem modo quo quid constituitur dissolvitur* (Cruise on Dignities, 2nd ed 90, cited *Cowley* v *Cowley*, [1900] P 118, at p 123)

(*o*) Jenk Cent 70

Statute

In the first place, with respect to statutes of the realm, we may remark that these, being created by an exercise of the highest authority which the constitution of this country acknowledges, cannot be dispensed with, amended, suspended, or repealed, but by the authority by which they were made *jura eodem modo destituuntur quo constituuntur* (*p*) It was, indeed, a maxim of the civilians that, as laws might be established by long and continued custom, so they could likewise be abrogated by desuetude, or be annulled by contrary usage *ea vero quæ ipsa sibi quæque civitas constituit sæpe mutari solent vel tacito consensu populi vel alia postea lege lata* (*q*) Our law, however, until recently, followed the rule that every statute continues in force till repealed by the legislature (*r*) But in 1902 the King's Bench Division refused to issue a *mandamus* to a metropolitan magistrate directing him to issue a summons against Jesuits, whose presence in this country was—as it still is—an offence under the Catholic Relief Act, 1829 (10 Geo 4, c 7), s 34 and it is perfectly clear that the Court, though giving various elaborate reasons, was determined, by some means or other, to prevent a meddlesome zealot from putting into operation for the first time an enactment which had been, so to speak, obsolete from the day on which it was passed (*s*)

Record

We propose, in the next place to consider the three following species of obligations viz, by record, by specialty, and by simple contract, as to the first of which it will suffice to say, that an obligation by record may be discharged by a release under seal (*t*)

Specialty, how discharged before breach

In the case of a specialty, no rule of our common law was better established than that such a contract could, before breach,

(*p*) Dwarr Stats 2nd ed 529 Bell Dict and Dig of Scotch Law 636 *Cujus est instituere ejus est abrogare* We say in general he that institutes may also abrogate, most especially when the institution is not only by but for himself If the multitude therefore do institute, the multitude may abrogate, and they themselves or those who succeed in the same right can only be fit judges of the performance of the ends of the institution (Sidney Discourse concerning Government p 15)

(*q*) I 1 2 11 Irving Civ Law, 4th ed 123

(*r*) *Ashford* v *Thornton* 1 B & Ald 405 (as to trial by combat) affords a remarkable instance of the rule See, also *per* Patteson J *R* v *Archbishop of Canterbury* 11 Q B 483 at p 627 and *ante* p 17

(*s*) *R* v *Kennedy* 86 L T 753

(*t*) Per Parke, B, in *Barker* v *St Quintin* 12 M & W 441 at p 453 (cited in *Ex p Games*, 3 H & C 294, at p 299), Litt, s 507 and the commentary thereon, Shep Touch, by Preston, 322, *Farmer* v *Mottram*, 7 Scott, N R 408

only be discharged by an instrument of equal force (*u*), that a subsequent parol, that is to say, written or verbal agreement, not under seal, dispensing with or varying the time or mode of performance of an act covenanted to be done, could not be pleaded in bar to an action, on an instrument under seal, for non-performance of the act in the manner thereby prescribed (*x*) —in short, that the terms of a deed could not be contradicted or varied by parol, that a parol licence could not be set up in opposition to a deed (*y*)

In equity, however, the rule is different, a parol agreement, founded on valuable consideration, was formerly a good ground for an injunction to restrain an action upon a deed brought in breach of the agreement and it is clear that the rule of equity which now prevails throughout the High Court (*z*), is that a contract under seal, even though the contract be one which is required by law to be in writing, may be rescinded by a valid parol agreement (*a*)

Accord and satisfaction after breach

It is well established that, at the common law, accord and satisfaction after a breach is a good defence to an action to recover unliquidated damages for the breach of a contract under seal, but not to an action to recover a specialty debt, the distinction being that, in the latter case, the duty to pay the debt is deemed to arise entirely from the deed, and therefore can be avoided only by matter of as high a nature, whereas, in the former case, the action is considered to be founded, not entirely upon the deed, but mainly upon the subsequent wrong or default, which, as it supports only a claim to amends, may be satisfied by amends given (*b*) It is equally well established however, that, in equity, a specialty debt may be discharged when overdue, by accord and satisfaction, and the rule of equity now prevails in the High Court (*c*)

It has been thought that, by the rules of equity, a voluntary

(*u*) *Per* Bosanquet J , in *West* v *Blakeway* 3 Scott N R 199 at p 216

(*x*) *Heard* v *Wadham* 1 East 619 *Gwynne* v *Dary*, 2 Scott N R 29 (cited by Cockburn C J in *Albert* v *Grosvenor Invest Co* , L R 3 Q B 123 at p 127 *Roe* d *Gregson* v *Harrison* 2 T R 425 *Blake's Case* 6 Rep 43b, *Peytoe's Case* 9 Rep 77b *Kaye* v *Waghorn* 1 Taunt 428 *Cocks* v *Nash* 9 Bing 341 *Harden* v *Clifton* 1 Q B 522, *Rippinghall* v *Lloyd*, 5 B & Ad 742 is particularly worthy of perusal in connection with the above subject

(*y*) *Per* Lush J in *Albert* v *Grosvenor Invest Co* L R 3 Q B 123 at p 128

(*z*) Judicature Act 1873 (36 & 37 Vict c 66), s 25 (11)

(*a*) Fry Spec Perf 3rd ed pp 469 470

(*b*) *Blake's Case* 6 Rep 43 b

(*c*) *Steeds* v *Steeds*, 22 Q B D 537

parol declaration by a creditor that he intends to release his debtor from the debt becomes binding upon the creditor after the debtor has acted upon the faith of it (*d*) But this seems to be incorrect, for even in equity, a representation, to create an estoppel, must be a misrepresentation of an existing fact, and not of a mere intention (*e*)

Simple contracts

The extent of applicability of the maxim, *unumquodque dissolvitur eodem ligamine quo ligatur*, to simple contracts, may be thus concisely indicated "It is, said Parke, B, in *Foster* v *Dauber* (*f*), 'competent for both parties to an *executory* contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract (*g*) But an *executed* contract cannot be discharged, except by release under seal, or by performance of the obligation,' or by accord and satisfaction (*h*) A bill of exchange or promissory note, however, stands on a different footing, and the obligation thereon may, even after breach, be discharged by the waiver or renunciation of the holder (*i*) a doctrine which the Bills of Exchange Act, 1882 (45 & 46 Vict c 61), s 62, recognises, but limits by the requirement that the renunciation, which must be absolute and unconditional, must also be in writing unless the bill or note be delivered up to the acceptor or maker (*k*)

With respect, then, to simple contracts, which are neither within the operation of the Statute of Frauds nor under the control of any Act of Parliament, the rule is, that such contracts may, before breach, be dissolved by parol, the term *parol* being understood as applicable indifferently to written and verbal contracts 'By the general rules of the common law,' and independently of any statutory enactment, if there be a contract which has been reduced into writing,' and which is meant in itself to constitute an entire agreement, "*verbal*

(*d*) *Yeomans* v *Williams* L R 1 Eq 184

(*e*) *Jorden* v *Money* 5 H L C 185 *Chadwick* v *Manning*, [1896] A C 231 See also *Maddison* v *Alderson* 8 App Cas 467 at p 473 *per* Ld Selborne

(*f*) 6 Exch 839, at p 851

(*g*) See *De Bernardy* v *Harding* 8 Exch 822

(*h*) *Goldham* v *Edwards* 17 C B 141 It is a general rule of law, that a simple contract may *before* breach be waived or discharged, without a deed and without consideration, but *after* breach there can be no discharge except by deed or upon sufficient consideration (Byles on Bills, 7th ed, p 168, adopted by Bramwell, B, in *Dobson* v *Espie* 2 H & N 79 at p 83) See also *Clay* v *Turley*, 27 L J Ex 2

(*i*) See *Cook* v *Lister* 13 C B N S 543, at p 593, Judgm, *Foster* v *Dawber*, 6 Exch 839, at p 851

(*k*) See *Edwards* v *Walters* [1898] 2 Ch 157

evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify, the written contract (*l*), but, after the instrument has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make it a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement' (*m*) It should be observed that the first part of the above rule is confined and must be restricted in its application to a contemporaneous *verbal* agreement It has been expressly decided that, in an action on a bill or note, a contemporaneous agreement, *in writing*, may be set up, as between the immediate parties, to vary the contract evidenced by such instrument (*n*), and a *verbal* agreement, set up in suspension though not in defeasance of a written contract has been held good (*o*)

(*l*) See *Eden* v *Blake* 13 M & W 614 (which presents a good illustration of this rule), *Abrey* v *Crux* L R 5 C P 37, *Laurie* v *Scholefield*, L R 4 C P 622, *per* Willes J, in *Heffield* v *Meadows*, L R 4 C P 595, at p 599, *Lockett* v *Nicklin*, 2 Exch 93 *Martin* v *Pycroft*, 2 De G M & G 785 (considered in *North* v *Loomes* [1919] 1 Ch 378 at p 386), *Adams* v *Wordley*, 1 M & W 374 at p 380 (recognised in *Flight* v *Cray* 3 C B N S 320 at p 322) *Hughes* v *Statham* 4 B & C 187 *Hoare* v *Graham*, 3 Camp 57 (cited *per* Tindal, C J in *Broun* v *Langley* 5 Scott N R 249, at p 254) *Henson* v *Coope*, 3 Scott N R 48, *Reay* v *Richardson*, 2 Cr M & R 422, *per* Bayley, J, in *Lewis* v *Jones*, 4 B & C 506, at p 512 *per* Ld Abinger in *Allen* v *Pink* 4 M & W 140 at p 144, *Knapp* v *Harden* 1 Gale 47, *Soares* v *Glyn*, 8 Q B 24, *Manley* v *Boycot*, 2 E & B 46

See *Malpas* v *L & S W Ry Co*, L R 1 C P 336

A mistake in the original written contract may sometimes be set up by way of equitable defence see *Steele* v *Haddock*, 10 Exch 643, *Reis* v *Scot Equit Life Ass Soc* 2 H & N 19 *Wake* v *Harrop*, 6 H & N 768, *Pattle* v *Hornibrook*, [1897] 1 Ch 25

(*m*) Judgm *Goss* v *Nugent*, 5 B & Ad 58 at pp 64 65 see also *Hargreaves* v *Parsons*, 13 M & W 561 *Taylor* v *Hilary*, 1 Cr M & R 741, and *Giles* v v *Spencer*, 3 C B N S 244, present instances of substituted agreements See also, *Patmore* v *Colburn* 1 Cr M & R 65, *Douglas* v *Watson* 17 C B 685

(*n*) *Brown* v *Langley* 5 Scott N R 249, *per* Gibbs J in *Bowerbank* v *Monteiro* 4 Taunt 844 *per* Bovill C J in *Young* v *Austen* L R 4 C P 553 at p 557 See *Strong* v *Foster* 17 C B 201 *Halhead* v *Young* 6 L & B 312 *Pooley* v *Harradine*, 7 E & B 431 (cited by Crompton, J in *Eum* v *Lancaster* 6 B & S 571, at p 576)

(*o*) *Walker* v *Littell*, 11 C B N S 369 but see *Stott* v *Fairlamb*, 52 L J Q B 420, *New Lond Cred Synd* v *Neale* [1898] 2 Q B 487

King v Gillett

In *King v Gillett* (*p*) (which shows that a contract to marry, founded on mutual promises, is not within s 4 of the Statute of Frauds), the Court of Exchequer held that to an action on such a contract, it is a good plea that, after the promise, and before any breach, the plaintiff absolved and discharged the defendant from his promise and the performance of the same and we have here more particularly mentioned this case, because it affords an exact illustration of the rule now under consideration, and which we find laid down in the Digest in these words *nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est, ideo verborum obligatio verbis tollitur, nudi consensus obligatio contrario consensu dissolvitur* (*q*) So, in *Langden v Stokes* (*r*), which was followed by the Court in deciding the above case, and which was an action of assumpsit, the defendant pleaded that before any breach, the plaintiff *exoneravit eum* of the alleged promise, and the plea was held good, on the ground that, as this was a promise by words, it might be discharged by words before breach In order, however to sustain such a plea, if issue be taken thereon, the defendant, it has been observed, must prove a proposition to exonerate on the part of the plaintiff, acceded to by himself, and this in effect will be a *rescinding* of the contract previously made' (*s*)

Where writing required by statute

By the Statute of Frauds, however, certain contracts are not enforceable by action, unless they be in writing (*t*) Therefore, if the parties to a contract in writing to which the statute applies afterwards make a mere verbal agreement to *vary* its terms, neither party can maintain an action at law upon the contract as so varied, for that is an action upon a contract some of the terms of which are not in writing (*u*), and the result of the decisions seems to be that neither the plaintiff nor the defendant can avail himself of a verbal agreement to vary a

(*p*) 7 M & W 55, see also *Dart v Bomford* 6 H & N 245

(*q*) D 50 17 35

(*r*) Cro Car 383

(*s*) *King v Gillett* 7 M & W 55 at p 59 In *Wood v Leadbitter*, 13 M & W 838 it was held that a parol licence to enter and remain for some time on the land of another even though money were paid for it, is revocable at any time, and without paying back the money and the law respecting the revocation of a licence was much considered See also *Roffey v Henderson*, 17 Q B 574, at p 586 *Adams v Andrews* 15 Q B 284 *Taplin v Florence* 10 C B 744

(*t*) 29 Car 2 c 3 ss 4 17 but s 17 is now replaced by the Sale of Goods Act 1893 (56 & 57 Vict c 71) s 4 It is now settled that the statute does not render a verbal contract void (*Maddison v Alderson* 8 App Cas 467 at p 488 *Britain v Rossiter* 11 Q B D 123 See *Hugill v Masker* 22 Id 364)

(*u*) *Goss v Nugent* 5 B & Ad 58

contract previously made in writing and required so to be by the statute (*r*) To meet the objection that he did not perform his part of the contract within the stipulated time, the plaintiff may, indeed, prove, by verbal evidence, that he voluntarily postponed performance at the defendant's request (*y*) but it is not open to him to prove by verbal evidence that at his request the defendant agreed that performance should be postponed, because this would be to prove a new verbal contract (*z*) nor can the defendant rely upon a verbal agreement by the plaintiff to vary some of the terms of the contract as an absolute rescission of the original contract in writing (*a*), for that is an attempt to give to the verbal agreement an effect which the parties clearly did not intend that it should have

It seems nevertheless, that in an action upon a contract made in writing and required by the statute so to be made, it is a good defence at law that, before breach, the parties, by an agreement not in writing, waived and abandoned the whole contract in its entirety that defence not being substantiated however by proof of a verbal agreement for a partial variation (*b*) and it is clear that a verbal agreement amounting to an entire rescission of the contract is an effectual answer in equity to a claim for specific performance (*c*)

Payment of less sum

We may further observe in connection with the maxim under consideration, that payment of part only of a liquidated and ascertained demand, cannot at law be a satisfaction of the whole, for the transaction between the parties consists in reality of two parts viz, payment, and an agreement to give up the residue which agreement is void, as being made without consideration (*d*) The above rule does not, however, apply if the claim is *bona fide* disputable, nor if there has been an acceptance of a chattel or of a negotiable security in satisfaction

(*x*) See the cases collected in *Hickman* v *Haynes* L R 10 C P 598 at p 605, *Vezey* v *Rashleigh* [1904] 1 Ch 634 (as to which see *per* Shearman J in *Williams* v *Moss Empires*, [1915] 3 K B 242, at p 246)

(*y*) *Hickman* v *Haynes* *supra* *Levey* v *Goldberg* [1922] 1 K B 688

(*z*) *Plevins* v *Downing* 1 C P D 220 (as to which see *Hartley* v *Hymans* [1920] 3 K B 475 at pp 489—491)

(*a*) *Noble* v *Ward* L R 2 Ex 135 (followed in *Williams* v *Moss Empires* *supra*, explained and distinguished in *Morris* v *Baron*, [1918] A C 1) *Moore* v *Campbell*, 10 Ex 323 *Vezey* v *Rashleigh* *supra*

(*b*) See *Goss* v *Nugent* 5 B & Ad 58 at p 66 *Harvey* v *Grabham* 5 A & E 61 at p 74 *Stead* v *Dawber* 10 Ad 57, at pp 64 65 *Moore* v *Campbell* 10 Ex 325 *Noble* v *Ward* L R 2 Ex 135 *Williams* v *Moss Empires* [1915] 3 K B 242

(*c*) Fry, Spec Perf 6th ed p 479

(*d*) *Foakes* v *Beer*, 9 App Cas 605

of the debt, will the Court examine whether that satisfaction were a reasonable one, but it will merely inquire whether the parties actually came to such an agreement A man, therefore, may give in satisfaction of a debt of £100 a horse of the value of £5, but not £5, and a sum of money payable at a *different time* may be a good satisfaction of a larger sum payable at a future day (*e*) Moreover, although the obligor of a bond cannot, at the day appointed, pay a less sum in satisfaction of the whole, yet if the obligee then receive a part and give his acquittance under seal for the whole, this will be a good discharge, according to the maxim, *eodem ligamine quo ligatum est dissolvitur* (*f*)

VIGILANTIBUS, NON DORMIENTIBUS, JURA SUBVENIUNT (2 *Inst* 690)—*The laws assist those who are vigilant, not those who sleep over their rights* (*g*)

Instances of this rule

We have already, under the maxim *caveat emptor* (*h*) considered the proposition that courts of justice require that each party to a contract shall exercise a due degree of vigilance and caution, we shall now, therefore, confine our attention to the important subject of the limitation of actions, which will serve to exemplify that general policy of our law, in pursuance of which 'the using of legal diligence is always favoured, and shall never turn to the disadvantage of the creditor' (*i*), merely prefacing that this principle is well known (*k*) and of very extensive applicability, and might be illustrated by reference to very many reported cases (*l*) Thus, where the right to claim compensation is given by statute—for instance, by an enclosure

(*e*) *Sibree* v *Tripp* 15 M & W 23, at pp 34, 38

(*f*) Co Litt 212 b *per* Parke, B in *Sibree* v *Tripp* (*supra*), at p 34

(*g*) See Wing Max 672, *Sheffield* v *Ratcliffe* Hob 334, at p 347

(*h*) *Ante* p 301 See also the maxim, *prior tempore potior jure ante* p 284

(*i*) *Per* Heath, J in *Cox* v *Morgan* 2 B & P 398, at p 412

(*k*) In *Cox* v *Morgan*, *supra* Heath J observed that this was one of the maxims earliest learnt by attendance in Westminster Hall It was applied in courts of equity as well as in courts of law (see *per* Ld Cranworth, in *Leather Cloth Co* v *American L Cloth Co*, 11 H L Cas 523, at 535 *Spackman* v *Evans*, L R 3 H L 171 at p 220, *Downes* v *Ship* Id 343 *McDonnel* v *White* 11 H L Cas 570)

(*l*) The principle may be applied in construing statutes They should not be so interpreted as to deprive a creditor of a right actually existing and vested in

Act—which directs that the claim shall be made within a specified time, the right will be forfeited by omission to assert it within that time, and in such a case the maxim under consideration has been held forcibly to apply (*m*), and the rule before us is obviously applicable whenever a party debars himself of a legal right or remedy by his own negligence or *laches* (*n*)

Policy of statutes for the limitation of actions

In the ancient possessory actions, 'there was a time of limitation settled, beyond which no man should avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary, for if he were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to recover the possession, both to punish his neglect, *nam leges vigilantibus, non dormientibus, subveniunt*, and also because it was presumed that the supposed wrong-doer had in such a length of time procured a legal title, otherwise he would sooner have been sued' (*o*) Further, as Wood, V-C, remarked in *Manby* v *Bewick* (*p*), "the legislature has in this, as in every civilized country that has ever existed, thought fit to prescribe certain limitations of time, after which persons may suppose themselves to be in peaceable possession of their property and capable of transmitting the estates of which they are in possession, without any apprehension of the title being impugned by litigation in respect of transactions which occurred at a distant period, when evidence in support of their own title may be most difficult to obtain

We can refer here but very briefly to some of the more important statutes respecting the limitation of actions which are at the present time in force

Recovery of land

The period within which an action for the recovery of land may be brought is now regulated by the Real Property Limitation

him unless they be clear and direct upon the point (*Bottomley* v *Hayward* 7 H & N 562, at pp 569, 570)

The maxim applies also where there has been undue delay in instituting a suit for divorce, see the Matrimonial Causes Act, 1857 (20 & 21 Vict c 85, s 31) and cases cited in Inderwick, Div Acts, 27 See also, *Castleden* v *Castleden* 4 Macq 159

(*m*) *Doe* d *Watson* v *Jefferson* 2 Bing 118 at p 125

(*n*) See for instance, *Camudge* v *Allenby* 6 B & C 373 (with which cf *Timmins* v *Gibbins* 18 Q B 722), *Lichfield Union* v *Greene* 1 H & N 884 The maxim was applied by Coltman, J, in *Onions* v *Bowdler* 5 C B 65 at p 74 where a mistake occurred in the overseers list of persons qualified to vote for a borough

(*o*) 3 Black Com 188 As to the doctrine of Prescription in the Roman Law see Mackeld Civ Law, 290 *Usucapio constituta est ut aliquis litium finis esset* D 41 10 5 Wood Civ Law 3rd ed 123

(*p*) 3 K & J 342, at p 352, *Dundee Harbour* v *Dougall* 1 Macq 317

Act, 1874 (*q*) This Act amended the Real Property Limitation Act, 1833 (*r*), by reducing the period from twenty years to twelve years next after the right to bring the action first accrued to the plaintiff or to some person through whom he claims If, however, at the time when that right first accrued the person to whom it accrued was under the disability of infancy, coverture, or unsoundness of mind, a further period of six years from the cesser of the disability is allowed for bringing the action, provided that it be brought within thirty years next after the accrual of the right (*s*)

Mortgage debts and judgments

Sect 8 of the Act of 1874 requires an action for the recovery of money secured by a mortgage of land, or by a judgment (*t*) to be brought within twelve years next after the present right to receive the same accrued to a person capable of giving a discharge therefor but where there has been within such twelve years a payment on account of principal or interest, or the requisite acknowledgment in writing of the right thereto, the twelve years begin to run afresh from such payment or acknowledgment This section applies to an action by mortgagee against mortgagor of land upon the covenant for payment of the debt in the mortgage-deed (*u*), but it has not removed from the operation of the Limitation Act, 1623, an action upon a simple contract debt, secured by a charge upon land (*x*)

Covenants

Unless the case falls within s 8 of the Act of 1874, the time for bringing an action of covenant or debt upon a specialty is fixed by the Civil Procedure Act 1833 (*y*), and that statute also fixes the time for an action of debt for rent upon an indenture of demise, or of debt or *sci fa* upon a recognizance These actions may be brought, as a rule within twenty years after accrual of the cause of action, but not later (*z*) The requisite acknowledgment by writing or part payment, however, extends the right of action for twenty years from the acknowledgment (*a*) and if at the time when the cause of action accrues the person to whom it accrues is under disability, the time does not begin to run until the disability has ceased (*b*)

(*q*) 37 & 38 Vict c 57 (*r*) 3 & 4 Will 4 c 27
(*s*) Ss 1—6
(*t*) Whether or not it operates as a charge on land (*Jay* v *Johnstone* [1893] 1 Q B 189)
(*u*) *Sutton* v *Sutton* 22 Ch D 511 see *Re Frisby*, 43 Ch D 106
(*x*) *Barnes* v *Glenton* [1899] 1 Q B 885
(*y*) 3 & 4 Will 4, c 42
(*z*) S 3 (*a*) S 5
(*b*) Ss 4 5, see *post* p 575

The Civil Procedure Act, 1833 (*bb*), also limits the time for bringing an action of debt upon an award where the submission is not by specialty, or for a fine due in respect of copyhold estates, or for an escape, or for money levied on a *fi fa*, to six years after the cause of action and an action for penalties damages, or sums of money given to the party grieved by any statute, to two years after the cause of action, but not so as to extend the time where further limited by any statute (*c*) Time, however, does not begin to run against a plaintiff under disability until the disability has ceased (*d*)

Simple contracts

The doctrine of limitation in the case of simple contracts is founded upon a presumption of payment or release arising from length of time, as it is not common for a creditor to wait so long without enforcing payment of what is due, and, as presumptions are founded upon the ordinary course of things, *ex eo quod plerumque fit*, the laws have formed the presumption, that the debt, if not recovered within the time prescribed, has been acquitted or released Besides, a debtor ought not to be obliged to take care for ever of the acquittances which prove a demand to be satisfied, and it is proper to limit a time beyond which he shall not be under the necessity of producing them This doctrine has also been established as a punishment for the negligence of the creditor The law having allowed him a time within which to institute his action, the claim ought not to be received or enforced when he has suffered that time to elapse (*e*)

For these reasons, the Limitation Act, 1623 (*f*), requires actions of account and of assumpsit, actions of debt grounded upon any lending or contract without specialty, and actions of debt or arrearages of rent (*g*), to be commenced within six years next after the cause of such actions, and not after (*h*) Certain actions of account between merchant and merchant, their factors or servants, were excepted from the provisions of this statute, but now by the Mercantile Law Amendment Act, 1856 (*i*), these

(*bb*) 3 & 4 Will 4 c 42
(*c*) S 3
(*d*) S 4 see *post* p 575
(*e*) 1 Pothier, by Evans, 451
(*f*) 21 Jac 1, c 16, s 3
(*g*) See also 3 & 4 Will 4, c 27, s 42
(*h*) No time less than six years is unreasonable, as between drawer and holder of a cheque for its presentment unless loss is occasioned by the delay (*Laws* v *Rand*, 3 C B N S 442) See also as to payment by cheque *Hopkins* v *Ware* L R 4 Ex 268
(*i*) 19 & 20 Vict c 97, s 9

actions also must be brought within six years after the cause thereof accrued

Actions *ex delicto*

With respect to actions *ex delicto*, the period of limitation (*k*) in trespass *quare clausum fregit*, or for taking goods or cattle, as also in trover, detinue, replevin, and case (except for slander), is six years, in trespass for assault, battery, or false imprisonment, it is four years and for slander, two years

The Limitation Act, 1623, s 3, applies in terms only to certain actions *at law*, but when the right of set-off in an action was created (*l*), it was applied to that right, since the right was only given to save the need of a cross-action (*m*) And Courts of equity, which follow the law where there is no equity to be administered, came to apply this statute—and, indeed, all like statutes of limitation—to proceedings before them, though not within the strict letter of the statute applying it by analogy, and thereby enforcing their own rule against aiding stale demands yet applying it with an important distinction in cases of concealed fraud, on the ground that it has always been a principle of equity, that no length of time is a bar to relief in cases of fraud where there has been no *laches* on the part of the person defrauded In a purely common law action it is not a valid reply to a plea of the statute, that the defendant's fraud had prevented the plaintiff from discovering his cause of action within the prescribed period (*n*), but in an action which before the Judicature Act could be brought either at common law or in a Court of equity, the maxim, *nemo ex suo delicto meliorem suam conditionem facere potest* (*o*), is applied, and the cause of action is treated as arising at the time when the fraud is first discovered (*p*) There is, therefore, no room in equity for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own, and in equity it is regarded as a case of concealed fraud, if a person furtively obtains the

Concealed fraud

(*k*) 21 Jac 1, c 16 s 3

(*l*) See 2 Geo 2 c 22, s 13, 8 Geo 2, c 24 s 5, R S C 1883, O 19 r 3

(*m*) *Remington* v *Stevens*, 2 Stra 1271, see *Walker* v *Clements*, 15 Q B 1046

(*n*) *Hunter* v *Gibbons*, 1 H & N 459, *Imper Gas Co* v *Lond Gas Co*, 10 Exch 99, *Osgood* v *Sunderland* 30 T L R 530

(*o*) D 50, 17, 134 § 1, see *per* Ld Coleridge in *Gibbs* v *Guild* 9 Q B D 59, at p 65

(*p*) *Gibbs* v *Guild supra Betjemann* v *Betjemann* [1895] 2 Ch 474 at p 482, *Oelkers* v *Ellis*, [1914] 2 K B 139, see *Thorne* v *Heard*, [1895] A C 495, at p 506

minerals out of the land of another by a *wilful* secret trespass underground, and it is so regarded, whether or not the wrong-doer afterwards takes active measures to avoid detection for otherwise cunning which renders such measures unnecessary would be rewarded (*q*)

Disabilities

We have mentioned that the Civil Procedure Act, 1833, contains provisions in favour of a person to whom a cause of action accrues whilst such person is under a disability, and the like provisions are to be found in s 7 of the Limitation Act 1623 Of the five disabilities mentioned in these statutes infancy and unsoundness of mind are the only two which remain unaffected by subsequent legislation By the Mercantile Law Amendment Act, 1856, s 10, the plaintiff's absence beyond the seas ceased to be a disability, and so did his imprisonment and the effect of the Married Women's Property Act, 1882 whereby a married woman became capable of suing in contract or in tort, or otherwise, as if she were a feme sole, is that every married woman is now discovert within the meaning of the above-mentioned statutes of limitation (*r*)

Defendant's absence beyond the seas

The Limitation Act, 1623, contained no provision to meet cases where the defendant is absent beyond the seas at the time when the cause of action accrues But provision for these cases was afterwards made by the 4 & 5 Anne, c 16, which provided that in such cases time should not begin to run until the defendant's return A similar provision will be found in s 4 of the Civil Procedure Act, 1833 (*s*) The effect of these provisions however, is cut down by the Mercantile Law Amendment Act, 1856, s 11 This section deals with the case where one of the joint debtors is beyond the seas at the time when the cause of action accrues against them, but the other is not, and it enacts that the absence of the former is not to prevent time from running in favour of the latter, but that a judgment recovered against the latter is not to be a bar to a subsequent action against the former

Payment by one co contractor

With regard to the effect upon the Limitation Act, 1623, and the Civil Procedure Act, 1833, of the part payment of a

(*q*) *Bulli etc* v *Osborne*, [1899] A C 351 As to the effect of concealed fraud upon the right to recover land see 3 & 4 Will 4, c 27, s 26 *Willis* v *Howe* [1893] 2 Ch 545 *Re Levesley*, 32 T L R 145 *Re Coole*, [1920] 2 Ch 536

(*r*) See *Lowe* v *Fox*, 15 Q B D 667, *Hulley* v *Silversprings Co*, [1922] 2 Ch 269

(*s*) See, also s 5 As to what places are not beyond the seas within the meaning of these Acts, see the Mercantile Law Amendment Act, 1856 (19 & 20 Vict c 97), s 12, and the Civil Procedure Act, 1833 (3 & 4 Will 4, c 42) s 7

debt, it is important to notice that the Mercantile Law Amendment Act, 1856, s 14, provides that one of several co-contractors, executors, or administrators, shall not lose the benefit of those statutes, so as to be chargeable in respect or by reason only (*t*) of any payment by another of them This enactment may be regarded as supplementary to Lord Tenterden's Act (9 Geo 4, c 14), which provides that none of such persons shall lose the benefit of the Limitation Act, 1623, so as to be chargeable in respect or by reason only of an acknowledgment or promise by another of them No similar provision, however, exists with regard to an acknowledgment by writing under the Civil Procedure Act, 1833, s 5, but it has been held that an acknowledgment by the executor of one of two co obligors to a bond does not bind the other, because an executor can only be liable in respect of the several liability and not of the joint liability of the bond (*u*) Having touched upon the topic of part payment, we may here notice that the payment by a devisee for life of lands of interest upon his testator's simple contract or specialty debt keeps alive, as against the remainderman, the creditor's remedies against the lands (*x*)

Maxim as to prescription

It is not intended here, nor would it be consistent with the plan of this work to consider in detail the numerous points with which the various statutes of limitations bristle There is, however, one maxim which naturally suggests itself in this place, and which is illustrated by the provisions with respect to cases of disability, which suspend the ordinary operation of such statutes until the disability is removed The maxim alluded to is expressed thus *Contra non valentem agere nulla currit præscriptio*—prescription does not run against a party who is unable to act For instance, in the case of a debt, it only begins to run from the time when the creditor has a right to institute his suit, because no delay can be imputed to him before that time (*y*) In the case, therefore, of a contract to pay money at a future period, or upon the happening of a certain event, as, when J S is married, ' the six years are to be

(*t*) See *Re Tucker* [1894] 3 Ch 429

(*u*) *Read* v *Price*, [1909] 2 K B 724

(*x*) See *Re Hollinqshead*, 37 Ch D 651

(*y*) 1 Pothier, by Evans, 451, *Hemp* v *Garland* 4 Q B 519 at p 524, *Reeves* v *Butcher*, [1891] 2 Q B 509 *Coburn* v *Colledge*, [1897] 1 Q B 702, *Huggins* v *Coates*, 5 Q B 492 *Holmes* v *Kerrison* 2 Taunt 323 See also *Davies* v *Humphreys*, 6 M & W 153, Bell, Dict & Dig of Scots Law, 223

Where a loan is made by cheque the statute does not begin to run until the cheque is paid, *Garden* v *Bruce*, L R 3 C P 300

dated, in the first instance, from the arrival of the specified period, in the second, from the time when the event occurred (*z*) Again, if a person incurs a debt while he enjoys the immunity from process which our law allows to an ambassador, the six years do not begin to run until that immunity has ceased (*a*)

Where, however, the statute has once begun to run, the rule is that no subsequent disability interrupts its operation, for instance, its operation is not interrupted by the death of the debtor, and the non-appointment of an executor by reason of litigation as to the right to probate (*b*) But even to this rule there is an exception for where administration of the goods of a creditor is granted to a debtor, this, being by act of law, suspends the statute during the administration (*c*)

ACTIO PERSONALIS MORITUR CUM PERSONA (*Noy, Max* 14)—*A personal right of action dies with the person*

The legal meaning and application of this maxim will, perhaps, most clearly be shown, by stating concisely the various actions maintainable by and against executors and administrators, as well as those causes of action which die with the person To the latter alone can the above maxim be considered in strictness to apply (*d*)

1 *Contracts* The personal representatives are, as a general rule, entitled to sue on all covenants broken in the lifetime of the covenantee, as for rent then due, or for breach of covenant for quiet enjoyment (*e*), or to discharge the land from incumbrances (*f*) A distinction must, however, be remarked between a covenant running with the land and a purely collateral

Actions ex *contractu* by personal representatives

(*z*) 1 Pothier by Evans 451 *Shutford* v *Borough*, Godb 437, *Fenton* v *Emblers* 1 Black W 353

(*a*) *Musurus Bey* v *Godban* [1894] 2 Q B 352

(*b*) *Rhodes* v *Smethurst*, 4 M & W 42, and 6 Id 351, *Homfray* v *Scroope* 13 Q B 509, at p 513, *Freake* v *Cranefeldt*, 3 My & Cr 499, *Penny* v *Brice* 18 C B N S 393

(*c*) *Seagram* v *Knight* 2 Ch App 628

(*d*) By R S C 1883, O XVII r 1 whether the cause of action survives or not there is no abatement of a cause or matter by reason of the death of either party between the verdict or finding of the issues of fact and the judgment and judgment may be entered notwithstanding the death

(*e*) *Lucy* v *Levington* 2 Lev 26 By 13 Edw 1, st 1 c 23 executors were given a writ of account In 31 Edw 3, st 1 c 11 originated the office of administrator

(*f*) *Smith* v *Simonds* Comb 64

covenant In the former case, where the formal breach has been in the ancestor's lifetime, but the substantial damage has taken place since his death, the real and not the personal representative is the proper plaintiff, whereas, in the case of a covenant not running with the land, and intended not to be limited to the life of the covenantee, as a covenant not to fell trees excepted from the demise, the personal representative is alone entitled to sue (*g*) In a case where it was held that the executor of a tenant for life may recover for a breach of covenant to repair committed by a lessee of the testator in his lifetime, without averring a damage to his personal estate, the rule was stated to be, that unless the particular covenant be one for breach whereof, in the lifetime of the lessor, the *heir alone* can sue, the executor may sue unless, indeed, it be a mere personal contract, to which the rule applies, *actio personalis moritur cum persona* (*h*)

The personal representative, moreover, may sue, not only for the recovery of all debts due to the deceased by specialty or otherwise, but for all breaches of contract with him, except breaches which import a mere personal injury (*i*) and, with that exception, all rights of action for breaches of contract committed during the lifetime of the deceased pass to the personal representative, as also does the right to sue for breaches, committed after the death of the deceased, of contracts which were neither limited to his lifetime nor determined by his death (*k*) An administrator moreover, may sue for the price of goods sold and delivered between the death of the intestate and the taking out letters of administration (*l*), but he cannot sue in his representative character upon contracts made after

(*g*) *Raymond* v *Fitch* 2 C M & R 588, at pp 598, 599 *per* Williams J, and Parke, B, in *Beckham* v *Drake*, 2 H L Cas 579 at p 596, 624 *per* Parke, J, in *Carr* v *Roberts*, 5 B & Ad 78 at p 84 *Kingdon* v *Nottle* 1 M & S 355, and 4 M & S 53, *King* v *Jones* 5 Taunt 518, and (in error), 4 M & S 188

(*h*) *Ricketts* v *Weaver* 12 M & W 718 recognising *Raymond* v *Fitch* *supra* As to a covenant in an indenture of apprenticeship, see *Baxter* v *Burfield*, 2 Stra 1266, *Cooper* v *Simmons* 7 H & N 707

(*i*) Judgm in *Raymond* v *Fitch* 2 C M & R 586 at pp 596 597 *per* Tindal, C J in *Orme* v *Broughton* 10 Bing 533 *Stubbs* v *Holywell Ry Co* L R 2 Ex 311 1 Wms Saund 112, n (1), *Edwards* v *Grace*, 2 M & W 190 *Webb* v *Cowdell*, 14 M & W 820 *per* Vaughan Williams, L J in *Formby* v *Barker*, [1903] 2 Ch 539, at p 550, *Ives* v *Brown* [1919] 2 Ch 315

(*k*) *Cooper* v *Johnson* 2 B & Ald 394 *per* Bayley, J in *Rhodes* v *Haigh* 2 B & C 346, 347, *M Dougal* v *Robertson*, 4 Bing 435 *Tyler* v *Jones*, 3 B & C 144, *Clarke* v *Crofts*, 4 Bing 143, *Bowker* v *Evans* 15 Q B D 565, *Knights* v *Quarles* 2 B & B 102 (which was an action against an attorney for negligence in investigating a title)

(*l*) *Foster* v *Bates*, 12 M & W 226

the death of the intestate in the course of carrying on the intestate's business (*m*)

An action, however, is not maintainable by an executor or administrator for a breach of promise of marriage made to the deceased, where no special damage is alleged (*n*), and possibly it will not lie, even where such special damage is alleged (*o*), at any rate, damages have never yet been recovered after the death of the promisor (*p*) The general allegation of the breach imports only a personal injury Generally, with respect to injuries affecting the life or health of the deceased—such personal injuries, for instance, as arise out of the unskilfulness of a medical practitioner, or the negligence of a coach proprietor—the maxim as to *actio personalis* is applicable, unless some damage done to the personal estate of the deceased be stated on the record (*q*) But where the result of a breach of a contract relating to the person is a damage, not to the person only, but also to the personal estate for instance, where, in the case of negligent carriage or cure, the consequential damage includes the expenditure of money, or the loss for a time of the profits of a business, or of the wages of labour or where, in the case of a contract to carry safely both the person and the goods, both be injured in such cases it appears that the executor may sue for the breach of contract, and recover damages to the extent of the injury to the personal estate (*r*)

Against representatives

The personal representatives, on the other hand, are liable, so far as they have assets, on all the covenants and contracts of the deceased broken in his lifetime (*s*), and likewise on such as are broken after his death, for the due performance of which

(*m*) *Bolingbroke* v *Kerr* L R 1 Ex 222

(*n*) *Chamberlain* v *Williamson* 2 M & S 408 see also *Finlay* v *Chirney* 20 Q B D 494

(*o*) See *per* Ld Esher in *Finlay* v *Chirney*, 20 Q B D 494 at p 499 and *per* Swinfen Eady, L J , in *Quirk* v *Thomas*, [1916] 1 K B 516 at p 527

(*p*) *Per* Swinfen Eady, L J , *ubi supra*

(*q*) Judgm , in *Chamberlain* v *Williamson* 2 M & S 408 at pp 415 416 *Beckham* v *Drake* 2 H L Cas 579, at pp 596, 624 See *Knights* v *Quarles*, 2 B & B 102 at p 104

(*r*) Judgm *Beckham* v *Drake* 8 M & W 846 at pp 854, 855 *Bradshaw* v *Lanc & Y R Co* 10 C P 189, *Daly* v *Dublin Ry Co* 30 L R Ir 514, *per* Ld Halsbury, in *The Greta Holme* [1897] A C 596 at p 601

(*s*) Where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of reward to him by the other the law will imply, or the jury may infer a promise by each party to do what is to be done by him , and for breach of such a promise, executors may sue or be sued (*Morgan* v *Ravey* 6 H & N 265, at p 276) see also *Batthyany* v *Walford*, 36 Ch D 269, at p 279, *Blyth* v *Fladgate*, [1891] 1 Ch 337, at p 366

his skill or taste was not required (*t*), and which were not to be performed by the deceased in person (*u*) "The executors," observed Parke, B (*x*), "are in truth contained in the person of the testator, with respect to all his contracts, except indeed in the case of a *personal* contract, that is, a contract depending on personal skill, in which is always implied the condition that the person is not prevented by the act of God from completing the work That condition is peculiar to personal contracts" The distinction must, moreover, be noticed between a mere authority and a contract, the former being revoked by death, whereas the latter is not determined thereby, except as above mentioned (*y*)

Further, the personal representatives are liable on a covenant by deceased for their performance of a particular act, as for payment of a sum of money (*z*), for building a house left unfinished by the deceased (*a*), or on his contract for the performance of work by the plaintiff, before the completion of which he died, but which was subsequently completed (*b*) And the same principle was held to apply where an intestate had agreed to receive from the plaintiffs monthly during a certain period a certain quantity of slate, a portion of which, when tendered after his death, but before the expiration of the stipulated period, his administrator refused to accept (*c*)

The action of *debt* on simple contract, except for rent (*d*), did not, however, formerly lie against the personal representative for a debt contracted by the deceased (*e*), unless the undertaking to pay originated with the representative (*f*) and the reason

(*t*) *Per* Parke, B in *Sibont* v *Kirkman*, 1 M & W 418, at p 423 see *per* Patteson J, in *Wentworth* v *Cock* 10 A & E 42, at pp 45, 46, *Hopwood* v *Whaley* 6 C B 744 Bac Abr *Executors and Administrators*, (P 1), Com Dig *Administration* (B 14)

(*u*) *Hyde* v *Dean of Windsor*, Cro Eliz 552 *per Cur* in *Marshall* v *Broadhurst* 1 Cr & J 403, at p 406

(*x*) In *Wills* v *Murray*, 4 Exch 843, at p 866 See *Tasker* v *Shepherd*, 6 H & N 575

(*y*) *Bradbury* v *Morgan* 1 H & C 249

(*z*) *Ex parte Tindal* 8 Bing 402, at pp 404 405, and cases there cited, *Powell* v *Graham*, 7 Taunt 580

(*a*) *Quick* v *Ludborrow*, 3 Bulstr 29, at 30 See *per Cur* in *Marshall* v *Broadhurst*, 1 Cr & J 403, at pp 405, 406, *per* Ld Abinger in *Corner* v *Shew*, 3 M & W 350, at pp 353 354

(*b*) *Corner* v *Shew* 3 M & W 350 at p 352 See *per* Alderson, B in *Prior* v *Hembrow*, 8 M & W 873, at pp 889, 890.

(*c*) *Wentworth* v *Cock*, 10 A & E 42

(*d*) *Norwood* v *Read* Plowd 180

(*e*) *Barry* v *Robinson*, 1 B & P (N R) 293

(*f*) *Per* Best, C J, in *Riddell* v *Sutton*, 5 Bing 200, at p 206

was, that executors or administrators, when charged for the debt, were not admitted to wage their law, and, consequently, were deprived of a legal defence of which the deceased himself might have made use, but this reason did not apply to assumpsit, which, therefore, could always be brought (*g*) However, by the Civil Procedure Act, 1833, wager of law was abolished, and an action of debt on simple contract became maintainable in any Court of common law against an executor or administrator (*h*)

Actions *ex delicto*

2 *Torts* —It is to actions in form *ex delicto* that the maxim, *actio personalis moritur cum persona*, is peculiarly applicable, for, as Lord Abinger observed (*i*), this maxim ' is not applied in the old authorities to causes of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another which latter are annexed to the person, and die with the person, except where the remedy is given to (or by) the personal representatives by the statute law ' And the general rule of the common law is, that if an injury were done either to the person or to the property of another for which unliquidated damages only could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done (*k*)

Injuries to testator's personalty

Dealing, first, with actions brought *by* personal representatives, we find that this general rule of the common law received considerable alteration by statute, as early as 1330, when the 4 Edw 3, c 7, was passed This Act, after reciting that in times past executors had not actions for a trespass done to their testators as of the goods and chattels of the same testators carried away in their life, ' enacted that executors (*l*) in such cases should have an action against the trespassers, and recover their damages, in like manner as their testators if they were in life, and the effect of this Act, which, being remedial in character, has always been construed liberally (*m*), seems to be, that, whatever the form of the action may be, a personal representative

(*g*) 3 Bla Com 16th ed 347 and n (12) In *Perkinson* v *Gilford*, Cro Car 539 debt was held to lie against the executors of a sheriff, who had levied under a *fi fa*, and had died without paying over the money As to a set off by an executor sued as such see *Mardall* v *Thellusson* 6 E & B 976, and 18 Q B 857

(*h*) 3 & 4 Will 4 c 42 ss 13, 14

(*i*) In *Raymond* v *Fitch* 2 Cr M & R 588, at p 597

(*k*) *Wheatley* v *Lane* 1 Wms Saund (ed 1845) 216 a, n (1)

(*l*) Administrators are within the equity of the Act (*Smith* v *Colgay* Cro Eliz 384), and the remedy was extended by 25 Edw 3, st 5 c 5 to executors of executors

(*m*) See *per* Ld Ellenborough in *Wilson* v *Knubley*, 7 East, 128 at p 134, *Emerson* v *Emerson*, 1 Ventr 187

now always has the same action as the deceased person whom he represents would have had, for any injury done in such person's lifetime to his personal estate, whereby that estate is rendered less beneficial (*n*) In other words, the Act has been construed as extending "to all torts, except those relating to freeholds, and those where the injury done is of a personal nature" (*o*) For instance, the Act gives an executor a remedy for the infringement in his testator's lifetime of his registered trade-mark, for that is an injury to personal property (*p*)

Representative's title to personal estate

And here we may remind the reader that "the right of an executor to the personal estate of the testator is derived from the will, and the property in the personal goods and chattels of the testator is vested in him immediately upon the testator's death, and he is deemed to be in legal possession of them from that time, though before probate granted (*q*) The title of an administrator, on the other hand, is derived from the letters of administration, though it has relation back, for many purposes, to the date of the death for instance, it has been held that trespass to goods is maintainable by an administrator for an act done between the death of the intestate and the grant of the letters (*r*) Detinue, however, does not lie at the suit of an administrator for goods of the intestate which the defendant restored before the grant (*s*)

In regard to this doctrine of relation, we may add in the words of Parke, B, that "an act done by one who afterwards becomes administrator, to the *prejudice* of the estate, is not made good by the subsequent administration It is only in cases where the act is for the *benefit* of the estate that the relation back exists, by virtue of which relation the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled" (*t*)

Injuries to testator's realty

The common law provides no remedy after a person's death

(*n*) See 1 Wms Saund (ed 1845) 217 b n

(*o*) *Per* Bramwell L J in *Tucross* v *Grant* 4 C P D 40, at p 45

(*p*) *Oakey* v *Dalton* 35 Ch D 700 see *Hatchard* v *Mege* 18 Q B D 771

(*q*) *Per* Ld Campbell in *Pemberton* v *Chapman* 7 E & B 210 at p 217

(*r*) *Tharpe* v *Stallwood* 5 M & Gr 760 (recognised in *Foster* v *Bates*, 12 M & W 226), see *Welchman* v *Sturgis*, 13 Q B 552 In *Bodger* v *Arch* 10 Exch 333 the doctrine of relation was applied in peculiar circumstances to prevent the operation of the statute of limitations see *Stamford Bank* v *Smith*, [1892] 1 Q B 765

(*s*) *Crossfield* v *Such* 8 Exch 825

(*t*) In *Morgan* v *Thomas*, 8 Exch 302 at p 307 see *Re Watson* 18 Q B D 116, and 19 Id 234

for an injury done in his lifetime to his real estate (*u*), and accordingly, if his personal representatives sue in respect of such an injury, the maxim, *actio personalis moritur cum persona*, still, as a rule, defeats the action, unless it be maintainable under the Civil Procedure Act, 1833 (*v*) Under this Act, an action may be maintained by executors or administrators of a deceased person for any injury to his real estate committed in his lifetime, for which he might have maintained an action if alive, provided, first, that the injury was committed within six months before his death, and, secondly, that their action be brought within one year after his death, and damages recovered in the action form part of his personal estate Since this Act does not enable an executor to commence an action for an injury which was done to his testator's real estate more than six months before the testator's death, an executor cannot carry on a pending action, commenced by his testator, while alive, for an injury to his real estate, if at the time when the testator dies six months have elapsed since the injury was committed (*y*) In the case, however, of a continuing injury which gives rise to a new cause of action every day, the executor can bring an action, or carry on his testator's action, in respect of the injury, if and so far as the injury continued within the period of six months before the testator died (*z*)

Injuries to testator's person

Notwithstanding the statutory exceptions which we have noticed to the general rule of the common law, that rule still applies where a tort is committed to a man's person, feelings or reputation, as by battery, libel, slander, or his daughter's seduction, and in such cases no action is maintainable by his executors or administrators, for they represent not so much the person as the personal estate of the testator or intestate, of which they are in law the assignees (*a*) Accordingly, where a man sustained personal injuries through the defendants' negligence, whilst he was using a level crossing at their railway, and eventually died from such injuries, it was held that his administratrix could recover damages neither for the injuries themselves nor for the loss such injuries occasioned to him, while yet alive,

(*u*) See 1 Wms Saund (ed 1845) 217 b
(*v*) 3 & 4 Will 4, c 42 s 2
(*y*) *Kirk* v *Todd*, 21 Ch D 484
(*z*) *Jones* v *Simes* 43 Ch D 607 *Jenks* v *Clifden*, [1897] 1 Ch 694
(*a*) 3 Blac Com 16th ed 302 n (9), Com Dig *Administration* (B 13), *Bowker* v *Evans* 15 Q B D 565

through his inability to work and his need of doctors and nurses (*b*)

Lord Campbell's Act

The victim of bodily harm, if occasioned by another's wrongful act, has a cause of action against the wrong-doer, to recover damages for his physical sufferings, but if the bodily harm results in the victim's death, our common law does not transfer the cause of action to his legal personal representatives, nor does it give to the members of the victim's family who were dependent upon him for their support any cause of action against the wrong-doer for the pecuniary loss which they sustain through their breadwinner's death For such pecuniary loss, however, some remedy is provided by the Fatal Accidents Act, 1846 (*c*), commonly known as Lord Campbell's Act Under this Act, in every case where the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the injured person to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death, and even though the death was caused under such circumstances as amounted in law to a felony (*d*) Such action, though it must be brought, as a rule (*e*), in the name of the executor or administrator, is an action for the benefit of the wife, husband, parents (*f*) and children (*f*) of the deceased person the jury being required to give such damages as they think proportioned to the injury resulting from the death to the parties respectively for whose benefit the action is brought, and the amount recovered, after deducting costs not recovered, is divisible amongst these parties in such shares as the jury by their verdict direct (*g*) The action must be brought within twelve months after the death (*h*)

This Act it is to be observed, creates a new cause of action,

(*b*) *Pulling* v *G E Ry Co* 9 Q B D 110 where *Bradshaw* v *Lanc & Y Ry Co* L R 10 C P 189 was distinguished as being an action for breach of contract See *ante* p 579

(*c*) 9 & 10 Vict c 93 amended by the Fatal Accidents Act 1864 (27 & 28 Vict c 95) and the Fatal Accidents (Damages) Act 1908 (8 Edw 7 c 7) The Employers Liability Act 1880 (43 & 44 Vict c 42) and the Workmen's Compensation Act, 1906 (6 Edw 7 c 58) also give remedies to personal representatives or dependants of a deceased workman

(*d*) 9 & 10 Vict c 93 s 1

(*e*) Id s 2, see 27 & 28 Vict c 95 s 1

(*f*) As defined by the Act see s 5

(*g*) S 2

(*h*) S 3

arising upon and out of a person's death (*s*), and, therefore, it really leaves the maxim, *actio personalis moritur cum persona*, untouched, for the cause of action which the injured person might have maintained for his personal sufferings dies with him, and in an action, brought under the Act for the benefit of his relatives, compensation is recoverable only for the pecuniary loss which they themselves sustain by reason of his death (*k*) The Act, however, gives no cause of action, unless the injured person was entitled, at the time of his death, to bring an action for his personal injuries For instance, the relatives remain without remedy if the injuries from which the deceased died were the result of his own contributory negligence (*l*), or if satisfaction for his injuries was accepted by him before he died (*m*) Moreover, it seems that, by virtue of the maxim, *actio personalis moritur cum persona*, the relations lose their remedy under the Act if the wrong-doer dies, whether he die before or after the death of the person whom he injured, for the Act supplies no remedy either to the injured person while he lives, or to his relatives after his death, against the executors or administrators of the wrong-doer (*n*) Death of wrong doer

The Employers' Liability Act, 1880, contains no provisions depriving the employer of the right to plead as a defence the contributory negligence of the injured person or giving the injured person or his personal representatives any remedy as against the representatives of a deceased employer The Workmen's Compensation Act, 1906, on the other hand, impliedly makes the right to recover compensation for personal injury to a workman in no way dependent on the question whether he was or was not guilty of contributory negligence, and, moreover (*o*), expressly provides that the term 'employer" shall include 'the legal personal representatives of a deceased employer'

(*s*) See *per* Ld Selborne in *Seward* v *Vera Cruz* 10 App Cas 59 at p 67 cited in *Adam* v *Brit & F SS Co* [1898] 2 Q B 430)

(*k*) *Blake* v *Midl Ry Co* 18 Q B 93, *Chapman* v *Rothwell* 1 B & F 168 *Pym* v *G N Ry Co*, 4 B & S 396 see also *Duckworth* v *Johnson* 4 H & N 653 *Franklin* v *S E Ry Co* 3 Id 211 *Dalton* v *S E Ry Co* 4 C B N S 296, *Berry* v *Humm* [1915] 1 K B 627 Funeral expenses of the deceased cannot be recovered (*Clark* v *Lond Gen Omni Co* [1906] 2 K B 648) As to taking into account insurances on the life of the deceased see 8 Edw 7 c 7 and as to taking into account a pension, dependent on the bounty of the Crown which the relatives receive by reason of the death see *Baker* v *Dalgleish S S Co* [1921] 3 K B 481

(*l*) *Witherley* v *Regent's Can Co*, 12 C B N S 2 *Pym* v *G N Ry Co* 4 B & S 396

(*m*) *Read* v *G E Ry Co* L R 3 Q B 555

(*n*) See s 1 of the Act

(*o*) See s 13 of the Act

Actions *ex delicto* against personal representatives

Turning now to actions *ex delicto* brought against the personal representatives of a wrong-doer, we must refer again to the Civil Procedure Act, 1833 (*p*) By this Act, an action of trespass, or trespass on the case, may be maintained against the executors or administrators of any deceased person for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, provided, first, that the injury was committed within six months before such deceased person's death (*q*), and, secondly, that the action be brought within six months after such executors or administrators have taken upon themselves the administration of his estate, and the damages recovered in the action are payable in like order of administration as simple contract debts

Rule at common law

Before the passing of this Act, the remedy for a tort to the property of another, real or personal, by an action in form *ex delicto*- such as trespass, trover, or case for waste, or for diverting a watercourse or obstructing ancient lights -could not have been enforced against the personal representatives of the tort-feasor (*r*), and this, therefore, must still be the general rule in cases where, the tort having been committed more than six months before the tort-feasor's death, the above Act does not apply (*s*) Cases, however, occur in which a person whose property has been damaged may treat the injury either as a tort or as a breach of contract, and in these cases he has a remedy in assumpsit against the wrong-doer's executors, which is independent of the above Act (*t*) the general rule of the common law being that executors are liable for damage done by their testator to personal property if assumpsit can be brought in respect of such damage (*u*)

Liability of innkeeper

Where a guest at an inn lost his goods there *propter defectum hospitoris* (*x*), it was held that the guest could recover the value of the goods from the innkeeper's executors, as damages for a

(*p*) 3 & 4 Will 4 c 42 s 2

(*q*) See *Richmond* v *Nicholson*, 8 Scott, 184 *Powell* v *Rees* 7 A & E 426 and cases cited *ante* p 583 notes (*y*) and (*z*)

(*r*) See 1 Wms Saund (ed 1845) 216 a n (1) Where chattels, wrongfully in the possession of the testator continued *in specie* in the executor's hands detinue was maintainable to recover the specific goods Bro Abr *Detinue*, pl 19, *Le Mason* v *Dixon* W Jones 173

(*s*) The statutes 10 Car 2 st 1 c 7 and 4 & 5 W & M c 24 s 12 provide a remedy against the representatives of an executor or administrator who committed waste (see *Huntley* v *Russell*, 13 Q B 572, *Coward* v *Gregory* L R 2 C P 153)

(*t*) See *per* Ld Mansfield in *Hambly* v *Trott*, Cowp 371, at p 375

(*u*) See per Bowen, L J in *Phillips* v *Homfray* 24 Ch D 439 at 457

(*x*) *See Calye's Case*, 8 Rep 32 (noted 1 Smith L C 12th ed , p 131)

breach of contract, and it was laid down that "where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him" (*y*)

Tort to property

Upon the question whether the common law of itself supplies any remedy by action against the personal representatives of a wrong-doer for a tort committed by him to property *Phillips* v *Homfray* (*z*) may now be regarded as a leading case In that case the wrongful act was a trespass to land by the secret use of certain underground ways without the landowner's knowledge and the action was brought by the landowner against the trespasser to recover compensation for the trespass While the action was pending, the trespasser died, and thereupon the landowner sought to continue the action against the executors of the trespasser on the ground that, as no way-leave had been paid for the use of the underground ways, the estate of the deceased wrong-doer had derived a profit from his wrong (*a*) The Court of Appeal however, decided that the maxim, *actio personalis moritur cum persona*, applied The rule, laid down in the judgment delivered by Bowen, L J in this case, is to the general effect of the maxim, was as follows —

Rule laid down in *Phillips* v *Homfray*

'The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act appears to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys In such cases, whatever the original form of action it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance In such cases the action, though arising out of a wrongful act, does not die with the person The property or the proceeds or value which, in the lifetime of the wrong-doer could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there But it is not every wrongful act by which a wrong-doer indirectly benefits that falls under this head, if the benefit does

(*y*) *Morgan* v *Ravey*, 6 H & N 265, at p 276

(*z*) 24 Ch D 439

(*a*) The landowner's remedy under 3 & 4 Will 4, c 42 s 2 was barred by lapse of time

not consist in the acquisition of property, or its proceeds or value Where there is nothing amongst the assets of the deceased that in law or equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby " (*b*)

As regards torts to property, therefore, the rule of the common law, which equity also recognises, is that remedies for the wrongful acts " can only be pursued against the estate of a deceased person when property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate " (*c*)

Tort to the person

For a tort committed to the person, such as battery, or false imprisonment, the Civil Procedure Act, 1833 (*d*), gives no remedy against the personal representatives of the tort-feasor and it is clear that, at common law, no action for a tort of this kind can be maintained against them (*e*) By our law an executor represents the debts and property, but not the person of the testator, and it seems to have been thought that there would be an injustice in making the executor stand in the place of the dead man when the causes of action were purely personal (*f*) Accordingly, the rule at common law is, that no action lies against executors for a tort committed by their testator for which unliquidated damages is the only remedy (*g*), and for that reason the estate of a deceased person cannot be made answerable to a claim to recover damages for deceit (*h*), or defamation (*i*), or for damages for adultery awarded against a co-respondent (*k*) Moreover, as damages of a vindictive and uncertain kind may be given for a breach of promise of marriage, the maxim, *actio personalis moritur cum persona*, applies upon the promisor's death, except in so far as the plaintiff has suffered

Breach of promise

(*b*) 24 Ch D 454 455

(*c*) *Per* Bowen L J in *Finlay* v *Chirney*, 20 Q B D 494, at p 504

(*d*) 3 & 4 Will 4 c 42

(*e*) 3 Blac Com 302

(*f*) *Per* Bowen, L J , in *Phillips* v *Homfray* 24 Ch D 439 at p 456, see also *per* Ld Ellenborough in *Chamberlain* v *Williamson* 2 M & S 408, at p 415 (cited *per* Bowen, L J in *Finlay* v *Chirney*, 20 Q B D 494, at p 505)

(*g*) *Per* Jessel, M R , in *Kirk* v *Todd*, 21 Ch D 484, at p 489

(*h*) *Re Duncan*, [1899] 1 Ch 387

(*i*) *Hatchard* v *Mege*, 18 Q B D 771

(*k*) *Brydges* v *Brydges & Wood*, [1909] P 187

special damage to her estate, arising out of the breach of contract (*l*) and the maxim perhaps applies even where there has been such damage (*m*)

Demise of the Crown

Upon a petition of right whereby compensation was claimed for damage to property occasioned by the negligence of the servants of the Crown in a preceding reign Lord Lyndhurst inclined to the view that the maxim, *actio personalis moritur cum persona*, was applicable The main ground, however, of his decision against the claimant was that a petition of right does not lie for negligent or tortious acts of the Crown's servants (*n*)

Action by master whose servant has been killed outright

After some controversy, it seems to be now settled that a master cannot maintain an action for injuries to his servant by a wrongful or negligent act which caused the servant's immediate death, and that he cannot recover from the wrong doer damages either for the loss of the servant's services or for expenses incurred in burying the servant, and that this rule obtains even if the servant was the master's own child (*o*) This rule rests mainly upon the statement of Lord Ellenborough at *nisi prius* (*p*) that "in a *civil* court the death of a human being could not be complained of as an injury" or, as Bowen, L J , said in a later case (*q*), the killing of the deceased *per se* gives no right of action at all, either at law or under Lord Campbell's Act '

Death caused by breach of contract

It has, nevertheless, been decided that, in an action for the breach of a warranty that an article was fit for consumption as human food, the damages recoverable may include the loss by the plaintiff of his wife's services, if she died of eating the article, and the expense of hiring some one else to perform those services after the wife's death (*r*) This decision was based upon the distinction between an action for breach of contract and an action of tort

Duties to be performed

Notwithstanding the maxim *actio personalis moritur cum persona*, an action in respect of dilapidations to the buildings of a benefice lay at common law against the executors of a

(*l*) *Finlay* v *Chirney* 20 Q B D 494, at p 504

(*m*) See *per* Ld Esher in *Finlay* v *Chirney supra*, at p 499, and *per* Swinfen Eady L J in *Quirk* v *Thomas* [1916] 1 K B 516 at p 527 *ante* p 579

(*n*) *Canterbury* v *A G* 1 Phill 306, see *ante* p 38

(*o*) *Clark* v *Lond Gen Omni Co*, [1906] 2 K B 648 where the opinion of the majority of the Court in *Osborn* v *Gillett* L R 8 Ex 88, was followed

(*p*) *Baker* v *Bolton* 1 Camp 493

(*q*) *The Vera Cruz* (No 2) 9 P D 96

(*r*) *Jackson* v *Watson*, [1909] 2 K B 193

deceased incumbent at the suit of his successor or even of the executors of his successor (*s*), and the reason was that the omission to repair was considered not as a tort, but as the breach of a duty, analogous to an implied contract, with regard to the property (*t*) For the like reason, it appears that the maxim does not apply to a suit against executors in respect of their testator's breach of trust (*u*), or his breach of his duty to repair his copyhold tenement in accordance with the custom of the manor (*x*)

Statutory duties

The maxim has no application to statutory duties, such as the duty of an employer to pay compensation to the dependants of a deceased workman under the Workmen's Compensation Act, 1906 This duty may be enforced by the executors of a deceased dependant to whom compensation was payable at the time of her death (*y*) So too where an action was commenced by a manufacturer to compel a local authority to perform their statutory duty of making a sewer to enable the manufacturer to dispose of liquids proceeding from his factory, it was held that the cause of action, if any, survived to his executors on his death (*z*) There is, however, a decision to the effect that the extraordinary expenses of repairing a highway damaged by extraordinary traffic thereon cannot be recovered by the highway authority, under the Highways Act, 1878 (*a*), from the executor of the person by whose order the traffic was conducted (*b*) The claim was, it seems, treated as one to which Lord Mansfield's remark might be applied "All private criminal injuries or wrongs, as well as all public crimes, are buried with the offender" (*c*)

(*s*) See *Bunbury* v *Hewson* 3 Exch 558 *Ross* v *Adcock* L R 3 C P 655 By the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict c 43) ss 34, 36 the cost of the repairs became recoverable as a debt (see *Re Monk* 35 Ch D 583)

(*t*) See *per* Cotton L J in *Batthyany* v *Walford* 36 Ch D 280, referring to *Sollers* v *Lawrence* Willes, 413, at p 421

(*u*) *Concha* v *Murrieta* 40 Ch D 543 at p 559, *Ramskill* v *Edwards*, 31 Ch D 100, at p 111 See also *Re Sharpe*, [1892] 1 Ch 154 Sequestration issued to compel the performance of a duty, is not determined by the death of the person against whose estate it was issued (*Pratt* v *Inman* 43 Ch D 175)

(*x*) *Blackmore* v *White*, [1899] 1 Q B 293 See also *Batthyany* v *Walford*, 36 Ch D 269

(*y*) *Darlington* v *Roscoe* [1907] 1 K B 219 *United Collieries* v *Simpson*, [1909] A C 383

(*z*) *Peebles* v *Oswaldtwistle U D C* [1896] 2 Q B 159

(*a*) Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict c 77), s 23, as amended by the Locomotives Act, 1898 (61 & 62 Vict c 29), s 12

(*b*) *Story* v *Sheard*, [1892] 2 Q B 515

(*c*) In *Hambly* v *Trott*, 1 Cowp 371, at 374

General rule

In conclusion, the extent and limits of the common law doctrine, *actio personalis moritur cum persona*, may be summed up thus it was a rule of the common law that if an injury were done either to the person or property of another for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done but this rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed for there the action survived (*d*)

(*d*) 1 Wms Saund (ed 1845) 216 a see also Williams on Executors 11th ed p 1332

CHAPTER X

MAXIMS APPLICABLE TO THE LAW OF EVIDENCE

WE have in a previous chapter investigated certain rules of the law of evidence which relate peculiarly to the interpretation of written instruments, it is proposed in these concluding pages, to state some few additional rules of evidence Very little, however, has been here attempted beyond a statement and brief illustration of them, because it appeared desirable at once to refer the reader to treatises of acknowledged authority on the subject, from which, after consideration of the more important cases there indicated, a clear perception of the extensive applicability of the following maxims can alone be derived

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OPTIMUS INTERPRES RERUM USUS (*2 Inst 282*)—*Usage is the best interpreter of things*

Definition custom—usage

Custom, *consuetudo*, is a law not written, established by long usage and the consent of our ancestors (*a*) and hence it is said that usage, *usus*, is the legal evidence of custom (*b*) Moreover, where a law is established by an implied consent, it is either common law or custom if universal, it is *common law* (*c*), if particular to this or that place then it is *custom* When any practice was, in its origin, found to be convenient and beneficial, it was naturally repeated continued from age to age, and grew into a law, either local or general (*d*) A

(*a*) Jacob Law Dict tit *Custom*

(*b*) *Per* Bayley J , in *Read* v *Rann*, 10 B & C 438

(*c*) In point of fact the common law of England *lex non scripta* is nothing but custom (Judgm in *Nunn* v *Varty*, 3 Curt 352 at p 363) But the claim of any particular place to be exempt from the obligation imposed by the common law, may also be properly called a custom (Id)

(*d*) 3 Salk 112 *Ex non scripto jus venit quod usus comprobavit nam diuturni mores consensu utentium comprobati legem imitantur* I 1 2 9 *Consuetudinis jus esse putatur id quod voluntate omnium sine lege vetustas comprobavit*—Cic de Invent n 22

custom, therefore, or customary law, may be defined to be a usage which has obtained the force of law, and is, in truth, the binding law, within a particular district, or at a particular place, of the persons and things which it concerns (*e*), *consuetudo loci est observanda* (*f*)

There are, however, several requisites to the validity of a custom, which can here be but briefly specified

Custom, when good

First, it must be *certain*, or capable of being reduced to a certainty (*g*) Therefore, a custom that lands shall descend to the most worthy of the owner's blood, is void, for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good And a custom to pay a year's improved value for a fine on a copyhold estate is good, for, although the value is a thing uncertain, yet it may at any time be ascertained (*h*)

Secondly, the custom must be reasonable in itself, or, rather, not unreasonable (*i*) A custom is unreasonable and bad if it conflicts with the general principles of the common law, such as a custom which would compel persons to alienate property without an exercise of free will (*j*) A custom, however, is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for *consuetudo et certa causa rationabili usitata privat communem legem* (*k*) custom, when grounded upon a certain and reasonable cause supersedes the common law (*l*), in proof whereof may be instanced the customs of gavelkind and borough English (*m*), which are directly

(*e*) *Tanistry Case* Dav Ir 29 at 31 32 (cited in *Tyson* v *Smith* 9 A & E 406, at p 421 and in *Rogers* v *Brenton* 10 Q B 26 at p 63)

(*f*) *Finch's Case*, 6 Rep 63a at 67a See *Busher* v *Thompson* 4 C B 48

(*g*) *Bluett* v *Tregonning* 3 A & E 554 at p 575 (where the custom alleged was designated by Williams J as uncertain indefinite and absurd) *Constable* v *Nicholson* 14 C B N S 230 *A G* v *Mathias* 27 L J Ch 761, *Padwick* v *Knight* 7 Exch 854 *Wilson* v *Willes*, 7 East 121 *Broadbent* v *Wilkes*, Willes, 360 and (in error) 1 Wils, 63 (which also shows that a custom must be *reasonable* with this case cf *Rogers* v *Taylor* 1 H & N 706), *Carlyon* v *Lovering* Id 784

(*h*) 1 Blac Com 78, 1 Roll Abr 565 *Tanistry Case* Dav Ir 29, at 33

(*i*) 1 Blac Com 77

(*j*) *Johnson* v *Clark* [1908] 1 Ch 303

(*k*) Co Litt 113 a, *Tyson* v *Smith*, 9 A & E 406, at p 421

(*l*) Litt s 169 Co Litt 33 b *Falmouth* v *George* 5 Bing 286 at p 293 It is of the very essence of a custom that it should vary from the common law (*per* Ld Kenyon in *Horton* v *Beckman* 6 T R 760 at 764)

(*m*) See *Muggleton* v *Barnett*, 2 H E N 653 The law takes notice of the custom of borough English and therefore in pleading the custom its nature need not be specially set forth (*Doe* d *Hamilton* v *Clift*, 12 A & E 566 at p 579) The same remark applies to the custom of gavelkind (see Co Litt 175 b)

contrary to the general law of descent, or the custom of Kent, which is opposed to the general law of escheat (*n*) Referring to a peculiar custom respecting the descent of copyhold lands in a manor, Cockburn, J , observed that such "local customs are remnants of the older English tenures, which, though generally superseded by the feudal tenures introduced after the dominion of the Normans had become firmly established, yet remained in many places, probably in manors which, instead of passing into the possession of Norman lords, remained in the hands of English proprietors These customs, therefore, are not merely the result of accident or caprice, but were originally founded on some general principle or rule of descent" (*o*)

Further, a custom is not necessarily unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, which is upheld in favour of husbandry, or the custom to dry nets on the land of another, which is likewise upheld in favour of fishing and for the benefit of navigation (*p*) Similarly, the existence of a fair being treated as a matter of public convenience, a custom to erect stalls at a fair upon the highway may be reasonable, though the exercise of the custom causes a partial obstruction of the highway so long as the fair continues (*q*), and upon the ground that recreation is necessary (*r*) it has been held to be a good custom for the inhabitants of a parish, at all seasonable times of the year, to enter upon a close within the parish, and there to erect a maypole and dance round it, and otherwise to enjoy upon the close any lawful and innocent recreation (*s*) Again, in the interests of agriculture, it is a reasonable custom that a tenant shall have the way-going crop after the expiration of

(*n*) See 2 Blac Com 84

(*o*) *Muggleton* v *Barnett* 2 H & N 653 at p 681 cf 1 Blac Com 74

(*p*) *Mercer* v *Denne* [1905] 2 Ch 538, see *Tyson* v *Smith*, 9 A & E 406, at p 421, Co Litt 93 b See also *Falmouth* v *George*, 5 Bing 286, at p 293 There cannot be a custom for the inhabitants of a parish to have, as such a profit à prendre in alieno solo (*Gateward's Case* 6 Rep 59 b) see *Goodman* v *Saltash*, 7 App Cas 633 *Neill* v *Devonshire*, 8 Id 135, at p 154 *Fitzhardinge* v *Purcell* [1908] 2 Ch 139

(*q*) *Elwood* v *Bullock* 6 Q B 383, see *Simpson* v *Wells* L R 7 Q B 214

(*r*) See *Abbot* v *Weekly*, 1 Lev 176 *Fitch* v *Rawling* 2 Black Hv 393 at p 398

(*s*) *Hall* v *Nottingham* 1 Ex D 1 A custom for the inhabitants of a parish to train horses at all seasonable times of the year in a place *outside* the parish is not good (*Sowerby* v *Coleman*, L R 2 Ex 96 cf *Edwards* v *Jenkins*, [1896] 1 Ch 308)

his term (*t*), and that a tenant, who is bound to use his farm in a good and tenantable manner and according to the rules of good husbandry, may, on quitting the farm, charge his landlord with part of the expense of draining land which needed drainage, though the drainage was done without the landlord's consent or knowledge (*u*)

• On the other hand, a custom, which is contrary to the public good, or prejudicial to the many and beneficial only to some particular person, is repugnant to the law of reason, for it could not have had a reasonable commencement For example, a custom set up in a manor on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad, for it is injurious to the multitude and beneficial only to the lord (*v*) So, a custom is bad, that the lord of the manor shall have £3 for every pound-breach of any stranger (*y*), or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage at the lord's will (*z*) In these and similar cases (*a*), the customs themselves are void, on the ground of them having had no reasonable commencement—as being founded in wrong and usurpation and not on the voluntary consent of the people to whom they relate (*b*), for it is a true principle, that no custom can prevail against right, reason, or the law of nature The will of the people is the foundation of that custom, which subsequently becomes binding on them, but, if it be grounded, not upon reason, but error, it is not the will of the people (*c*), and to such a custom the established maxim of law applies *malus usus est abolendus* (*d*)—an evil or invalid custom ought to be abolished

(*t*) *Wigglesworth* v *Dallison* Dougl 201, and 1 Sm L C 12th ed p 613

(*u*) *Mousley* v *Ludlam* 21 L J Q B 64, *Dalby* v *Hirst* 1 B & B 224 *Salusbury* v *Gladstone* 9 H L Cas 692 (followed in *Blewett* v *Jenkins* 12 C B N S 16), is an important case with reference to the reasonableness of a custom See also *Phillips* v *Ball* 6 C B N S 811 Compare the Agricultural Holdings Act, 1908 (8 Edw 7 c 28) s 3, Sch I Pt II

(*x*) Year Bk 2 H 4 fol 24 B pl 20 1 Blac Com 77

(*y*) See *Tyson* v *Smith* 9 A & E 406, at p 422, n (a)

(*z*) Ibid , p 422

(*a*) *Douglas* v *Dysart*, 10 C B N S 688 See *Phillips* v *Ball*, 6 C B N S 811

(*b*) *Tyson* v *Smith*, 9 A & E 406 at p 422

(*c*) See Taylor, Civ Law, 3rd ed , 245, 246, Noy, Max , 9th ed , p 59, n (*a*), Id 60

(*d*) Litt s 212, 4 Inst 274, *Hilton* v *Granville* 5 Q B 701 (as to which case see *Gill* v *Dickinson* 5 Q B D 159 *Love* v *Bell*, 10 Q B D 547, at p 561, *Buccleugh* v *Wakefield* L R 4 H L 377, at p 399) See, also, *Rogers* v

Thirdly, the custom must have existed from time immemorial (*e*), it is no good custom if it originated within the time of legal memory (*f*) But, in the absence of evidence to the contrary, the immemorial existence of a custom should be inferred, as a fact, from an uninterrupted modern usage to observe it (*g*), and whenever it is found that a custom has existed immemorially, it is the duty of a Court of law to presume that it had a legal origin, if any legal origin is reasonably possible (*h*), for "it is a maxim of the law of England to give effect to everything which appears to have been established for a considerable time and to presume that what has been done has been done of right and not of wrong" (*i*), and "it is a most convenient thing that every supposition, not wholly irrational, should be made in favour of long-continued enjoyment" (*j*)

Fourthly, the custom must have continued without any interruption, for any interruption would cause a temporary cessation of the custom, and the revival would give it a new beginning, which must necessarily be within time of memory, and consequently the custom will be void But this must be understood with regard to an interruption of the *right* for an interruption of the possession only, for ten or twenty years, will not destroy the custom As, if the inhabitants of a parish

Taylor 1 H & N 706 *Clayton* v *Corby* 5 Q B 415 (where a prescriptive right to dig clay was held unreasonable—cited by Id Denman in *Wilkinson* v *Haygarth* 12 Q B 837 at p 845) *Gibbs* v *Flight* 3 C B 581 *Bailey* v *Stephens* 12 C B N S 91 *Constable* v *Nicholson*, 14 Id 230 241 In *Lewis* v *Lane* 2 My & K 449 a custom inconsistent with the doctrine of resulting trusts was held to be unreasonable

The Superior Courts have at all times investigated the customs under which justice has been administered by local jurisdictions and unless they are found consonant to reason and in harmony with the principles of law, they have always been rejected as illegal (Judgm , *Cox* v *Mayor of London* 1 H & C 338 at p 358)

(*e*) Legal memory begins with the beginning of the reign of Richard I , see Litt s 170

(*f*) 1 Blac Com 76, *Simpson* v *Wells* L R 7 Q B 214 See also *Mounsey* v *Ismay* 3 H & C 486 and cf *De la Warr* v *Miles* 17 Ch D 535 With regard however to usages of trade, the custom may change, and a new custom may become notorious so as to be incorporated into every contract unless it be expressly excluded (*per* Channell, J in *Moult* v *Halliday* [1898] 1 Q B 125, at p 130)

(*g*) *R* v *Jolliffe* 2 B & C 54, *Jenkins* v *Harvey*, 1 Cr M & R 877 at p 894 2 Id 393 at p 407 see *Shephard* v *Payne* 16 C B N S 132, *Bryant* v *Foot* L R 3 Q B 497, *Lawrence* v *Hitch* Id 521 *Holford* v *George*, Id 639 *Mercer* v *Denne* [1904] 2 Ch 534

(*h*) *Goodman* v *Saltash* 7 App Cas 633, *A G* v *Wright*, [1897] 2 Q B 318 see also *Foreman* v *Free Fishers of Whitstable*, L R 4 H L 266 at p 280

(*i*) *Per* Pollock C B , in *Gibson* v *Doeg* 2 H & N 615 at p 623

(*j*) *Per* Bramwell, B , in *Penryn* v *Best*, 3 Ex D 292, at p 299, see *Tilbury* v *Silva*, 45 Ch D 98

have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not use it for ten years it only becomes more difficult to prove, but, if the right be in any way discontinued for a single day, the custom is quite at an end (*k*)

Fifthly, the custom must have been *peaceably enjoyed* and *acquiesced in*, not subject to contention and dispute For, as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting (*l*)

Sixthly, a custom, though established by consent, must, when established, be *compulsory*, and not left to the option of every man whether or not he will use it A custom that all the inhabitants shall be rated towards the maintenance of a bridge will be good, but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all (*m*)

Seventhly, customs existing in the same place "must be *consistent with each other*, one custom cannot be set up in opposition to another For if both are really customs, then both are of equal antiquity, and both established by mutual consent which to say of contradictory customs is absurd" (*n*)

Eighthly, customs in derogation of the common law, or of the general rights of property, must be strictly construed (*o*)

Ninthly, if it is sought to attach a custom or usage to a written contract it must not be inconsistent therewith, therefore where by the terms of a charterparty a ship was to proceed to a certain port, or so near thereto as she could get, and there discharge her cargo as customary, it was decided that a custom of the port by which the charterer was bound to take delivery only at the port, and not at a place as near thereto as the vessel could safely get was excluded, as being inconsistent with the written contract (*p*)

Where, then, continued custom has acquired the force of an

(*k*) 1 Blac Com 77

(*l*) Ibid

(*m*) 1 Blac Com 78 This does not mean that a trade usage cannot be excluded by contract

(*n*) 1 Blac Com 78

(*o*) Ibid Judgm in *Rogers* v *Brenton*, 10 Q B 26, at p 57, *per* Bayley, J in *Richardson* v *Walker*, 2 B & C 827, at p 839 See as to the above rule, *per* Cockburn C J, in *Muggleton* v *Barnett* 2 H & N 653, at pp 680 681

(*p*) *Hayton* v *Irvin*, 5 C P D 130 See also *The Alhambra*, 6 P D 68, *Reynolds* v *Tomlinson*, [1896] 1 Q B 586

express law (*q*), reference must of course be made to such custom in order to determine the rights and liabilities of parties, arising out of transactions which are affected by it, *optimus interpres rerum usus* This maxim is, however, likewise applicable to many cases, and under many circumstances, which are quite independent of customary law in the sense in which that term has been here used, and which are regulated by mercantile usage and the peculiar rules recognised by merchants

Usage of trade

The law merchant, it has been observed, forms a branch of the law of England, and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce, and, when so adopted, it is unnecessary to plead and prove them (*r*)

Mercantile contracts

In cases, also, relating to mercantile contracts, courts of law will, in order to ascertain the usage and understanding of merchants, examine and hear witnesses conversant with those subjects, for merchants have a style peculiar to themselves, which, though short, yet is understood by them, and of which usage and custom are the legitimate interpreters (*s*) And this principle is not confined to mercantile contracts or instruments, although it has been more frequently applied to them than to others (*t*), but it may be stated generally, that where the words used by parties have, by the known usage of trade, by any local custom, or amongst particular classes, acquired a peculiar sense, distinct from the popular sense of the same words, their meaning

(*q*) See Judgm in *Tyson* v *Smith*, 9 A & E 406 at pp 425, 426

(*r*) Judgm in *Barnett* v *Brandao* 7 Scott N R 301 at p 927, and in the same case (H L) 12 Cl & F 787, at pp 805 810, see also *Bellamy* v *Marjoribanks* 7 Exch 389 *Jones* v *Peppercorne* 28 L J Ch 158

As to the mode of proving mercantile usage, see *Mackenzie* v *Dunlop* 3 Macq 22

(*s*) 3 Stark Ev 1033 Id 4th ed 701 (cited in *Smith* v *Wilson*, 3 B & Ad 728, at p 733) *per* Ld Hardwicke in *Baker* v *Paine*, 1 Ves 456, at p 459 See *Startup* v *Macdonald*, 7 Scott, N R 269 (where the question was respecting the reasonableness of the time at which a tender of goods was made, in the absence of any usage of trade on the subject), *Coddington* v *Paleologo*, L R 2 Ex 193, at p 197

Evidence of former transactions between the same parties is receivable for the purpose of explaining the meaning of the terms used in their written contract, if ambiguous (*Bourne* v *Gatliff* 11 Cl & F 45)

See further *Johnston* v *Usborne*, 11 A & E 549 *Stewart* v *Aberdein* 4 M & W 211 as to which case see 1 Arnold Mar Insur 5th ed 203 n (1)

(*t*) *Per* Parke J in *Smith* v *Wilson* 3 B & Ad 728 at p 733 where evidence was held admissible to show that by the custom of the country the word *thousand*, as applied to rabbits, denoted *twelve hundred* *Spicer* v *Cooper* 1 Q B 424, is also in point

may be ascertained by reference to that usage or custom (*u*) And the question in such cases usually is, whether there was a recognised practice and usage with reference to the transaction out of which the written contract between the parties arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used such words in that particular sense "The character and description of evidence admissible for that purpose" being "*the fact* of a general usage and practice prevailing in that particular trade or business, not the judgment and opinion of the witnesses, for the contract may be safely and correctly interpreted by reference to the fact of usage, as it may be presumed such fact is known to the contracting parties, and that they contract in conformity thereto, but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge" (*v*)

The following examples must here suffice in illustration of the subject just adverted to, and in the notes will be found references to a few cases, showing the operation of the well-known rule stated above, that evidence of usage mercantile or otherwise cannot be admitted to *vary* a written contract (*y*)

In an action for the breach of a contract for the sale of a quantity of gambier, evidence was held admissible to show that by the usage of the trade a "bale" of gambier was understood to mean a package of a particular description, and, consequently, that the contract would not be duly performed by tendering packages of a totally different description (*z*)

(*u*) Judgm *Robertson* v *French* 4 East, 130 at p 135 See *Carter* v *Crick* 4 H & N 412, *Birrell* v *Dryer*, 9 App Cas 345

(*x*) Judgm *Lewis* v *Marshall*, 8 Scott, N R 493, see *Russ S Nav Co* v *Silva*, 13 C B N S 610

As to mercantile words see also *Peek* v *N Staff Ry Co*, 10 H L Cas 473, at p 543, *Sutton* v *Cicers* 15 App Cas 144

(*y*) In the under mentioned cases evidence of custom or usage was held inadmissible for construing a mercantile instrument *Dickenson* v *Jardine*, L R 3 C P 639, *Hall* v *Janson*, 4 E & B 500 *Cockburn* v *Alexander* 6 C B 791 *Spartali* v *Benecke*, 10 C B 212 (distinguished in *Godts* v *Rose*, 17 C B 229 at p 234, and in *Field* v *Lelean*, 6 H & N 617), *Couturier* v *Hastie*, 5 Exch 40 and 9 Id 102, *Re Stroud*, 8 C B 502 See *Miller* v *Tetherington*, 6 H & N 278, and 7 Id 954, *Symonds* v *Lloyd* 6 C B N S 691, *Foster* v *Mentor Life Ass Co*, 3 C & B 48

Parol evidence may be admitted to show that a person whose name appears at the head of an invoice as vendor was not in fact a contracting party, *Holding* v *Elliott*, 5 H & N 117, or to show that there never was any contract between the parties, *Rogers* v *Hadley* 2 H & C 227, *Kempson* v *Boyle* 3 Id 763 *Hurst* v *G W Ry Co* 19 C B N S 310

(*z*) *Gorrissen* v *Perrin* 2 C B N S 681 See *Devaux* v *Conolly* 8 C B 640 In the following cases evidence of mercantile usage has been admitted to

Difference between custom of merchants and usage of trade

It is important when considering this question to bear in mind the difference between the general custom of merchants and the usage of a particular trade The former is the established law of the land, it receives judicial notice, and therefore does not require to be proved in the ordinary way by the evidence of witnesses It has had its origin no doubt in the practice of merchants, which, having been uniformly observed for a long period of time, comes at length to be judicially noticed It is not possible to say at what exact period of time, or by what precise means, this change takes place, but probably after the custom has been frequently proved as a fact in and recognised by the Courts as a binding custom in a particular trade they will take judicial notice of it (*a*) Thus the custom for hotel-keepers to hire the furniture for their hotels has been so frequently proved that the Courts take judicial notice of it in questions arising on the reputed ownership clauses in the statutes relating to bankruptcy (*b*)

Where evidence of an established local usage—as on the stock exchange of a particular town (*c*) is admitted to add to or to affect the construction of a written contract, it is admitted on the ground that the contracting parties are both cognisant of the usage, and must be presumed to have made their agreement with reference to it but it seems that a person who employs an agent to transact business for him in a particular market is bound by its usages, though he be ignorant thereof, provided the same are reasonable, and do not change the intrinsic nature of the employment, but merely regulate its performance (*d*)

explain words or phrases occurring in written contracts — month *Simpson* v *Margitson* 11 Q B 23 net proceeds *Caine* v *Horsfall* 1 Exch 519, wet as applied to palm oil *Warde* v *Stuart* 1 C B N S 88 in regular turns of loading , *Leidemann* v *Schultz*, 14 C B 38 (with which compare *Hudson* v *Clementson*, 18 Id 213)

(*a*) See the observations and cases collected in the notes to *Wigglesworth* v *Dallison*, 1 Smith s L C

(*b*) *Craucour* v *Salter* 18 Ch D 30 *Ex p Turquand* 14 Q B D 636 see *Whitfield* v *Brand* 16 M & W 282 where the Court appears to have judicially noticed the custom for booksellers to have in their shops books for sale on commission Cf *Re Goetz* [1898] 1 Q B 787, *Re Tabor*, [1920] 1 K B 808

(*c*) *Bayliffe* v *Butterworth* 1 Exch 425, *Pollock* v *Stables* 12 Q B 765 *Bayley* v *Wilkins* 7 C B 886 *Taylor* v *Stray* 2 C B N S 174 *Cropper* v *Cook*, L R 3 C P 194, at p 198, *Torrington* v *Lowe*, L R 4 C P 26 *Grissel* v *Bristowe* Id 36 *Maxted* v *Paine*, L R 4 Ex 81 and 203 *Davis* v *Haycock*, Id 373 *Kidston* v *Empire Mar Ins Co*, L R 1 C P 535, and 2 Id 357, *Chapman* v *Shepherd*, 2 Id 228

(*d*) *Robinson* v *Mollett* L R 7 H L 802 at p 896, see *Perry* v *Barnett* 15 Q B D 388 and for a case where one contracting party was bound by a custom of a port of which he was ignorant see *King* v *Hinde* 12 L R Ir 113

Evidence of usage to explain deeds

There is also another extensive class of decisions in which evidence of usage is admitted to explain and construe ancient grants or charters, or to support claims not incompatible therewith (*e*) Nor is there any difference in this respect between a private deed and the king's charter (*f*), and in either case evidence of usage may be given to expound the instrument, provided such usage is not inconsistent with, or repugnant to, its express terms (*g*) So, the immemorial existence of certain rights or exemptions, as a modus or a claim to the payment of tolls, may be inferred from uninterrupted modern usage (*h*)

Generally, as regards a deed (as well as a will)—the state of the subject to which it relates at the time of execution may be inquired into and where a deed is ancient, so that the state of the subject-matter or its date cannot be proved by direct evidence, evidence of the mode in which the property in question has been held and enjoyed is admissible Thus, where the question was whether the soil or merely the herbage passed under the term "pastura" in an ancient admission as entered on the court rolls of a manor, evidence was received to show that the tenants had for a long series of years enjoyed the land itself (*i*), for *optimus interpres rerum usus* (*k*)

Statutes

Lastly, evidence of usage is likewise admissible to aid in interpreting Acts of Parliament, the language of which is doubtful for *jus et norma loquendi* are governed by usage

(*e*) *Bradley* v *Pilots of Newcastle* 2 E & B 427 *Beaufort* v *Swansea* 3 Exch 413 at p 435, *A G* v *Drummond* 1 Dru & War 353, *Shore* v *Wilson* 9 Cl & F 569

(*f*) All charters or grants of the Crown may be repealed or revoked when they are contrary to law or uncertain or injurious to the rights and interests of third persons and the appropriate process for the purpose is by writ of *scire facias* (Judgm *R* v *Hughes* L R 1 P C 87), see *per* Ld Kenyon in *Withnell* v *Gartham*, 6 T R 388, at p 398

(*g*) *R* v *Saluay* 9 B & C 424 at p 435 *Stammers* v *Dixon* 7 East, 200 *per* Ld Brougham in *A G* v *Brazenose Coll*, 2 Cl & F 295, at p 317, *per* Tindal, C J, in *Davis* v *Waddington* 8 Scott N R 807 at p 813 See *Re Nottingham Corporn*, [1897] 2 Q B 502, at pp 511, 512 *N E Ry Co* v *Hastings* [1900] A C 260

(*h*) See *per* Parke B in *Jenkins* v *Harvey* 1 Cr M & R 877 at p 894, *per* Richardson, J in *Chad* v *Tilsed* 2 B & B 403 at p 409 *Foreman* v *Free Fishers of Whitstable*, L R 4 H L 266, and cases there cited *Egremont* v *Saul* 6 A & E 924 *Brune* v *Thompson* 4 Q B 543

(*i*) *Doe* d *Kinglake* v *Beviss* 7 C B 456, see Taylor on Ev, 11th ed, p 828

(*k*) *Per* Ld Wensleydale in *Waterpark* v *Furnell* 7 H L Cas 650 at p 684 (citing *Weld* v *Hornby* 7 East, 199, *Beaufort* v *Swansea* 3 Exch 413, *A G* v *Parker* 1 Ves 43, and *per* Ld St Leonards in *A G* v *Drummond*, 1 Dru & W 368) See the maxim as to *contemporanea expositio ante* p 440 As to construing the rubrics and canons see *Martin* v *Mackonochie*, L R 2 A & E 116, at p 195

The meaning of things spoken or written must be such as it has constantly been received to be by common acceptation (*l*), and that exposition shall be preferred, which, in the words of Sir E Coke (*m*), is "approved by constant and continual use and experience" *optima enim est legis interpres consuetudo* (*n*) Thus, the Court was influenced in its construction of a statute of Anne, by the fact that it was that which had been generally considered the true one for one hundred and sixty years (*o*)

CUILIBET IN SUA ARTE PERITO EST CREDENDUM (*Co Litt* 125 *a*)—*Credence should be given to one skilled in his peculiar profession*

Necessity of rule

Almost all the injuries, it has been observed, which one individual may receive from another, and which lay the foundation of actions, involve questions peculiar to the trades and conditions of the parties, and, in these cases, the jury must, according to the above maxim, attend to the witnesses, and decide according to their number, professional skill, and means of knowledge Thus, in an action against a surgeon for ignorance, the question may turn on a nice point of surgery In an action on a policy of life insurance, physicians must be examined So, for injuries to a mill worked by running water, if occasioned by the erection of another mill higher up the stream, mill-wrights and engineers must be called as witnesses In like manner, it may be necessary for a jury to decide questions of navigation, as in the ordinary case of deviation on a policy of marine insurance, of seaworthiness, or where one ship runs down another at sea through bad steering (*q*)

Evidence as to matters of science, &c

Respecting matters, then, of science or trade (*r*), and others of the same description, persons of skill may not only speak

(*l*) *Sheppard* v *Gosnold*, Vaugh 159 at p 169 *per* Crowder J , in *The Fermoy Peerage* 9 H L Cas 715, at p 747, Arg *R* v *Bellringer* 4 T R 810 at 819

(*m*) 2 Inst 18

(*n*) D 1 3, 37, *per* Ld Brougham in *Dunbar* v *Roxburghe* 3 Cl & F 335 at p 354

(*o*) *Cor* v *Leigh* L R 9 Q B 333, and see Maxwell Interp of Statutes, 6th ed , p 537

(*q*) *Johnstone* v *Sutton* 1 T R 493, at pp 538, 539

(*r*) The importance attached to the *lex mercatoria*, or custom of merchants, and the implied warranty by a skilled labourer, artizan, or artist, that he is reasonably competent to the task he undertakes, may be referred to this maxim, see 1 Blac Com 75

as to facts, but are even allowed to give their opinions in evidence (*s*), which is contrary to the general rule, that the opinion of a witness is not evidence Thus the opinion of medical men is evidence as to the state of a patient whom they have seen, and even in cases where they have not themselves seen the patient, but have heard the symptoms and particulars of his state detailed by other witnesses, their opinions on the nature of such symptoms have been admitted (*t*) In prosecutions for murder, they have, therefore, been allowed to state their opinion whether the wounds described by witnesses were likely to be the cause of death (*u*)

With respect to the admissibility in evidence of the opinion of a medical man as to a prisoner's state of mind, the following question was proposed to the judges by the House of Lords (*x*) "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?" To this question the majority of the judges returned the following answer, which removes much of the difficulty which formerly existed with reference to this, the most important practical application of the maxim under review, and must be considered as laying down the rule upon the subject 'We think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible But where the facts admitted are not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right"

Further, on the principle expressed by the maxim, *cuilibet* Insurance

(*s*) 1 Stark Ev, 3rd ed 173, 175, Stark Ev 4th ed 96, 273
(*t*) I Phil Ev, 10th ed 521
(*u*) Ibid
(*x*) *M Naghten's Case*, 10 Cl & F 200 at pp 211 212

in sua arte perito est credendum, ship-builders have been allowed to state their opinions as to the seaworthiness of a ship from examining a survey taken by others, at the taking of which they themselves were not present, and the opinion of an artist is evidence as to the genuineness of a picture (*y*) But, although witnesses conversant with a particular trade may be allowed to speak to a prevailing practice in that trade, and although scientific persons may give their opinion on matters of science, it has been expressly decided that witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably have been influenced if particular parties had acted in one way rather than another (*z*) For instance, in an action on a policy of insurance, where a broker stated, on cross-examination, that in his opinion certain letters ought to have been disclosed, and that, if they had, the policy would not have been underwritten this was held to be mere opinion, and not evidence (*a*) There is, however, authority to support the view that such opinions are evidence (*b*) It has been said that the differences to be found in these decisions are less upon any point of law than on the application of a settled law to certain states of facts, and that such evidence has only been rejected when it has been tendered in an inquiry, the nature of which is not such as to require any peculiar habits of thought or study in order to qualify a man to understand it (*c*) Whether or not this be the true solution of the difficulty, it seems that, as a matter of practice, the evidence of underwriters and brokers on

(*y*) Phil Ev , 10th ed 522 So evidence as to the genuineness of handwriting given by a witness possessing the requisite experience and skill is admissible although little or no weight has by many judges been thought to be due to such testimony (2 Phil Ev 10th ed 308) see *Doe* d *Mudd* v *Suckermore*, 5 A & E 703, *Doe* d *Jenkins* v *Davies* 10 Q B 314 See *Brookes* v *Tichbourne* 5 Exch 929, at p 931, *Newton* v *Ricketts*, 9 H L Cas 262

By the Criminal Procedure Act 1865 (28 & 29 Vict c 18) s 8, comparison of a disputed writing with any writing *proved to the satisfaction of the judge to be genuine* shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise, of the writing in dispute See *R* v *Silverlock* [1894] 2 Q B 766

(*z*) Judgm in *Campbell* v *Rickards*, 5 B & Ad 840, at p 846 See, also, *Greville* v *Chapman*, 5 Q B 731, as to which latter case see Taylor on Ev , 11th ed , p 971

(*a*) *Carter* v *Boehm*, 3 Burr 1905 at 1913, 1914 see *Campbell* v *Rickards*, 5 B & Ad 840

(*b*) See *Chapman* v *Walton*, 10 Bing 57 *Rickards* v *Murdock*, 10 B & C 257

(*c*) See notes to *Carter* v *Boehm* 1 Smith L C

such questions is being more and more resorted to without objection (*d*)

Where the fixing of the fair price for a contract to insure is a matter of skill and judgment, and must be effected by applying certain general principles of calculation to the particular circumstances of the individual case, it seems to be matter of evidence to show whether the fact suppressed would have been noticed as a term in the particular calculation In some instances, moreover, the materiality of the fact withheld would be a question of pure science, in others, it is very possible that mere common sense, although sufficient to comprehend that the disclosure was material, would not be so to understand to what extent the risk was increased by that fact, and, in intermediate cases, it seems difficult in principle wholly to exclude evidence of the nature alluded to although its importance may vary exceedingly according to circumstances (*e*)

The Sussex Peerage Case offers a good illustration of the maxim *cuilibet in sua arte perito est credendum*, in so far as it applies to the *legal* knowledge of a party, whose evidence it is proposed to take In order to prove the law prevailing at Rome on the subject of marriage, a Roman Catholic bishop was tendered as a witness, and was examined as to the nature and extent of the duties of his office in its bearing on the subject of marriage, with the view of ascertaining whether he had such a peculiar knowledge of the law relative to marriage as would render him competent to give evidence respecting it It appeared from this examination that the witness had resided more than twenty years at Rome, and had studied the ecclesiastical law prevailing there on the above subject, that a knowledge of this law was necessary to the due discharge of an important part of the duties of his office, that the decision of matrimonial cases, so far as they might be affected by the ecclesiastical and canon law, fell within the jurisdiction of Roman Catholic bishops, and, further, that the tribunals at Rome would respect and act upon such decision in any particular case if not appealed from It was held that the witness came within the definition of *peritus*, and was receivable accordingly (*f*) In a later case

(*d*) Arnould Mar Ins 5th ed 581, *Ionides* v *Pender* L R 9 Q B 531 at p 535

(*e*) 3 Stark Ev, 3rd ed 887 888

(*f*) *Sussex Peerage* 11 Cl & F 85 See also, *Di Sora* v *Phillipps*, 10 H L Cas 624, *per* Ld Langdale in *Nelson* v *Bridport*, 8 Beav 527, *De Bode* v *R*, 8 Q B 208, at pp 246, 250 *et seq* *Perth Peerage*, 2 H L Cas 865, at p 874

it was held that the mercantile usage of a foreign country bearing on a particular subject may be proved by a witness who, though he has not been a lawyer by profession, and has never held any official appointment as judge, advocate, or solicitor, can yet satisfy the Court that he has had special and peculiar means of acquiring knowledge respecting such usage (*g*) Thus the Court has allowed the law of a foreign country to be proved by the evidence of a secretary to the embassy of that country (*h*)

Lastly, although in accordance with the principal maxim, a skilled witness may be examined as to mercantile usage, or as to the meaning of a term of art, he cannot be asked to construe (*i*) a written document, for *ad quæstionem legis respondent judices*

OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM (*Branch, Max., 5th ed., p* 80)—*Every presumption is made against a wrong-doer*

Example of rule

The following case serves forcibly to illustrate this maxim An account of personal estate having been decreed in equity, the defendant charged the plaintiff with a debt as due to the estate It was proved that the defendant had wrongfully opened a bundle of papers relating to the account, which had been sealed up and left in his hands that he had altered and displaced the papers and that it could not be known what papers might have been abstracted The Court, upon these facts, disallowed defendant's whole demand, although the Lord Chancellor declared himself satisfied, as indeed the defendant swore, that all the papers entrusted to the defendant had been produced, the ground of this decision being that *in odium spoliatoris omnia præsumuntur* (*k*)

A long course of practice sanctioned by professional men is often the best expositor of the law (*per* Ld Eldon, in *Candler* v *Candler* Jac 225, at p 232)

(*g*) *Vander Donckt* v *Thellusson*, 8 C B 812 See *R* v *Povey* 22 L J Q B 19 In *Bristow* v *Sequeville*, 5 Exch 275, a witness was held inadmissible to prove the law of a foreign country, whose knowledge of it had been acquired solely by study at a university in another country This decision was followed in *Re Bonelli*, 1 P D 69, and in *Cartwright* v *Cartwright* 26 W R 684

(*h*) *Re Dost Aly Khan* 6 P D 6

(*i*) *Kirkland* v *Nisbet* 3 Macq 766, *Bowes* v *Shand*, 2 App Cas 455 at p 462

(*k*) *Wardour* v *Berresford* 1 Vern 452 *Sanson* v *Rumsey*, 2 Vern 561, affords another illustration of the maxim See also *Dalston* v *Coatsworth*, 1 P Wms 731 (cited Arg in *Ld Melville's Trial* 29 St T 550, at p 1194), *Garside* v *Ratcliff*, 1 Chanc Cas 292

Withholding evidence

Again, "if a man, by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted" (*l*) Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him (*m*) Thus, where a person who has wrongfully converted property will not produce it, it shall be presumed, as against him, to be of the best description (*n*) On the other hand, if goods be sold without any express stipulation as to price, and the seller prove their delivery, but give no evidence to fix their value, they are presumed to be worth the lowest price for which goods of that description usually sell, unless, indeed, it be shown that the buyer himself has destroyed the means of ascertaining the value, for then a contrary presumption arises, and the goods are taken to be of the very best description (*o*)

According to the same principle, if a man withhold an agreement under which he is chargeable, after a notice to produce, it is presumed, as against him, to have been properly stamped, until the contrary appear (*p*) Where a public officer, such as a sheriff, produces an instrument, the execution of which he was bound to procure, as against him it is presumed to have been duly executed (*q*) Moreover, if a person is proved to have defaced or destroyed a written instrument, a presumption arises, that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and, accordingly, slight

(*l*) 1 Smith, L C 12th ed , pp 410 411 see *Crisp* v *Anderson*, 1 Stark 35 The maxim likewise applies to the spoliation of ship s papers, *The Hunter*, 1 Dods Adm R 480, at p 486, *The Johanna Emilie*, 18 Jur 703, at p 705

(*m*) *A G* v *Windsor*, 24 Beav 679, at p 706

(*n*) *Armory* v *Delamirie* 1 Stra 504 (followed in *Mortimer* v *Cradock*, 12 L J C P 166, and applied by Ld Cairns in *Hammersmith Ry Co* v *Brand*, L R 4 H L 171 at p 224) But 'a person who refuses to allow his solicitor to violate the confidence of the professional relation cannot be regarded in the same odious light as was the jeweller in the above case (*per* Ld Chelmsford in *Wentworth* v *Lloyd* 10 H L Cas 589) See too, *Williamson* v *Rover Cycle Co*, [1901] 2 Ir R 615, where the maxim was held not to apply in a case where the defendants destroyed parts of a bicycle which the plaintiff had sent them for inspection *after they had been examined* by his own expert witnesses

(*o*) *Clunnes* v *Pezzey*, 1 Camp 8 (followed in *Lawton* v *Sweeney*, 8 Jur 964) See *Hayden* v *Hayward*, 1 Camp 180

(*p*) *Crisp* v *Anderson*, 1 Stark 35 See *Marine Invest Co* v *Haviside*, L R 5 H L 624

(*q*) *Scott* v *Waithman* 3 Stark 168, *Plumer* v *Brisco*, 11 Q B 46, at p 52, *Barnes* v *Lucas*, Ry & M 264

evidence of the contents of the instrument will usually be sufficient (*r*) A testator made a will, by which he devised an estate to A , and afterwards made another will, which was lost, and which the jury found, by special verdict, to have been different from the former will, though they did not find in what particular the difference consisted the Court decided that the devisee under the first will was entitled to the estate, but Lord Mansfield observed, that, if the devisee under the first will had destroyed the second, it would have been a good ground for the jury to find a revocation (*s*)

With reference to the cases in which a deed or other instrument, which ought to be in the possession of a litigant party, is not produced, the general rule is, that the law excludes such evidence of facts as, from the nature of the thing, supposes still better evidence in the party's possession or power And this rule is founded on a presumption that there is something in the evidence withheld which makes against the party producing it (*t*) *Tuyman* v *Knowles* (*u*) may be referred to in connection with this part of the subject That was an action of trespass *qu cl fr* , at the trial of which the plaintiff relied upon his bare possession of the close, although it appeared that he had taken it under an agreement in writing which was not produced, the judge directed the jury that having proved that he was in possession of the close at the time of the trespass, the plaintiff must have a verdict, but that to entitle himself to more than nominal damages, he should have shown the duration of his term And this direction was upheld by the Court, Maule, J , observing that the plaintiff had the means of showing the quantum of his interest, and that "the non-production of the lease raised a presumption that the production of it would do the plaintiff no good "

Rule in actions of ejectment

On the principle of this maxim rests the well-known rule in actions of ejectment that the plaintiff must recover by the strength of his own title, not the weakness of his antagonist's, for no one can recover in ejectment who would not be entitled

(*r*) 1 Phil Ev 10th ed 477 478 where various case are cited exemplifying the maxim in the text, *Annesley* v *Anglesey*, 17 St Tr 1139, at p 1430, 1 Stark Ev 3rd ed 409 *Roe* d *Haldane* v *Harvey* 4 Burr 2484, *Trimlestown* v *Kemmis* 9 Cl & F 749, at p 775

(*s*) *Harwood* v *Goodright* Cowp 87

(*t*) As illustrating the nature and force of this presumption, see *Lumley* v *Wagner* 1 De G M & G 604 at pp 633, 634, *Braithwaite* v *Coleman*, 1 Har & W 229, *Mason* v *Morley* 34 L J Ch 422

(*u*) 13 C B 222, see *Rust* v *Victoria Dock Co* , 36 Ch D 113, at p 119

to enter without bringing ejectment, and any person entering on the possession of the tenant, unless he has a better title, is a wrong-doer

If the evidence alleged to be withheld is shown to be unattainable, the presumption *contra spoliatorem* ceases, and the inferior evidence is admissible 'If, therefore, a deed be in the possession of the adverse party, and not produced, or if it be lost or destroyed, no matter whether by the adverse party or not, secondary evidence is clearly admissible, and, if the deed be in the possession of a third person, who is not by law compellable to produce it, and he refuse to do so, the result is the same, for the object is then unattainable by the party offering the secondary evidence" (*r*)

OMNIA PRÆSUMUNTUR RITE ET SOLENNITER ESSE ACTA (*Co Litt* 6 *b*, 232 *b*) *All acts are presumed to have been done rightly and regularly*

Ex diuturnitate temporis omnia præsumuntur rite et solenniter esse acta (*y*) Antiquity of time fortifieth all titles and supposeth the best beginning the law can give them' (*z*) Rule stated

It is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time and to presume that what has been done was done of right, and not of wrong' (*a*) "It is a most convenient thing that every supposition, not wholly irrational, should be made in favour of long-continued enjoyment' (*b*) This maxim

(*x*) Judgm *Doe d Gilbert* v *Ross* 7 M & W 102 at p 121 *Marston* v *Downes* 1 A & E 31 *Cooke* v *Tansuell* 8 Taunt 450

(*y*) Jenk Cent 185 *Roberts* v *Bethell* 12 C B 778 seems to offer an illustration of this presumption See *Potez* v *Glossop* 3 Exch 186 at p 191 (observed upon by Ld Wensleydale in *Buller* v *Mountgarret* 7 H L Cas 633 at p 647) *Morgan* v *Whitmore* 6 Exch 716

(*z*) *Slade* v *Drake* Hob 295 at 297 *Ellis* v *Mayor of Bridgnorth* 15 C B N S 52

(*a*) *Per* Pollock C B in *Gibson* v *Doeg*, 2 H & N 615 at p 623 and in *Price* v *Worwood*, 4 Id 512, at p 514 where he observed, The law will presume a state of things to continue which is lawful in every respect, but if the continuance is unlawful it cannot be presumed

(*b*) *Per* Bramwell, L J in *Penryn* v *Best*, 3 Ex D 292 at p 299 See also *Philipps* v *Halliday*, [1891] A C 228 at p 231 *G E Ry Co* v *Goldsmid* 9 App Cas 927, at p 939, *Goodman* v *Saltash*, 7 App Cas 633

applies as well where matters are in contest between private persons as to matters public in their nature (*c*)

Rule applies to private rights

For instance A lease of a house contained a covenant by the lessee that he would not, without the lessor's consent, carry on any trade upon the demised premises, nor convert them into a shop, nor suffer them to be used for any purpose other than a dwelling house The house was converted into a public-house and grocery shop, and the lessor, with full knowledge of this fact, continued to accept the rent for more than twenty years The plaintiff, having purchased from the lessor the reversion of the premises, brought an action of ejectment for breach of the covenant It was held that user of the premises in their altered state for more than twenty years, with the knowledge of the lessor, was evidence from which a jury might presume that the alteration was made with his licence (*d*)

Where indeed, a private right is in question, the presumption *omnia rite esse acta* may, as has been already stated, arise, under various and wholly dissimilar states of facts, *ex diuturnitate temporis* Thus, the enrolment of a deed may be presumed, where there has been a conveyance by lease and release, the existence of the lease may be presumed upon the production of the release, and livery of seisin, the surrender of a copyhold estate, or a reconveyance from the mortgagee to the mortgagor, may be presumed (*e*) Where an attestation clause to a deed stated that the deed had been signed, sealed and delivered, and commissioners before whom the deed had to be executed, certified that the parties had acknowledged the same, the Court presumed that the deed had been properly sealed, although upon its face there was no sign of the impression of a seal (*f*)

Ancient deeds

Upon the same principle proceeds the rule that deeds, wills,

(*c*) See *per* Pollock C B in *Reed* v *Lamb*, 6 H & N 75 at pp 85—86, *per* Crompton J in *Dawson* v *Surveyor for Willoughby*, 5 B & S 920, at p 924

(*d*) *Gibson* v *Doeg*, 2 H & N 615

(*e*) *Per* Watson B, in *Williams* v *Eyton*, 2 H & N 771 at p 777 and cases cited in *Doe* d *Roberton* v *Gardiner*, 12 C B 319 So a lease is presumed, in the absence of evidence to the contrary, on production of the counterpart (*Hughes* v *Clark* 10 C B 905) In *Avery* v *Bowden* 6 E & B 953 at p 973 Pollock C B observed that where the maxim *omnia rite acta præsumuntur* applies, there indeed, if the event ought properly to have taken place on *Tuesday* evidence that it did take place either on *Tuesday* or *Wednesday* is strong evidence that it took place on the *Tuesday*

(*f*) *Re Sandilands*, L R 6 C P 411 For a case where the presumption was rebutted and the onus shifted see *Marine Invest Co* v *Haviside*, L R 5 H L 624

and other attested documents which are more than thirty years old, and are produced from the proper custody, prove themselves, and the testimony of the subscribing witness may be dispensed with, although of course it is competent to the opposite party to call him to disprove the regularity of the execution (*q*)

Rule applied to public and official acts

Again, where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution In these cases the ordinary rule is, *omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium* (*h*)—everything is presumed to be rightly and duly performed until the contrary is shown (*i*) The following may be mentioned as general presumptions of law illustrating this maxim —That a man, in fact acting in a public capacity, was properly appointed and is duly authorised so to act (*k*), that in the absence of proof to the contrary, credit should be given to public officers who have acted, *prima facie*, within the limits of their authority, for having done so with honesty and discretion (*l*) that the records of a court of justice have been correctly made (*m*), according to the rule, *res judicata pro veritate accipitur* (*n*) that judges and jurors do nothing

(*q*) Best on Presumptions p 81 see *Re Airey* [1897] 1 Ch 164 at p 169 The date which appears on the face of a document is *prima facie* its true date (*Malpas* v *Clements* 19 L J Q B 435 *Lanes* v *Rand* 3 C B N S 442)

(*h*) Co Litt 232 *Van Omeron* v *Dowick* 2 Camp 42 at p 44 *Doe* d *Phillips* v *Evans* 1 Cr & M 450 at p 461 *Powell* v *Sonnett* 3 Bing 381 offers a good instance of the application of this maxim *Taylor* v *Cook* 8 Price, 650 at p 653 illustrates the presumption as to signatures The Court will not presume any fact so as to vitiate an order of removal (*per* Ld Denman, in *R* v *Stockton* 5 B & Ad 546 at p 550 see *R* v *St Paul Covent Garden* 7 Q B 232 *R* v *Warwickshire JJ* , 6 Q B 750 *R* v *St Mary Magdalen* 2 E & B 809) As to an order of affiliation see *Watson* v *Little* 5 H & N 472 at p 478 As to an award, see *per* Parke B , in *Manning* v *E Cos Ry* 12 M & W 237, at p 251 as to presuming an indenture of apprenticeship, *R* v *Fordingbridge* 1 E & E 678 *R* v *Broadhempton* 1 E & E 154 at pp 162, 163

Quære whether the maxim applies to the performance of a *moral* duty see *per* Willes, J , in *Fitzgerald* v *Dressler*, 7 C B N S 374, at p 390

(*i*) See *per* Jervis C J , in *Davies* v *Pratt* 17 C B 183 at p 188

(*k*) *Per* Ld Ellenborough in *R* v *Verelst* 3 Camp 432 *Monke* v *Butler* 1 Roll R 83 *M Gahey* v *Alston* 2 M & W 206 *Faulkner* v *Johnson*, 11 M & W 581 *Doe* d *Hopley* v *Young*, 8 Q B 63, *R* v *Essex* Dearsl & B 369, *M Mahon* v *Lennard* 6 H L Cas 970 See the above maxim applied *per* Erle C J in *Bremner* v *Hull* L R 1 C P 748, at p 759

(*l*) *Derby* v *Bury Imp Commrs* , L R 4 Ex 222, at p 226

(*m*) *Reed* v *Jackson* 1 East, 355

(*n*) D 50 17 207, Co Litt 103 a *Magrath* v *Hardy* 4 Bing N C 782 at p 796, *per* Alderson, B , in *Hopkins* v *Francis* 13 M & W 668 at p 670 *Irwin* v *Grey* L R 2 H L 20, *Smith* v *Sydney*, L R 5 Q B 203

A family Bible is in the nature of a record, and being produced from the proper custody is itself evidence of pedigrees entered in it (*Hubbard* v *Lees* L R 1 Ex 255, at p 258)

causelessly and maliciously (*o*), that the decisions of a court of competent jurisdiction are well founded, and their judgments regular (*p*), and that facts, without proof of which the verdict could not have been found, were proved at the trial (*q*)

Besides the cases below cited (*r*) which strikingly illustrate the presumption of law under our notice, the following may be adduced

Other instances — Presumptions (1) against fraud, &c,

It is a well-established rule that the law will presume in favour of honesty and against fraud (*s*), and this presumption acquires weight from the length of time during which a transaction has subsisted (*t*) The law will moreover strongly presume against the commission of a criminal act for instance, that a witness has committed perjury (*u*)

(2) as to marriage,

The law will also presume strongly in favour of the validity of a marriage, especially where a great length of time has elapsed since its celebration (*x*) indeed the legal presumption as to marriage and legitimacy is only to be rebutted by strong, distinct, satisfactory and conclusive evidence (*y*), therefore

(*o*) *Sutton* v *Johnstone*, 1 T R 493 at p 503 See *Lumley* v *Gye* 3 E & B 114

(*p*) *Per* Bayley J in *Lyttleton* v *Cross* 3 B & C 317 at p 327 *R* v *Brenan* 16 L J Q B 289 See *Lee* v *Johnstone* 1 R 1 Sc & Div 426 *Morris* v *Ogden* L R 2 C P 687 at p 699

(*q*) *Per* Buller J in *Spieres* v *Parker* 1 T R 141 at 145 146 If the return to a mandamus be certain on the face of it that is sufficient and the Court cannot intend facts inconsistent with it for the purpose of making it bad *per* Buller J *R* v *Lyme Regis* 1 Doug 149 at p 159 See *R* v *Nott Water works* 6 A & E 355

(*r*) See as to presuming in Act of Parliament in support of an ancient usage *L* v *Chapter of Exeter* 12 A & E 512 at p 532 the passing of a by law by a corporation from usage *R* v *Powell* 3 E & B 377 in favour of acts of commissioners having authority by statute *Horton* v *Westminster Imp Commrs* 7 Exch 780 *R* v *St Michael's Southampton* 6 E & B 807 in order of justices for stopping up a road *Williams* v *Lyton* 2 H & N 771 at p 777 and 4 Id 657 See also *Woodbridge Union* v *Colneis Guardians* 13 Q B 269

(*s*) *Middleton* v *Barned* 4 Exch 241 *per* Parke B Id 243 and in *Shaw* v *Beck* 6 Exch 392 at p 400 *Doe* d *Tatum* v *Catomore* 16 Q B 745 at p 747 with which cf *Doe* d *Shallcross* v *Palmer* Id 747 See *Trott* v *Trott* 29 L J P 156

(*t*) *Re Postlethwaite* 60 L T 514 at p 520

(*u*) *Per* Ld Brougham in *McGregor* v *Topham* 3 H L Cas 132 at pp 147 148 *per* Turner, L J, in *Harrison* v *Mayor of Southampton* 4 D M & G 137 at p 153

(*x*) *Lauderdale Peerage* 10 App Cas 692 at pp 742 755 761 *Piers* v *Piers*, 2 H L Cas 331 *Suchet* v *Lambert* 15 C B N S 781 at pp 787 768 *Harrison* v *Mayor of Southampton* 4 D M & G 137 As to presuming consent to a marriage see *Re Birch* 17 Beav 358

(*y*) *Per* Ld Brougham in *Piers* v *Piers* 2 H L Cas 331 at p 373 (citing *per* Ld Lyndhurst in *Morris* v *Davies* 5 Cl & F 163 at p 265) See *Lapsley* v *Grierson* 1 H L Cas 498 *Saye and Sele Peerage* Id 507 *per* Erle J in *Walton* v *Gavin* 16 Q B 48, at p 58, *Harrison* v *Mayor of Southampton* 4 D M & G 137, at p 153

where it was shown that the man and woman had gone through a form of marriage, and thereby indicated an intention to be married, it was held that those who claimed by virtue of the marriage were not bound to prove that all necessary ceremonies had been performed (*z*)

(3) as to ancient baronies,

Where the claimant of an ancient barony, which has been long in abeyance, proves that his ancestor sat as a peer in Parliament, and no patent or charter of creation can be discovered, it is now the established rule to hold that the barony was created by writ of summons and sitting, although the original writ or enrolment of it is not produced (*a*) In *The Hastings Peerage Case*, it was proved that A was summoned by special writ to Parliament in 49 Hen 3, but there was no proof that he sat, there being no rolls or journals of that period A 's son and heir, B , sat in the Parliament of 18 Edw 1, but there was no proof that he was summoned to that Parliament, there being no writs of summons or enrolments of such writs extant from 49 Hen 3 to 23 Edw 1 It further appeared that B was summoned to the Parliament of 23 Edw 1, and to several subsequent Parliaments, but there was no proof that he sat It was held that it might be well presumed that B sat in the Parliament of 18 Edw 1, in pursuance of a summons, on the principle that *omnia praesumuntur legitime facta donec probetur in contrarium* (*b*)

(4) as to title to property,

As regards the acts of private individuals, the presumption *omnia rite esse acta*, forcibly applies where they are of a formal character, as writings under seal (*c*) Likewise upon proof of title, everything which is collateral to the title will be intended, without proof for, although the law requires exactness in the derivation of a title, yet where that has been proved, all collateral circumstances will be presumed in favour of right (*d*),

(*z*) *Sastry Velaider* v *Sembecutty* 6 App Cas 364 See also *R* v *Jones* 11 Q B D 118 *R* v *Cresswell* 1 Q B D 446

(*a*) *Braye Peerage*, 6 Cl & F 737, *Vaux Peerage* 5 Cl & F 526

(*b*) *The Hastings Peerage* 8 Cl & F 144 at p 162

(*c*) See *Brymer* v *Thames Haven Co* 2 Exch 549 *D'Arcy* v *Tamar etc Ry Co* 4 H & C 463 467–468

As to presumption that a foreign bill of exchange was duly stamped at the time of its indorsement to plaintiff see *Bradlaugh* v *De Rin* L R 3 C P 286

As to presumption of evidence of probate see *Doe d Woodhouse* v *Powell* 8 Q B 576

As to presumption that a will was duly executed see *Lloyd* v *Roberts* 12 Moo P C 158 at p 165 *Trott* v *Trott* 29 L J P 156 *Byles* v *Cox* 74 L T 222 *Harris* v *Knight* 15 P D 170, at p 179 where the will was lost

(*d*) 3 Stark Ev , 3rd ed 936, 2 Wms Saund 5th ed 42 n (7)

and, wherever the possession of a party is rightful, the general rule of presumption is applied to invest that possession with a legal title (*e*) No greater obligation, it has, indeed, been said (*f*), lies upon a court of justice than that of supporting long-continued enjoyment by every legal means, and by every reasonable presumption, this "doctrine of presumption goes on the footing of validity, and upholds validity by supposing that everything was present which that validity required", *omnia præsumuntur rite fuisse acta* is the principle to be observed

In reference also to a claim by the rector of a parish to certain fees, founded on prescription, it has been judicially observed that "the true principle of the law applicable to this question, is that, where a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be assumed that it was received as of right during the whole period of legal memory, that is, from the beginning of the reign of Richard I to the present time, unless the contrary is proved" (*g*)

(5) against criminal neglect of duty

On the same principle it is a general rule that, where a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it unless the contrary be shown—*stabitur præsumptioni donec probetur in contrarium* (*h*), negative evidence rebuts this presumption, that all has been duly performed (*i*) Thus, on an indictment for the non-repair of a road, the presumption, that an award, in relief of the defendants, was duly made according to the directions of an inclosure Act, may be rebutted by proof of repairs subsequently done to the road by the defendants for, if the fact had been in accordance with such presumption, they ought not to have continued to repair (*k*)

Proceedings of inferior courts

It is, however, important to observe, in addition to the above general remark, that, in inferior courts and proceedings

(*e*) *Per* Ld Ellenborough in *Keene* v *Deardon* 8 East 248, at p 263 See *Simpson* v *Wilkinson* 8 Scott, N R 814, *Doe* d *Dand* v *Thompson*, 7 Q B 897

(*f*) *Per* Ld Westbury in *Lee* v *Johnstone* L R 1 Sc App Cas 426, at p 435

(*g*) *Bryant* v *Foot* L R 3 Q B 497 at p 505 *Lawrence* v *Hitch*, Id 521

(*h*) Wing Max 712, *Slade* v *Drake*, Hob 295, at 297, *per* Sir W Scott in the *Demerara Case*, 1 Dods R 263, at p 266

(*i*) *Per* Ld Ellenborough in *R* v *Haslingfield* 2 M & S 558, at p 561 (recognising *Williams* v *East India Co* 3 East, 192)

(*k*) *R* v *Haslingfield* 2 M & S 558, see also *Manning* v *E Cos Ry Co*, 12 M & W 237, *Doe* d *Nanney* v *Gore* 2 Id 320, *Heysham* v *Forster*, 5 Man & Ry 277 See *Rundle* v *Hearle*, [1898] 2 Q B 83

by magistrates, the maxim, *omnia præsumuntur rite esse acta*, does not apply to *give jurisdiction* (*l*)

Thus, the Mayor's Court, London, is an inferior Court When therefore process had issued out of that Court against C as a garnishee, and he declared in prohibition, it was held that jurisdiction was not sufficiently shown by a plea, which set up the custom of foreign attachment, but did not allege that the original debt, or the debt alleged to be due from the garnishee to the defendant, arose, or that any of the parties to the suit was a citizen or was resident, within the City (*m*)

Again, where the examination of a soldier, taken before two justices, was tendered in evidence to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time when he was examined, was quartered in the place where the justices had jurisdiction, it was held not to be admissible (*n*) So, in the case of an order by justices, their jurisdiction must appear on the face of such order, otherwise, it is a nullity, and not merely voidable (*o*), unless, indeed, the order follows a form authorised by statute Where in examination before removing justices left it doubtful whether the examination had been taken by a single justice or by two, the Court stated that they would look at the document as lawyers, and would give it the benefit of the legal presumption in its favour, and it was observed, that the maxim, *omnia præsumuntur rite esse acta*, applied in this case with particular effect, since the fault, if there really had been one, was an irregular assumption of power by a single justice, as well as a fraud of the two, in pretending that to have been done by two which was, in fact, done only by one (*p*)

In a case before the House of Lords some remarks were made in reference to this subject, which may be here advantageously inserted —It cannot be doubted, that where an inferior court (a court of limited jurisdiction, either in point of place or of subject-matter) assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also

(*l*) *Per* Holroyd J in *R* v *All Saints Southampton* 7 B & C 785, at p 790 See *R* v *Inh of Gate Fulford* Dearsl & B 74, Best on Presumptions, p 81

(*m*) *Mayor of London* v *Cox*, L R 2 H L 239

(*n*) *R* v *All Saints Southampton*, 7 B & C 785

(*o*) *Per* Bayley J, in *R* v *All Saints Southampton* 7 B & C 755 at p 790 *R* v *Hulcott* 6 T R 583, *R* v *Helling* 1 Stra 8 *R* v *Chilverscoton* 8 T R 178, *R* v *Holm* 11 East, 381 *R* v *Totness* 11 Q B 80 *R* v *Treasurer of Kent* 22 Q B D 608

(*p*) *R* v *Silkstone*, 2 Q B 920, and cases cited, Id p 729 n (*p*)

in what respect it has jurisdiction But it is another thing to contend that it must set forth all the facts or particulars out of which its jurisdiction arises Thus, if a power of commitment or other power is given to justices of a county, their conviction or order must set forth that they are two such justices of such county, in order that it may be certainly known whether they constitute the tribunal upon which the statute they assume to act under has conferred the authority to make that order or pronounce that conviction But although it is necessary that the jurisdiction of the inferior court should appear, yet there is no particular form in which it should be made to appear The Court above, which may control the inferior court, must be enabled, somehow or other, to see that there is jurisdiction such as will support the proceeding but in what way it shall so see it is not material, provided it does so see it (*q*) The rule, therefore, may be stated to be, that where it appears upon the face of the proceedings that the inferior court has jurisdiction, it will be intended that the proceedings are regular (*r*) but that, unless it so appears that is if it appear affirmatively that the inferior court has no jurisdiction, or, if it be left in doubt, whether it has jurisdiction or not -no such intendment will be made (*s*) "The old rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of the *superior* court but that which specially appears to be so, nothing is intended to be within the jurisdiction of an *inferior* court but that which is expressly alleged" (*t*) And again in all proceedings in inferior courts it is necessary to show that the proceedings were within the jurisdiction of the Court (*u*)

Foreign court of inferior jurisdiction

Where the District Court of Philadelphia at the suit of the defendant issued a writ of attachment against the plaintiff's

(*q*) *Per* Ld Brougham in *Taylor* v *Clemson* 11 Cl & F 610 affirming the decision of the Court of Exchequer Chamber in 2 Q B 978 In *Taylor* v *Clemson* and in *Mayor of London* v *Cox* L R 2 H L 239, many authorities as to the necessity of showing jurisdiction are collected and reviewed

(*r*) A presumption in favour of regularity in official practice is often made See (*ex gr*) *Barnes* v *Keane* 15 Q B 75 at p 82 *Re Warne* 15 C B 767 at p 769, *Baker* v *Cave* 1 H & N 674 *Cheney* v *Courtois* 13 C B N S 634 *Robinson* v *Collingwood* 17 C B N S 777

(*s*) *Per* Tindal C J in *Dempster* v *Purnell* 4 Scott N R 30 at p 39 (citing *Moratia* v *Sloper* Willes 30 and *Titley* v *Foxhall* Id 688) *per* Erle J in *Barnes* v *Keane*, 15 Q B 75 at p 84

(*t*) Arg *Peacock* v *Bell* 1 Saund 73 *b* at 74 *b* (adopted in *Gosset* v *Howard*, 10 Q B 453, and in *Mayor of London* v *Cox* L R 2 H L 239 at p 259) See, also, further in connection with the text *Mayor of London* v *Cox*, *supra*, at pp 261 *et seq*

(*u*) *Per* Alderson, B in *Stanton* v *Styles* 5 Exch 583, see also, *Mayor of London* v *Cox*, L R 2 H L 239

ship, for the purpose of enforcing a debt which the defendant alleged that the plaintiff owed him, and the plaintiff afterwards sued the defendant in this country for trespass in seizing the ship, it was held that it must be presumed, in the absence of evidence to the contrary, that the Court had jurisdiction to issue the process in question (*x*)

Gosset v Howard

• In the great case of *Gosset* v *Howard* (*y*), the Exchequer Chamber held that the warrant of the Speaker of the House of Commons must be construed by the rules applied in determining the validity of warrants and writs issuing from a *superior* Court and it was laid down that, with respect to writs so issued, it must be presumed that they are duly issued, that they have issued in a case in which the Court has jurisdiction, unless the contrary appear on the face of them, and that they are valid of themselves, without any allegation other than that of their issue, and a protection to all officers and others in their aid acting under them Many of the writs issued by superior Courts recite upon their face the cause of their issuing, and show their legality – writs of execution for instance Others however do not, and though unquestionably valid are framed in a form which, if they had proceeded from persons having a special jurisdiction unknown to the common law, would have been clearly insufficient, and would have rendered them altogether void With regard to the Speaker's warrant, the Court held that it must be construed with at least as much respect as would be shown to a writ out of any of the Courts at Westminster, observing, in the language of Mr Justice Powys (*z*), that the House of Commons is a great Court, and all things done by them are intended to have been *rite acta* (*a*)

RES INTER ALIOS ACTA ALTERI NOCERE NON DEBET (*Wing Max*, p 327) *A transaction between two parties ought not to operate to the disadvantage of a third* (*b*)

Principle rule

Of maxims relating to the law of evidence, the above may be considered as one of the most important and most useful, its

(*x*) *Taylor* v *Ford* 29 L T N S 792

(*y*) 10 Q B 411 where the cases with respect to the validity of warrants were cited in argument (*z*) *R* v *Paty* 2 Raym Ld 1105 at p 1108

(*a*) Judgm *Gosset* v *Howard* 10 Q B 411 at p 457 Cf *Bradlaugh* v *Gosset* 12 Q B D 271

(*b*) *Res inter alios judicatæ neque emolumentum afferre his qui judicio non interfuerunt neque prejudicium solent irrogare* Cod 7, 56, 2

effect is to prevent a litigant party from being concluded or even affected, by the acts, conduct, or declarations of strangers (*c*) On a principle of good faith and and mutual convenience, a man's own acts are binding upon himself, and are, as well as his conduct and declarations, evidence against him yet it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorised strangers, and if a party ought not to be bound by the acts of strangers, so neither ought their acts or conduct to be used as evidence against him (*d*)

The above rule, then, operates to exclude all the acts, declarations, or conduct of others as evidence to bind a party, either directly or by inference, so that, in general, no declaration, written entry, or affidavit made by a stranger is evidence against a man, nor can a person be affected, still less concluded, by any evidence (*e*), decree, or judgment to which he was not actually, or, in consideration of law, privy (*f*)

Maxim applied to judicial proceedings

In a leading case (*g*), immediately connected with this subject, it was laid down by the judges, as a general principle, "that a transaction between two parties in judicial proceedings ought not to be binding upon a third, for it would be unjust to bind any person who could not be admitted to make a defence,

(*c*) The maxim was much considered in *Meddowcroft* v *Huguenin* 3 Curt 403 (where the issue of a marriage which had been pronounced void by the Consistorial Court attempted unsuccessfully to impeach that sentence in the Prerogative Court) See *R* v *Fontaine Moreau* 11 Q B 1028, and cases *infra*

(*d*) 1 Stark Evid 3rd ed 58 59 see Stephen Dig Law of Evid 6th ed, p 171 See, also *Armstrong* v *Normandy*, 5 Exch 409 *R* v *Ambergate Ry Co* 1 E & B 372, at p 381 *Salmon* v *Webb*, 3 H L Cas 510

(*e*) See *Humphreys* v *Pensam* 1 My & Cr 580

(*f*) It cannot be doubted that a man's assertions or admissions whether made in the course of a judicial proceeding or otherwise and in the former case, whether he was himself a party to such proceeding or not may be given in evidence against him in any suit or action in which the fact so asserted or admitted becomes material to the issue to be determined And in principle there can be no difference whether the assertion or admission be made by the party himself who is and ought to be affected by it or by some one employed directed or invited by him to make the particular statement on his behalf In like manner a man who brings forward another for the purpose of asserting or proving some fact on his behalf whether in a court of justice or elsewhere must be taken himself to assert the fact which he thus seeks to establish (*per* Cockburn, C J, in *Richards* v *Morgan*, 4 B & S 641, at p 661)

(*g*) *Duchess of Kingston's Case* 20 St Tr 355 at p 537 See also *Needham* v *Bremner*, L R 1 C P 583, *Natal Land Co* v *Good* L R 2 P C 121 *Davies* v *Lowndes*, 7 Scott N R 141, *Doe d Bacon* v *Brydges* Id 333, *Trimlestown* v *Kemmis*, 9 Cl & F 749, at p 781 (cited in *Boileau* v *Rutlin*, 2 Exch 665, at p 677) The general rule stated in the text has however, been departed from in certain cases, for instance in questions relating to manorial rights, public rights of way, immemorial customs, disputed boundary, disputed modus, and pedigrees

or to examine witnesses, or to appeal from a judgment, which he might think erroneous, and, therefore, the depositions of witnesses in another cause (*h*) in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers" (*i*)

As regards the parties to the earlier suit, it is stated in the same case, as being generally true, "first, that the judgment of a Court of concurrent jurisdiction (*k*), directly upon the point, is, as a plea, a bar, or, as evidence, conclusive (*l*), between the same parties (*m*), upon the same matter directly in question in another Court, secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment" (*n*)

To the general principle, that a judgment is binding only as between the same parties and their privies (*o*), judgments *in rem* form an exception, for by a judgment *in rem* the subject-matter adjudicated upon is rendered, *ipso facto*, such as it is thereby declared to be, and the judgment, therefore, is of effect as between all persons whatever For instance, a grant of

(*h*) See, for instance *Morgan* v *Nicholl* L R 2 C P 117

(*i*) See, also *King* v *Norman* 4 C B 884 at p 898

(*k*) Provided the judgment is not beyond the statutory jurisdiction of the Court giving it (*Toronto Ry* v *Toronto Corpn*, [1904] A C 809)

(*l*) *I e* if pleaded there being an opportunity to plead it, for if a party does not take the first opportunity which the pleadings afford him of relying on an estoppel he leaves the matter at large (judgm *Feversham* v *Emerson* 11 Exch 385 at p 391)

(*m*) But not in a proceeding in which the parties are not the same Thus in order of quarter sessions quashing a bastardy order is no estoppel in an action for seduction brought *by the employer* of the woman *Anderson* v *Collinson* [1901] 2 K B 107

(*n*) *Duchess of Kingston's Case* 20 St Tr 355 see *per* Knight Bruce V C in *Barrs* v *Jackson* 1 Y & C (Ch) 585 at p 595 *per* Ld Selborne in *R* v *Hutchings* 6 Q B D 300 at p 304 *Priestman* v *Thomas* 9 P D 70 and 210, *A G for Trinidad* v *Ercké* [1893] A C 518 at p 523 *N E Ry* v *Dalton Overseers* [1898] 2 Q B 66, and see also *Wakefield Corpn* v *Cook* [1904] A C 31

(*o*) See, for instance, *Wenman* v *Mackenzie* 5 E & B 447, *Mercantile Trust Co* v *River Plate Trust Co* [1894] 1 Ch 578 *Young* v *Holloway* [1895] P 87, *Beardsley* v *Beardsley*, [1899] 1 Q B 746

probate by a Court of competent jurisdiction actually invests the executor with the character which it declares to belong to him, and such a grant, until its revocation, is conclusive against all the world (*p*) Amongst judgments which are considered to be *in rem* is the sentence of a Court of competent jurisdiction, in a proceeding against a vessel for the purpose of forcing a maritime lien, whereby the ship is condemned to be sold, in order that the lien may be satisfied out of the proceeds of sale (*q*)

It must be noticed, however, that, as regards the matters upon which a judgment is conclusive, there is no distinction in principle between a judgment *in rem* and a judgment *inter partes*, neither is conclusive except upon the points actually decided thereby (*r*) For instance, a judgment of conviction on an indictment for forging a bill of exchange has the force of a judgment *in rem*, for it operates upon the *status* of the defendant, and makes him a convicted felon but it is conclusive only as to the defendant's *status*, and is not even admissible evidence of the forgery in an action on the bill, although the conviction must have proceeded on the ground that the bill was forged (*s*) Similarly, a verdict of guilty and judgment thereon, on an indictment for a nuisance by obstructing a highway, is not conclusive evidence, on the question whether the way is public, in an action of trespass brought by the defendant against a private person for using the way (*t*)

Again, a decree of probate is conclusive evidence that the instrument proved was testamentary according to the law of this country, but it is not conclusive *in rem* as to the testator's domicile, even though it contain a finding thereon (*u*) It appears that the sentence of a prize court, condemning a vessel expressly on the ground of breach of neutrality, is conclusive evidence not only of the condemnation, but also of the fact that the vessel was not neutral but this case must be regarded as exceptional (*x*)

It is requisite to notice the distinction which exists between

(*p*) See *per* Buller, J in *Allen* v *Dundas* 3 T R 125 at 129 *Prosser* v *Wagner* 1 C B N S 289

(*q*) *Castrique* v *Imrie* 8 C B N S 405 at p 412 and L R 4 H L 414 at p 428 *Minna Craig Co* v *Chart Merc Bank* [1897] 1 Q B 55 460

(*r*) *Ballantyne* v *Mackinnon* [1896] 2 Q B 455, at p 462 *N E Ry* v *Dalton Overseers*, [1898] 2 Q B 66

(*s*) *Castrique* v *Imrie* L R 4 H L 414, at p 434, *per* Blackburn J

(*t*) *Petrie* v *Nuttall* 11 Exch 569

(*u*) *Concha* v *Concha* 11 App Cas 541

(*x*) *Ballantyne* v *Mackinnon* [1896] 2 Q B 455, 463

the case in which a verdict or judgment *inter partes* is offered in evidence, with a view to establish the mere fact that such a verdict was given, or such a judgment pronounced, and that in which it is offered as a means of proving some fact which is either expressly found by the verdict, or upon the supposed existence of which the judgment can alone be supported In the latter case, as has been already stated, the evidence will not, in general be admissible to conclude a third party, whereas, in the former, the judgment itself is invariably not only admissible as the proper legal evidence to prove the fact, but is usually conclusive evidence for that purpose, since it must be presumed that the Court has made a faithful record of its own proceedings Moreover, the mere fact that such a judgment was given can never be considered as *res inter alios acta*, being a thing done by public authority, neither can the legal consequences of such a judgment be ever so considered, for, when the law gives to a judgment a particular operation, that operation is properly shown and demonstrated by means of the judgment, which is no more *res inter alios* than the law which gives it force (*y*)

There is another qualification of the general rule as to *res inter alios* to be noticed Where the acts or declarations of others have any legal operation material to the subject of inquiry, they must necessarily be admissible in evidence, and the legal consequence resulting from their admission can no more be regarded as *res inter alios acta* than the law itself For instance where a question arises as to the right to a personal chattel, evidence is admissible, even against an owner who proves that he never sold the chattel, of a sale of the chattel in market overt for, although he was no party to the transaction, which took place entirely between others, yet, as such a sale has a legal operation on the question at issue, the fact is no more *res inter alios* than the law which gives effect to such a sale So, in actions against the sheriff, it frequently happens that the law depends wholly on transactions to which the sheriff is personally an entire stranger, as, where the question is as to the right of ownership in particular property seized under an execution and in these cases all transactions and acts between others are admissible in evidence, which, in point of law, are material to decide the right of property (*z*)

Where acts have a direct legal operation &c

(*y*) 1 Stark Evid, 3rd ed 252 *King* v *Norman* 4 C B 884 *Thomas* v *Russell* 9 Exch 764 *Drouet* v *Taylor*, 16 C B 671, *Bosleau* v *Rutlin* 2 Exch 665

(*z*) 1 Stark Evid, 3rd ed 61

In an action of assumpsit for making and fixing iron railings to the defendant's houses, the defence was, that the credit was given to A, by whom the houses were built under a contract, and not to the defendant A, who had become bankrupt since the railings were furnished, was called as a witness for the defendant, and, having stated that the order was given by him, was asked what was the state of the account between himself and the defendant in reference to the building of the houses at the time of his bankruptcy A's reply was, that the defendant had overpaid him by £350 On the part of the plaintiff it was insisted that the state of the account between A and the defendant was not admissible in evidence, that it was *res inter alios acta*, and that the inquiry was calculated improperly to influence the jury It was held, however, by the Court that the evidence was properly received, and Erle, J remarked, that in an action for goods sold and delivered, a common form of defence is, that the defendant is liable to pay a third person, and that in such cases the jury usually conclude that the defendant in reality wants to keep the goods without paying for them that the evidence went to show the *bona fides* of the defence by proving payment to such third person and that it was not, therefore, open to the objection of being *res inter alios acta* (*a*)

Hearsay

The well-known rule excluding hearsay evidence may here claim attention, more especially as its operation is not unfrequently confounded with that of the maxim 'res *inter alios*" A leading authority (*b*) upon the law of evidence condemns the expression 'hearsay evidence" as inaccurate and misleading, and the cause of general misconception as to the true nature of the rule The same writer prefers the phrase derivative or second-hand evidence" This is not admissible, the law requiring all evidence to be given under formal responsibility, *i e*, upon the direct testimony of a witness in open court, subject to the penalties with which perjury is attended The rule therefore may be thus stated,—the fact that a statement was made, whether orally or in writing, by a person not called as a witness, is not admissible in evidence, except in certain exceptional cases Some of these excepted cases, which effect a most important qualification of the rule, must now be noticed

Exceptions to rule—1st Declarations against interest

The declaration or entry of a deceased person who had

(*a*) *Gerish* v *Chartier* 1 C B 13, 17

(*b*) Best on Evidence, 11th ed, p 466 *et seq* See Stephen's Dig Law of Ev, 6th ed, pp 23, 173

peculiar means of knowing the matter stated and no object in misrepresenting it, is admissible, if relevant to the issue, where such declaration or entry was opposed to the proprietary (*c*) or pecuniary (*d*) interest of the declarant (*e*) In such a case when a written statement or entry is relevant, it is only necessary to prove the handwriting and death of the party who made it (*f*)

Higham v Ridgway

In the leading case on this subject, it was held, that an entry made by a man-midwife, who had delivered a woman of a child, of his having done so on a certain day, referring to his ledger, in which he had made a charge for his attendance, which was marked as 'paid,' was evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery (*g*) Here, it will be remarked, the entry was admitted, because the deceased party, by making it, discharged another, upon whom he would otherwise have had a claim In another case, which was an action of trover by the assignees of a bankrupt, two entries made by an attorney's clerk in a day-book kept for the purpose of minuting his transactions, were held admissible, by the first of which the clerk acknowledged the receipt of £100 from his employer for the purpose of making a tender, and in the second of which he stated the fact of tender and refusal, for if an action had been brought by the official assignee of the bankrupt against the clerk for money had and received, the plaintiff could have proved by the first entry that the defendant had received the £100 and, by the second, he could have shown

(*c*) *R* v *Exeter Guardians* L R 4 Q B 341

(*d*) *Sussex Peerage Case* 11 Cl & F 85, *R* v *Birmingham Overseers* 1 B & S 763

(*e*) *Per* Bayley B in *Gleadow* v *Atkin* 1 Cr & M 410 at p 423 adverting to *Middleton* v *Melton* 10 B & C 317 at p 326 1 Starkie 3rd ed 62 Steph Dig 6th ed pp 97, 181 *Doe* d *Sweetland* v *Webber*, 1 A & E 733 at p 740 *Plant* v *Taylor*, 7 H & N 211, at p 238 See *Ex p Edwards* 14 Q B D 415

(*f*) *Per* Parke, J in *Doe* d *Patteshall* v *Turford*, 3 B & Ad 890 at p 898

(*g*) *Higham* v *Ridgway* 10 East 109 (distinguished in *Doe* d *Kinglake* v *Beviss* 7 C B 456 at pp 496, 509 512, and in *Smith* v *Blakey*, L R 2 Q B 326), see *Bradley* v *James* 13 C B 822, at p 825, *Percival* v *Nanson*, 7 Exch 1 *Edse* v *Kingsford* 14 C B 759 *Doe* d *Baddeley* v *Michael*, 17 Q B 278, at p 276

In *Higham* v *Ridgway* there was evidence apart from the entry to show that the work for which the charge was made was actually done It has been held that this is not essential (*per* Jessel, M R, in *Taylor* v *Witham*, 3 Ch D 605, not following *Doe* d *Gallop* v *Vowles*, 1 Mood & R 261) See the question discussed in the notes to *Higham* v *Ridgway*, 2 Smith L C It is not a valid objection to the admissibility of an entry, that it purports to charge the deceased and afterwards to discharge him, for such an objection would go to the very root of this sort of evidence (*per* Ld Tenterden in *Rowe* v *Brenton* 8 Man & Ry (K B) 133, at pp 267, 268)

that the object for which the money was placed in the defendant's hands had not been attained Consequently, the declaration might be considered as the entry of a fact within the knowledge of the deceased, which rendered him subject to a pecuniary demand (*h*) And generally, it may be observed, that the rule as to *res inter alios acta* does not apply to exclude entries made by receivers, stewards, and other agents charging themselves with the receipt of money, such entries being admissible, after their decease, to prove the fact of their receipt of such money (*i*)

The foregoing are illustrations of the rule as to declarations against *pecuniary* interest The following remarks relate rather to declarations against proprietary interest An occupier *proved to be in possession* (*k*) of a piece of land is, *prima facie*, the owner in fee, and his declaration is receivable in evidence, when it shows that he was only tenant for life or years (*l*) So, in an issue between A and B, to determine whether C died possessed of certain property, her declaration that she had assigned it to A was held admissible (*m*) But it is clear, that a person who has already parted with his interest in property cannot be allowed to divest the right of another claiming under him by any statement which he may choose subsequently to make (*n*), and, therefore, the declarations of a person who had conveyed away his interest in an estate by executing a settlement, and had subsequently mortgaged the estate were, after the death of the mortgagor held inadmissible, on behalf of the mortgagee, to show that money had actually been advanced upon the mortgage (*o*)

2nd Declaration made in course of business

The declaration or entry of a deceased person if relevant to the issue is admissible where it was made in the ordinary

(*h*) *Marks* v *Lahee* 3 Bing N C 408

(*i*) *Per* Parke J in *Middleton* v *Melton* 10 B & C 317 at p 327

(*k*) His possession must be proved (*La Touche* v *Hutton*, 9 Ir R Eq 166)

(*l*) *Crease* v *Barrett* 1 C M & R 919, at p 931 *per* Mansfield, C J in *Peaceable* v *Watson* 4 Taunt 16 *Davies* v *Pearce*, 2 T R 53 *Trimlestown* v *Kemmis* 9 Cl & F 749 at p 780 As to the extent to which a tenant for life may by his declaration affect a remainderman see *Houe* v *Malkin* 40 L T 196

(*m*) *Ivat* v *Finch* 1 Taunt 141 (cited in *Beuley* v *Atkinson* 13 Ch D 283, at p 298)

(*n*) *Per* Ld Denman in *Doe* d *Sweetland* v *Webber* 1 A & E 733, at p 740

(*o*) *Doe* d *Sweetland* v *Webber*, 1 A & E 733 As to declarations against interest see, also *Sussex Peerage* 11 Cl & F 85 *Smith* v *Blakey* L R 2 Q B 326 *per* Ld Denman in *Davis* v *Lloyd* 1 Car & K 275 *Taylor* v *Witham*, 3 Ch D 605 *Blandy Jenkins* v *Dunraven* [1899] 2 Ch 121 and *Fountaine* v *Amherst* [1909] 2 Ch 382 (entries in solicitor's books)

course of business, or in the discharge of professional duty, near the time when the matter stated occurred and of the declarant's own knowledge (*p*)

Price v Earl of Torrington

The case (*p*) usually referred to as establishing the above rule, was an action brought by a brewer against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant showed that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen signed their names, and that the drayman was dead whose name appeared signed to an entry stating the delivery of the beer in question This was held to be evidence of a delivery

In another important case on this subject, at the trial of an action of ejectment, it was proved to be the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service, that, on one occasion, the attorney himself prepared a notice to be served on a tenant, took it out with him, together with two others, prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant and two of the notices were proved to have been delivered by him on that occasion The indorsements so made were held admissible, after the attorney's death to prove the service of the third notice (*q*)

It is necessary however, that the particular entry be contemporaneous with the circumstance to which it relates, that it be made in the course of performing some duty (*r*), or dis-

(*p*) Steph Dig 6th ed , pp 36 180 and notes to *Price* v *Torrington* 1 Salk 285, in 2 Sm L C *Malcomson* v *O Dea*, 10 H L Cas 593, at p 605 *Smith* v *Blakey* L R 2 Q B 326 at pp 329, 333

(*q*) *Doe* d *Patteshall* v *Turford* 3 B & Ad 890 (cited by Sir J Romilly in *Bright* v *Legerton* 29 L J Ch 852 854 applied in *Djambi Estates* 107 L T 681) *Stapylton* v *Clough* 2 E & B 933 *East Union Ry Co* v *Symonds* 5 Exch 237 *Doe* d *Padwick* v *Wittcomb* 4 H L Cas 425, and 6 Exch 601 See *Doe* d *Padwick* v *Skinner* 3 Exch 84 *R* v *St Mary Warwick*, 1 E & B 816 at pp 820 825 *R* v *Inhabs of Worth* 4 Q B 132 See also, *Poole* v *Dicas* 1 Bing N C 649

(*r*) See *Massey* v *Allen*, 13 Ch D 558 Field book entries made by a deceased surveyor for the purposes of a survey which he had been instructed to make are admissible in evidence (*Mellor* v *Walmesley*, [1905] 2 Ch 164, at p 168 where the C A reversed the decision of Swinfen Eady, J , as reported in *Mellor* v *Walmesley*, [1904] 2 Ch 525 at p 528)

charging some office (*s*), that it was the duty of the deceased person to do the particular thing and to record the fact of having done it contemporaneously (*t*), and that the entry relate to facts necessary to the performance of such duty, for, if the entry contain a statement of other circumstances, however naturally they may be thought to find a place in the narrative, the entry will not be legal proof of those circumstances (*u*)

Other exceptions

Space will not permit of the other exceptions to the rule excluding hearsay evidence being here treated The following extract from a judgment of Parke, B, well expresses the rule itself, and indicates many of the exceptions which qualify it — 'One great principle in the law of evidence is, that all such facts as have not been admitted by the party against whom they are offered or some one under whom he claims, ought to be proved under the sanction of an oath (or its statutory equivalent), either on the trial of the issue, or some other issue involving the same question, between the same parties, or those to whom they are privy To this rule certain exceptions have been recognised, some from very early times, on the ground of necessity or convenience, such as the proof of the quality and intention of acts by declarations accompanying them, of pedigrees and of public rights by the statement of deceased persons presumably well acquainted with the subject, as inhabitants of the district, in the one case, or relations, within certain limits, in the other, and another exception occurs, where proof of possession is allowed to be given by the entries of deceased stewards or receivers charging themselves, or proof of facts of a public nature by public documents" (*x*)

Res gestæ

There is one other topic, which may be adverted to as qualifying both the rule which excludes evidence of *res inter alios acta*, and also that as to hearsay evidence Under the head of *res gestæ*, an expression which, according to Sir James Stephen (*y*), seems to have come into use on account of its convenient obscurity, facts and statements are frequently admitted in

(*s*) See *Polini* v *Grey*, 12 Ch D 411

(*t*) *Mercer* v *Denne*, [1904] 2 Ch 534

(*u*) *Chambers* v *Bernasconi*, 1 C M & R 347, *per* Blackburn, J, in *Smith* v *Blakey*, L R 2 Q B 326, at p 332, *per* Parke, J in *Doe* d *Patteshall* v *Turford*, 3 B & Ad 890, at pp 897, 898, *per* Pollock, C B in *Milne* v *Leisler*, 7 H & N 786 at p 795, *Trotter* v *Maclean*, 13 Ch D 574

(*x*) *Per* Parke, B, in *Wright* v *Doe* d *Tatham*, 7 A & E 313, at pp 384, 385 For additional information as to the maxim respecting *res inter alios acta*, the reader is referred to 1 Taylor Evid, 11th ed, pp 392 *et seq*, 366 *et seq*, and Steph Dig, 6th ed, pp 11, 166 (*y*) Dig L of Ev, 6th ed, p 166

evidence, which upon the broad construction of one or other of the rules which have been noticed would be inadmissible The doctrine of *res gestæ* was much discussed in the case of *Wright* v *Doe* d *Tatham* (*z*) In delivering his opinion to the House of Lords in that case, Parke, B , said ' Where any facts are proper evidence upon an issue, all oral or written declarations which can explain such facts may be received in evidence ' (*a*) Where declarations accompany an act, they are frequently admissible in evidence as part of the *res gestæ*, or as the best and most proximate evidence of the nature and quality of the act, their connection with which either sanctions them as direct evidence, or constitutes them indirect evidence from which the real motive of the actor may be duly estimated (*b*)

Thus, an action was brought by a man on a policy of insurance, on the life of his wife, which was conditional upon her being in a good state of health at the time when the insurance was effected The question arose as to the admissibility of declarations, concerning the bad state of her health, made by the wife, when found lying in bed, apparently ill, a few days after she had obtained the medical certificate upon which the policy was subsequently issued These declarations were made to the witness, whom the defendants called at the trial to relate the wife's own account of the cause of the witness finding her in bed at an unseasonable hour and with the appearance of being ill, and they were held admissible, on the same ground that inquiries of patients, by medical men, with the answers to them, are evidence of the state of health of the patient at the time, and it was further observed, that this was not only good evidence, but the best evidence which the nature of the case afforded (*c*) *Aveson v Lord Kinnaird*

So, where a bankrupt has done an equivocal act his declarations accompanying the act have been held admissible to explain his intentions, and, in order to render them admissible, it is not requisite that such declarations were made at the precise time when the act in question was done (*d*)

(*z*) 7 A & E 313 This is a leading case

(*a*) 4 Bing N C 489

(*b*) See *Ford* v *Elliott*, 4 Exch 78, *per* Pollock, C B , in *Milne* v *Leisler*, 7 H & N 786, at p 796

(*c*) *Aveson* v *Kinnaird*, 6 East, 188 see 1 Phill Ev , 10th ed 149

(*d*) *Bateman* v *Bailey*, 5 T R 512 (cited in *Ridley* v *Gyde*, 9 Bing 349, at p 352, and in *Rawson* v *Haigh*, 2 Bing 99, at p 104) See *Smith* v *Cramer*, 1 Bing N C 585

So, in cases of treason and conspiracy, it is an established rule, that, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the plan originally concerted, and with reference to the common object, is, in the contemplation of law, the act of the whole party (*e*), though, where a question arises as to the admissibility of documentary evidence, for the purpose of implicating a party, and showing his acquiescence in such illegal purpose and common object, it will always be necessary to consider, whether the rule *scribere est agere* applies or whether the evidence in question is merely the narrative of some third party of a particular occurrence, and, therefore, in its nature hearsay and not original evidence

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NEMO TENETUR SEIPSUM ACCUSARE (Wing Max 486)—*No man can be compelled to criminate himself* (*f*)

Policy of our law

This maxim expresses a characteristic principle of English law (*g*) Hence it is, that, although an accused person may of his own accord make a voluntary statement as to the charge against him, a justice, before receiving his statement, is required, by the Indictable Offences Act, 1848 (*h*), to caution him that he is not obliged to say anything, and that what he does say may be given in evidence against him Hence also arises the rule that evidence of a confession by the accused is not admissible, unless it be proved that such confession was free and voluntary (*i*)

It may be stated as a general rule that a witness in any proceeding is privileged from answering, not merely where his answer will criminate him directly, but also where it may have a tendency to criminate him (*k*) 'The proposition is clear,"

(*e*) *Per* Bayley, J, in *Watson's Case* 32 St Tr 1, at p 7, *R* v *Blake* 6 Q B 126

(*f*) A man is *competent* to prove his own crime though not *compellable* (*per* Alderson, B in *Udal* v *Walton* 14 M & W 254 at p 256)

(*g*) As to the Scots law on the subject, see *Longuorth* v *Yelverton*, L R 1 Sc & Div 218

(*h*) 11 & 12 Vict c 42 s 18

(*i*) *R* v *Thompson* [1893] 2 Q B 12 (approved in *Ibrahim* v *R* [1914] A C 599, at p 610 followed in *R* v *Colpus* 12 Cr App 193 at p 200)

(*k*) *Fisher* v *Ronalds*, 12 C B 762 *per* Pollock C B, in *Adams* v *Lloyd* 3 H & N 351 at p 362, *R* v *Garbett* 1 Den 236 The cases supporting this proposition are collected in Rose Law of Evidence in Crim Cas 14th ed pp 171 *et seq* See *Ex p Fernandez* 10 C B N S 3, *Re Fernandes*, 6 H & N 717, *Bradlaugh* v *Evans*, 11 C B N S 377 As to an accused person giving evidence on his own behalf see p 632, *post*

remarked Lord Eldon in *Ex parte Symes* (*l*), "that no man can be compelled to answer what has any tendency to criminate him"—which proposition is, it seems, to be thus qualified, that the danger to be apprehended by the witness must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, not a danger of an imaginary and unsubstantial character having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct," for such a possibility should not be suffered to obstruct the administration of justice (*m*) And, although a party to a cause, who has been subpœnaed as a witness, cannot object to be sworn on the ground that any relevant questions would tend to criminate him (*n*), he may claim his privilege when such objectionable questions are put to him (*o*)

The protection does not extend to excuse a person from answering questions on the ground that the answers may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit, either at the instance of the Crown or of any other person (*p*) As to whether a person is bound to answer a question the answer to which may criminate his or her wife or husband, the authorities are somewhat conflicting, though they tend to establish the privilege in such cases (*q*), unless the witness be an accused person giving evidence on his own behalf (*qq*)

Where, however, the reason for the privilege of the witness

(*l*) 11 Ves 521 at p 525

(*m*) *R* v *Boyes* 1 B & S 311 at p 330 See *Re Reynolds* 20 Ch D 294, *Re Mex & S Amer Co* 28 L J Ch 631

(*n*) *Boyle* v *Wiseman* 10 Exch 647

(*o*) An objection to discovery whether by affidavit of documents or sworn answer to interrogatories on the ground that it may tend to criminate can only be taken in the affidavit or answer itself (*Spokes* v *Grosvenor Co* [1897] 2 Q B 124 and cases there cited) An objection on the same ground, to produce a document must be by oath (*Webb* v *East* 5 Ex D 23 where the C A declined to decide whether such objection is valid, but—see *Pritchett* v *Smart*, 7 C B 625—it seems that it is)

Discovery is not granted in actions to recover penalties or enforce forfeitures (*Mexborough* v *Whitwood U D C* [1897] 2 Q B 111, and cases there cited)

Whether or not a witness is compellable to answer questions having a tendency to *disgrace* him, is discussed in Best on Evidence 11th ed pp 124 *et seq*, to which the reader is referred A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor (Criminal Procedure Act, 1865 (28 & 29 Vict c 18) s 6)

(*p*) The Witnesses Act 1806 (46 Geo 3 c 37), which was enacted to put an end to doubts which had been expressed

(*q*) *R* v *Cleviger*, 2 T R 263 *R* v *All Saints Worcester* 6 M & G 194, at p 200, *per* Bayley J *Cartwright* v *Green* 8 Ves 405 *R* v *Halliday*, Bell C C 257 (*qq*) See p 632, *post*

or party interrogated ceases, the privilege also ceases (*r*), and therefore it ceases if the prosecution to which the witness might be exposed or his liability to a penalty or forfeiture is barred by lapse of time, or if the offence has been pardoned or the penalty or forfeiture waived (*s*)

How rule is qualified

The rule *nemo tenetur seipsum accusare*, which has been designated (*t*) "a maxim of our law as settled, as important and as wise as almost any other in it,' is, however, sometimes trenched upon, and the privilege which it confers, is in special cases abrogated Thus a bankrupt under examination before the Court of Bankruptcy (*u*) does not enjoy such privilege as regards any question touching his estate (*v*), though a witness summoned for examination as to the bankrupt's affairs, may refuse to answer a question upon the ground that his answer might tend to criminate himself (*y*) And the legislature sometimes, on grounds of policy, extends indemnity—partial or entire—to a witness whose privilege is taken away (*z*) Thus the Larceny Act, 1861, c 85 (*a*), enacts that nothing in any of the preceding ten sections of that Act, which relate to frauds by agents, bankers, and factors, 'shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court or upon the hearing of any matter in bankruptcy or insolvency and no person shall be liable to be convicted of any of the misdemeanours in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall, at any time previously to his being charged with such offence, have first disclosed such act on oath in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved" (*b*)

(*r*) Wigram on Discovery 2nd ed p 83 where the equity cases upon the point are collected

(*s*) See *Ex p Fernandez* 10 C B N S 3 *R* v *Boyes* 1 B & S 311

(*t*) *Per* Coleridge J in *R* v *Scott*, Dears & B 47 at p 61

(*u*) See the Bankruptcy Act 1914 (4 & 5 Geo 5 c 59) s 15 (8) as to which see *Re Atherton*, [1912] 2 K B 251

(*v*) *R* v *Erdheim* [1896] 2 Q B 260 *R* v *Scott*, Dears & B 47 *R* v *Crowe* Id 68 *R* v *Skeen* Bell C C 97, *R* v *Robinson*, L R 1 C C 80 at pp 85 87 90

(*y*) *Ex p Schofield*, 6 Ch D 230 *Re Reynolds* 20 Ch D 294

(*z*) See, for instance the Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Vict c 51), s 59 (*a*) 24 & 25 Vict c 96 s 85

(*b*) See the Bankruptcy Act, 1914 (4 & 5 Geo 5, c 59), s 166, and *R* v *Erdheim*, [1896] 2 Q B 260, as to the cases in which evidence cannot be given of admissions made on the hearing of a bankruptcy matter

The disclosure above referred to, in order to be available as a protection, must be made *bona fide*, and must not be a mere voluntary statement, made for the express purpose of screening the person making it from the penal consequences of his acts (*c*)

Answering affidavit

Lastly, in *R* v *Gillyard* (*d*), the facts were these A maltster, suspected of having violated the excise laws obtained a conviction against his servant for the purpose as was charged, of relieving himself from penalties, by force of the statute 7 & 8 Geo 4, c 52, s 46 In support of a rule *nisi* to quash the conviction the affidavits stated circumstances, showing that the conviction had been obtained by collusion, and no *affidavit was made in opposition to the rule* On behalf of the maltster it was urged that he ought not (regard being had to the maxim now under consideration) to have been called upon to defend himself by affidavit on a charge which was virtually of a criminal nature (*e*) But the conviction, nevertheless, was quashed as being "a fraud and mockery, the result of conspiracy and subornation of perjury Coleridge, J, remarking that, 'where the Court observes such dishonest practices it will interfere, although judgment has been given,' and that 'no honest man ought to think it beneath him or a hardship upon him to answer upon affidavit a charge of dishonesty made upon affidavit against him If a man, when such a serious accusation is preferred against him, will not deny it, he must not complain if the case is taken *pro confesso*'

Competency of witnesses

Upon the cognate subject of the competency of witnesses a few remarks must suffice At one time it was the most important topic of the law of evidence for formerly interest in a suit was considered to disqualify a person from giving testimony, the result being that the best evidence available was often excluded At common law the parties, and their husbands or wives, were incompetent as witnesses in all cases This incompetency was removed as to the parties in civil cases by the Evidence Act, 1851 (*f*), and as to their husbands or wives by the Evidence Amendment Act, 1853 (*g*) By both these Acts the rule of the common law was expressly preserved in criminal cases, and

(*c*) See *R* v *Strahan* 7 Cox C C 85 decided under the repealed Larceny Act (7 & 8 Geo 4 c 29), s 52

(*d*) 12 Q B 527

(*e*) Citing *Stephens* v *Hill* 10 M & W 28

(*f*) 14 & 15 Vict c 99 ss 2

(*g*) 16 & 17 Vict c 83 ss 1 2

by the latter Act the incompetency of the parties, and their husbands or wives, was retained in proceedings instituted in consequence of adultery By the Evidence Further Amendment Act, 1869 (*h*), however, the incompetency in such proceedings is removed, but no witness may be asked any question tending to show that he or she has committed adultery, unless such witness has already given evidence in the same proceeding in disproof of such adultery

With regard to the law of evidence in criminal cases, the year 1898 was marked by a great change, which for some years had been foreshadowed by the instances in which statutes creating new offences had expressly enabled a person charged therewith to be a witness on his own behalf By the Criminal Evidence Act, 1898 (*i*), every person charged with an offence, as also the wife or husband of such person, is a competent witness for the defence at every stage of the proceedings, whether such person be charged solely or jointly with others (*k*) but such person may not be called as a witness except upon his own application (*l*), nor, as a general rule, may the wife or husband except upon the application of the person charged (*m*) The husband or wife is not compellable to disclose communications made by the one to the other during marriage (*n*), but the person charged may be asked in cross-examination any question tending to criminate him (*o*) or (*p*) any other person as to the offence charged, though not, as a general rule, any question tending to show that he has committed another offence, or is of bad character (*q*) In respect of certain offences the wife or husband of the person charged may be called as a witness for the prosecution without the consent of that person (*r*), but as has been already indicated, the maxim, *nemo tenetur seipsum*

(*h*) 32 & 33 Vict c 68 s 3
(*i*) 61 & 62 Vict c 36
(*k*) S 1
(*l*) S 1 (a)
(*m*) S 1 (c) see s 4 and the Criminal Justice Administration Act, 1914 (4 & 5 Geo 5, c 58) noted at p 341 *ante*
(*n*) S 1 (d)
(*o*) S 1 (e)
(*p*) *R* v *Minihane* 16 Cr App R 38
(*q*) S 1 (f) See *R* v *Preston* [1909] 1 K B 568 *R* v *Beecham*, [1921] 3 K B 464
(*r*) S 4, and schedule See also the Criminal Law Amendment Act, 1912 (2 & 3 Geo 5 c 20) s 7 (6) the Children (Employment Abroad) Act, 1913 (3 & 4 Geo 5 c 7) s 3 (4) the Mental Deficiency Act 1913 (3 & 4 Geo 5, c 28), s 56 (6) the Unemployment Insurance Act, 1922 (12 Geo 5, c 7), s 11

accusare, still holds good to this extent, that the person charged cannot be compelled to enter the witness-box against his will (*s*)

HAVING thus briefly touched upon some few rules relating chiefly to the admissibility of evidence, and having considerably exceeded the limits originally prescribed to myself, I now feel compelled reluctantly to take leave of the reader, trusting that, however slight or disproportioned this attempt to illustrate our legal maxims may appear when compared with the extent and importance of the subject, I have yet, in the language of Lord Bacon, applied myself, not to that which might seem most for the ostentation of mine own wit or knowledge, but to that which might yield most use and profit to the student, and have afforded some materials for acquiring an insight into those conclusions of reason those *legum leges* essential to the true understanding and proper application of the law—whereof, though some may strongly savour of human refinement and ingenuity, the greater portion claim from us instinctively, as it were, recognition—and why? they have been written with the finger of Almighty God upon the heart of man (*t*)

(*s*) Except in proceedings—technically criminal but really civil—instituted for the purpose of trying a civil right only see the Evidence Act 1877 (40 & 41 Vict c 14), s 1 the Criminal Evidence Act 1898 (61 & 62 Vict c 36) s 6 (1)

(*t*) See *Calvin's Case*, 7 Rep 126

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CONSTITUTIONAL LAW AND LEGAL HISTORY

CHALMERS & ASQUITH MINTY THOMAS'S Leading Cases POTTER'S Legal History For final revision GARSIA'S Constitutional Law and Legal History in a Nutshell GRIFFITH'S Questions and Answers

CRIMINAL LAW AND PROCEDURE

ODGERS Common Law and WILSHERE'S Leading Cases For final revision GARSIA'S Criminal Law in a Nutshell FALLIN'S Questions and Answers

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WILLIAMS (with WILSHERE'S Analysis) or GOODEVE For revision GARSIA'S Real Property and Conveyancing in a Nutshell

CONVEYANCING

DEANE & SPURLING'S Introduction and CLARK'S Students' Precedents

COMMON LAW

ODGERS Common Law or INDERMAUR'S Common Law or SALMOND or CARTER on Contracts and FRASER or SALMOND on Torts COCKLE'S Leading Cases For final revision WILSHERE'S Outline of Contracts and Torts or CONYERS' Contracts and Torts in a Nutshell

EVIDENCE AND PROCEDURE

ODGERS Common Law or PHIPSON'S Manual of Evidence, and COCKLE'S Cases on Evidence For final revision WILSHERE'S Procedure and Evidence or GARSIA'S Procedure in a Nutshell and Evidence in a Nutshell

EQUITY

WILSHERE GARSIA'S Equity in a Nutshell FALLIN'S Questions and Answers

FINAL REVISION

BROOKS'S All You Want for the Bar Final

COMPANY LAW

SMITH'S Summary

SPECIAL SUBJECTS

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Suggested Course of Reading for the Solicitors' Final Examination.

For detailed Courses see STEELE'S Self-Preparation for the Final Examination

COMMON LAW

INDERMAUR'S Principles of the Common Law
SALMOND or ANSON on Contracts
RINGWOOD or SALMOND on Torts
SMITH'S Leading Cases with INDERMAUR'S Epitome or COCKLE & HIBBERT'S Leading Cases
CONYERS' Contracts and Torts in a Nutshell

EQUITY

SNELL'S Principles of Equity
BLYTH'S Analysis of SNELL or GARSIA'S Equity in a Nutshell
Equity for Examinees
WHITE & TUDOR'S Leading Cases with INDERMAUR'S Epitome
STRAHAN on Partnership
UNDERHILL on Trusts

REAL AND PERSONAL PROPERTY AND CONVEYANCING.

WILLIAMS or GOODEVE on Real Property
WILLIAMS or GOODEVE on Personal Property
WILSHERE'S Analysis of WILLIAMS
LEPHINSTONE'S or GIBSON'S Conveyancing
GARSIA'S Real Property in a Nutshell

PRACTICE OF THE COURTS

GIBSON'S Practice
GARSIA'S Procedure in a Nutshell

BANKRUPTCY

RINGWOOD'S Principles of Bankruptcy
GARSIA'S Bankruptcy Law in a Nutshell

CRIMINAL LAW

HARRIS'S Principles of Criminal Law
WILSHERE'S Leading Cases
GARSIA'S Criminal Law in a Nutshell

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GIBSON'S Probate and Divorce

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DICEY'S Digest
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COMPANIES.

SMITH'S Summary

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ADMINISTRATION OF ASSETS.

GARSIA'S Administration of Assets in a Nutshell 39 pages Price 3s 6d net 1927

This has been written specially for the Bar Final Examinations It embodies the changes made by the Administration of Estates Act 1925

ADMIRALTY.

SMITH'S Law and Practice in Admiralty For the use of Students By EUSTACE SMITH, of the Inner Temple Fourth Edition 232 pages Price 10s net 1892

AGENCY.

BOWSTEAD'S Digest of the Law of Agency By W BOWSTEAD, Barrister at Law Seventh Edition 485 pages Price £1 7s 6d net 1924

'The Digest will be a useful addition to any law library, and will be especially serviceable to practitioners who have to advise mercantile clients or to conduct their litigation as well as to students, such as candidates for the Bar Final Examination and for the Consular Service who have occasion to make the law of agency a subject of special study —*Law Quarterly Review*

WILSHERE'S Outline of the Law of Agency By A M WILSHERE, Barrister at Law 103 pages Price 7s 6d net 1925

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ARBITRATION.

SLATER'S Law of Arbitration and Awards With Appendix containing the Statutes relating to Arbitration, and a collection of Forms and Index Fifth Edition By JOSHUA SLATER, Barrister at Law 215 pages Price 5s net 1913

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RINGWOOD on Bankruptcy, Deeds of Arrangement and Bills of Sale With an Appendix containing the Acts, Rules, etc Re arranged and in part re written by G L HAGGEN, Lecturer in Law in Leeds University Sixteenth Edition, by A ROPER Text 352 pages, Appendix 316 pages Price £1 2s 6d net 1930

Mr Haggen has re written this work with a special view to the needs of students Of special interest are the marginal notes which are in narrative form and are of great value for final revision before the examination they give the main principles of the law in a nutshell

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GARSIA'S Bankruptcy Law in a Nutshell Including Deeds of Arrangement and Bills of Sale 62 pages Price 3s 6d net 1928

BILLS OF EXCHANGE.

JACOBS on Bills of Exchange, Cheques, Promissory Notes, and Negotiable Instruments Generally,

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WILLIS'S Law of Negotiable Securities Contained in a Course of Six Lectures delivered by WILLIAM WILLIS, Esq, K C, at the request of the Council of Legal Education Fifth Edition, by A W BAKER WELFORD, Barrister at Law 190 pages Price 10s net 1930

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CARRIERS.

WILLIAMS' Epitome of Railway Law Part I The Carriage of Goods Part II The Carriage of Passengers By E L G WILLIAMS, Barrister at Law Second Edition 231 pages Price 10s net 1921

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GARSIA'S Law relating to the Carriage of Goods by Sea in a Nutshell As amended by the Carriage of Goods by Sea Act, 1924 Second Edition By MARSTON GARSIA, Barrister at Law 36 pages Price 3s net 1925

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INDERMAUR'S Principles of the Common Law. The Law of Contracts and Torts, with a Short Outline of the Law of Evidence Fourteenth Edition Re written and enlarged by A M Wii SHERE, Barrister at Law 732 pages Price £1 10s net 1927

"It is clear in statement and makes as easy reading as the nature of the subject permits The selection of matter to be treated is good – exactly the right emphasis is laid on fundamental principles, and they are presented with an accuracy of statement not always to be found in law books Painstaking labour is evident in every page and the result is the student may read and the practitioner consult this book with confidence that his efforts will be repaid '– *Law Notes*

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INDERMAUR'S Leading Common Law Cases, with some short notes thereon Chiefly intended as a Guide to "SMITH S LEADING CASES" Tenth Edition by E A Till, Master of the Supreme Court With six illustrations by E T RILD 111 pages Price 8s 6d net 1922

The editor has introduced several new features with a view to assisting the student in remembering the principles of law dealt with but the unique feature of the edition is the addition of six illustrations by Mr E T Reed After seeing these illustrations of the bull in the ironmongers shop the chimney sweep and the jeweller the six carpenters in the tavern etc , you will find it easy to remember the cases and what points they decided I very wise student reads this book

COCKLE & HIBBERT'S Leading Cases in Common Law With Notes, Explanatory and Connective, presenting a Systematic View of the whole Subject

By E Cockle and W Nembhard Hibbert, LL D, Barristers at-Law Second Edition 962 pages Price £2 2s net 1929

This book is on the same lines as Cockle s Cases on Evidence

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Simple Contracts	**Carriers**	**Damages**
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SUSMAN'S Questions and Answers on Common Law By B Susman, Barrister at Law *[In the Press*

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BURGIN & FLETCHER S Students' Conflict of Laws An Introduction to the Study of Private International Law, based on Dicey Price £1 net 1928

HIBBERT'S Leading Cases on Conflict of Laws By W N HIBBERT, LL D, Barrister at Law

Ready about January, 1931 Price about 15s

CONSTITUTIONAL LAW AND HISTORY.

CHALMERS & ASQUITH'S Outlines of Constitutional Law By D CHALMERS and CYRIL ASQUITH, Barristers-at Law Fourth Edition 470 pages Price 15s net 1930

This work includes a survey of Central and Local Administrative Law and of Colonial Constitutions

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THOMAS & BELLOT'S Leading Cases in Constitutional Law With Introduction and Notes Sixth Edition By H H L BELLOT, LL D Formerly Acting Professor of Constitutional Law in the University of London 352 pages Price 10s 6d net 1927

Some knowledge of the chief cases in constitutional law is now required in many examinations and is obviously necessary to the thorough student of constitutional history This book extracts the essence of the cases with which the student is expected to be familiar, preserving always something of the concrete circumstance that is so helpful to the memory It adds where necessary a short note to the individual case and subjoins to each important group of cases some general remarks in the shape of a note The cases are so arranged as to be convenient for ready reference

MINTY'S Constitutional Laws of the British Empire, By L le M MINTY Barrister at Law 253 pages Price 15s net 1928

So far as possible the author has included sufficient material to enable a student to give a possible answer to every question that has been set for the LL B in the past few years, or is likely to be set in the near future

TASWELL-LANGMEAD'S English Constitutional History From the Teutonic Invasion to the Present Time Designed as a Text book for Students and others Ninth Edition By A L POOLE, M A, F S A,

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WILSHERE'S Analysis of Taswell-Langmead's Constitutional History By A M WILSHERE, LL B, Barrister at Law 133 pages Price 6s 6d net 1929

HAMMOND'S Short English Constitutional History for Law Students By EDGAR HAMMOND, B A 163 pages Price 7s 6d net 1920

GARSIA'S Constitutional Law and Legal History in a Nutshell Including an Alphabetical Table of Writs and their Uses, a Comparative Table of the Constitutions of Canada, Australia and South Africa Second Edition By M GARSIA, Barrister at Law 104 pages Price 4s net 1925

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GRIFFITH'S Questions and Answers in Constitutional Law and Legal History By D M GRIFFITH 86 pages Price 5s net 1930

CONTRACTS.

(See also Common Law)

WILSHERE'S Outline of Contracts and Torts By A M WILSHERE and DOUGLAS ROBB, Barristers at Law Third Edition 155 pages Price 7s 6d net 1928

It is designed as an assistance to the memory of the Student who has read Odgers or Indermaur on the Common Law

CARTER on Contracts Elements of the Law of Contracts By A T CARTER, of the Inner Temple Barrister-at Law, Reader to the Council of Legal Education Sixth Edition 272 pages Price 12s 6d net 1925

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CONYERS' Contracts in a Nutshell With Epitomes of Leading Cases By A J CONYERS, Barrister at Law Price 4s net 1930

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(See also Real Property)

ELPHINSTONE'S Introduction to Conveyancing By Sir HOWARD WARBURTON ELPHINSTONE, Bart Eighth Edition, by HARRY FARRAR, Barrister at Law, Editor of Key and Elphinstone's Precedents in Conveyancing [*In the press*

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"In our opinion no better work on the subject with which it deals was ever written for students and young practitioners — *Law Notes*

" from a somewhat critical examination of it we have come to the conclusion that it would be difficult to place in a student's hand a better work of its kind - *Law Students Journal*

DEANE & SPURLING'S Elements of Conveyancing, with an Appendix of Students' Precedents Fourth Edition, by W LYON BLEASE, Barrister at Law Price 17s 6d net 1925

This book is complementary to and extends the information in Williams, and Deane and Blease's Real Property It deals with the Acts of 1925 The reader is taken through the component parts of Purchase Deeds, Leases, Mortgage Deeds Settlements and Wills and the way in which these instruments are prepared is explained Previous to this is a short history of Conveyancing and a chapter on Contracts for Sale of Land dealing with the statutory requisites, the form, particulars and conditions of sale, the abstract of title, requisitions etc and finally there is a chapter on conveyance by registration The second part of the book, covering about 100 pages, contains CLARK'S STUDENTS PRECEDENTS IN CONVEYANCING, illustrating the various documents referred to in the first part It is the only book containing a representative collection of precedents for students

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CRIMINAL LAW AND PROCEDURE.

ODGERS on the Common Law See page 7

GARSIA'S Criminal Law and Procedure in a Nutshell Fourth Edition By M GARSIA, Barrister at Law 110 pages Price 4s net 1929

Enumerates and classifies the more important crimes, gives a short history of the Criminal Courts and a brief outline of criminal procedure

HARRIS'S Principles and Practice of the Criminal Law Intended as a Lucid Exposition of the subject for the use of Students and the Profession Four

teenth Edition By A M WILSHIRE, Barrister-at Law 576 pages Price 15s net 1926

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WILSHERE'S Leading Cases illustrating the Criminal Law, for Students Second Edition 398 pages Price 15s net 1924

" This book is a collection of cases pure and simple without a commentary In each case a short rubric is given and then follow the material parts of the judge s opinions The selection of cases has been judiciously made and it embraces the whole field of criminal law The student who has mastered this and its companion volume will be able to face his examiners in criminal law without trepidation —*Scots Law Times*

FARRIN'S Criminal Law for Examinees Recent Examination Questions with Answers by R W FARRIN, Barrister at Law 128 pages Price 6s net 1930

DICTIONARY.

The Concise Law Dictionary By P G OSBORN, Barrister at Law 333 pages Price 15s net 1927

A book every student should have for general reference It deals with existing law and with legal history Legal maxims are translated and there are glossaries of Latin French and Early English words relating to the Law There is also a list of abbreviations used in citing law reports A very useful feature is a digest of some four hundred leading cases

EQUITY.

SNELL'S Principles of Equity Intended for the use of Students and Practitioners Twentieth Edition By H G RIVINGTON, M A Oxon, and A C FOUNTAINE 595 pages Price £1 10s net 1929

(—— Adapted for Indian Students By S C BAGCHI Price £1 1s net 1930)

"In a most modest preface the editors disclaim any intention to interfere with Snell as generations of students have known it Actually what they have succeeded in doing is to make the book at least three times as valuable as it ever was before Illustrations from cases have been deftly introduced and the whole rendered simple and intelligible until it is hardly recognisable —*The Students Companion*

BLYTH'S Analysis of Snell's Principles of Equity, with Notes thereon By E E BLYTH, LL D, Solicitor Fourteenth Edition 275 pages Price 10s 6d net 1929

"This is an admirable analysis of a good treatise read with Snell this little book will be found very profitable to the student —*Law Journal*

GARSIA'S Equity in a Nutshell By M GARSIA, Barrister at Law 76 pages Price 3s 6d net 1928

FARRIN'S Equity for Examinees Questions set at recent examinations with Answers by R W FARRIN, Barrister at Law 128 pages Price 6s net 1930

STORY'S Commentaries on Equity Jurisprudence Third English Edition By A E RANDALL 641 pages Price 37s 6d net 1920

WILSHERE'S Principles of Equity Second Edition By L B HILLARD, Barrister at Law 590 pages Price £1 2s 6d net 1929

In this book the author has endeavoured to *explain* and enable the student to *understand* Equity He has incorporated a large number of explanations from the authorities and has tried to make the subject intelligible while at the same time he has as much useful and relevant detail as the larger students works It is not a mere "cram book

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WHITE & TUDOR'S Leading Cases in Equity. A Selection of Leading Cases in Equity, with Notes Ninth Edition By E P HEWITT, K C 2 vols Price £4 10s net 1928

" White and Tudor towers high above all other works on Equity It is the fountain of Equity from which all authors draw and drink It is the book we all turn to when we want to know what the Judges of the old Court of Chancery or its modern representative the Chancery Division have said and decided on this or that principle of law It is the book in which counsel in his chambers puts such faith, and from which in Court counsel reads with so much confidence It is the book from the law of which Judges hesitate to depart —*Law Notes*

EVIDENCE.

All You Want for the Bar Final See page 19

COCKLE'S Leading Cases and Statutes on the Law of Evidence, with Notes, explanatory and connective, presenting a systematic view of the whole subject By ERNEST COCKLE, Barrister at Law Fourth Edition By S L PHIPSON 533 pages Price 18s 6d net 1925

This book and Phipson's Manual are together ***sufficient*** for all ordinary examination purposes and will save students the necessity of reading larger works on this subject

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PHIPSON'S Manual of the Law of Evidence Fourth Edition 282 pages Price 12s 6d net 1928

This is an abridgment for students of Mr Phipson's larger treatise With Cockle's Cases it will be sufficient for examination purposes

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BEST'S Principles of Evidence With Elementary Rules for conducting the Examination and Cross Examination of Witnesses Twelfth Edition By S L PHIPSON, Barrister at Law 673 pages Price £1 12s 6d net 1923

"The most valuable work on the law of evidence which exists in any country —*Law Times*

GARSIA'S Evidence in a Nutshell By MARSTON GARSIA, Barrister at Law 30 pages Price 2s 6d net 1929

WROTTESLEY on the Examination of Witnesses in Court Including Examination in Chief, Cross Examination, and Re Examination With chapters on Preliminary Steps and some Elementary Rules of Evidence Second Edition By F J WROTTESLEY, of the Inner Temple, Barrister at Law 173 pages Price 6s net 1929

This is a practical book for the law student It is interesting and is packed full of valuable hints and information The author lays down clearly and succinctly the rules which should guide the advocate in the examination of witnesses and in the argument of questions of fact and law, and has illustrated the precepts which he has given by showing how they have been put into actual practice by the greatest advocates of modern times

EXAMINATION GUIDES AND QUESTIONS.

The Concise Law Dictionary (*ante*, p 15) is an indispensable book of reference

GARSIA'S Digest of Questions set at Bar Examinations, 1914-27 134 pages Price 6s net

The questions are grouped logically under subjects, and references are given to text books where the answers will be found

The Q and A Series See details under subjects
Common Law By SUSMAN
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BROOKS'S All You Want for the Bar Final A Condensed Cram Book, dealing with Torts, Contracts, Equity, Civil Procedure, Evidence, Pleading By GRAHAM BROOKS Second edition 137 pages Price 5s 6d net 1929

The author claims that a full knowledge of the contents of this book is by itself sufficient for the purpose of answering all questions normally asked

STEELE'S Articled Clerk's Guide to and Self-Preparation for the Final and Honours Examinations Containing a Complete Course of Study, with Books to Read, Test Questions, Regulations, &c., and intended for the use of those Articled Clerks who read by themselves Incorporating Indermaur's Articled Clerk's Guide Second Edition By E A. STEELE and G R J DUCKWORTH, Solicitors, Principals of the Halifax Law Classes Price 5s net 1926

This book tells you what are the best books to read, how and when to read them gives test questions to be answered at the various stages of reading and a set of questions and answers Even if you are being coached you will find many useful hints and much sound advice in it

A New Guide to the Bar Containing the Regulations and Examination Papers Sixth Edition By M GARSIA, Barrister at Law 130 pages Price 5s net 1928

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