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PRINCIPLES

OF THE

ENGLISH LAW OF CONTRACT

AND OF

AGENCY IN ITS RELATION TO CONTRACT

ANSON

PRINCIPLES

OF THE

ENGLISH LAW OF CONTRACT

AND OF

AGENCY IN ITS RELATION TO CONTRACT

BY

THE RIGHT HONOURABLE

SIR WILLIAM R. ANSON, BART., D.C.L.

OF THE INNER TEMPLE, BARRISTER-AT-LAW
SOMETIME WARDEN OF ALL SOULS COLLEGE, OXFORD

Seventeenth Edition

BY

JOHN C. MILES, KT., M.A., B.C.L.

OF THE INNER TEMPLE, BARRISTER-AT-LAW
FELLOW OF MERTON COLLEGE, OXFORD

AND

J. L. BRIERLY, M.A., B.C.L.

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PREFACE
TO THE SEVENTEENTH EDITION

SIR MAURICE L. GWYER, the editor of the five preceding editions of this book, having been appointed Solicitor to H. M. Treasury, has felt himself prevented by other duties from editing the present edition. The Delegates of the Clarendon Press have asked us to undertake the task.

We have endeavoured to preserve the characteristic features and aims of the book, as Sir William Anson set them forth in his preface to the Sixth edition, which is here reprinted. At the same time we have felt that the purpose of a book which is intended for students and deals with a constantly developing subject justifies a freer revision than an editor might generally be entitled to give to a book which is not his own. The most important alterations which we have made in the present edition will be found on pp. 80–4 (part performance), pp. 109–11 (composition with creditors), pp. 126–40 (infants), pp. 153–69 (mistake), pp. 222–3 (definition of a wager), pp. 242–7 (restraint of trade), pp. 248–52 (severability of illegal contracts), pp. 277–8 (the recent decision of the Privy Council in the case of the Lord Strathcona Steamship Co.), pp. 284–95 (assignment), pp. 330–4 (discharge by agreement), pp. 359–66 (conditions and warranties under the Sale of Goods Act), and pp. 384–6 (*quantum meruit*). We have omitted the section which in previous editions dealt with the assignment of obligations on the transfer of interests in land as this subject is now more adequately dealt with in books treating of the law of property than when Sir William Anson wrote.

We have to thank for many valuable criticisms and suggestions our colleagues, Mr. G. C. Cheshire of Exeter College, Mr. C. K. Allen of University College, Mr. H. G. Hanbury of Lincoln College, and Mr. F. H. Lawson of Merton College.

With this edition Sir William Anson's book, which was first published in 1879, attains its jubilee.

J. C. M.
J. L. B.

OXFORD,
February, 1929.

ERRATA

p. 19	sidenote:	*for* 6 B. & Ad.	*read* 4 B. & Ad.
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,, 94	,,	,, Cole	,, Coles
,, 111	,,	,, 1 C. & P. 357	,, 1 C. & P. 557
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,, 138	,,	,, Silver	,, Silber
,, 139	,,	,, 3 K.B. 606	,, 3 K.B. 607
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,, 380	,,	,, Ferville	,, Freville

PREFACE TO THE SIXTH EDITION

WHEN the subject of Contract was first introduced into the School of Jurisprudence at Oxford, in the year 1877, teachers of Law had to consider the books which their pupils might best be directed to read. Some works on the subject, of acknowledged value to the practising lawyer, were hardly suitable for beginners, and the choice seemed to lie between the works of Mr. Leake, Sir Frederick Pollock, and the late Mr. Smith. Of these, Mr. Smith alone wrote expressly for students, and I had, as a student, read his book with interest and advantage. But I thought that it left room for an elementary treatise worked out upon different lines.

Neither Sir Frederick Pollock nor Mr. Leake wrote for beginners, and I feared lest the mass of statement and illustration which their books contain, ordered and luminous though it be, might tend to oppress and dishearten the student entering upon a course of reading for the School of Law. Being at that time the only public teacher of English Law in the University, I had some practical acquaintance with the sort of difficulties which beset the learner, and I endeavoured to supply the want which I have described.

In working out the plan of my book I necessarily studied the modes of treatment adopted by these two writers, and I became aware that they are based on two totally different principles. Mr. Leake treats the contract as a subject of litigation, from the point of view of the pleader's chambers. He seems to ask, What are the kinds of contract of which this may be one? Then—What have I got to prove? By what defences may I be met? Sir Frederick Pollock regards the subject *ab extra*; he inquires what is the nature

of that legal relation which we term contract, and how is it brought about. He watches the parties coming to terms, tells us how the contract may be made, and by what flaws in its structure it may be invalidated. Mr. Leake treats the subject from every point of view in which it can interest a litigant. Sir Frederick Pollock wrote a treatise on the Formation of Contract: only in later editions has he introduced a chapter on Performance.

To both these writers I must own myself to be under great obligations. If I try to apportion my gratitude, I should say that perhaps I obtained the most complete information on the subject from Mr. Leake, but that Sir Frederick Pollock started me on my way.

The object which I set before me was to trace the principles which govern the contractual obligation from its beginning to its end; to show how a contract is made, what is needed to make it binding, whom it may affect, how it is interpreted, and how it may be discharged. I wished to do this in outline, and in such a way as might best induce the student to refer to cases, and to acquire the habit of going to original authorities instead of taking rules upon trust. So I have cited few cases: not desiring to present to the reader all the modes in which principles have been applied to facts, and perhaps imperceptibly qualified in their application, but rather to illustrate general rules by the most recent or most striking decisions.

In successive editions I have made some changes of arrangement, and have tried to keep the book up to date. Since it first appeared, in 1879, the Legislature has been busy with the law of Contract. The law relating to Married Women's Property, to Bankruptcy, to Bills of Exchange, to Partnership, to Mercantile Agency, has either been recast or thrown for the first time into statutory form: the effects of the Judicature Act in the general

application of equitable rules and remedies have become gradually apparent in judicial decisions. Thus it has been necessary to alter parts of my book from time to time, but in this, the sixth, edition I have made many changes for the sake of greater clearness and better arrangement. The whole of the chapters on Offer and Acceptance, on the Effects of Illegality, on the Discharge of Contract by Breach, and a great part of the chapters on Mistake and Fraud, Infants and Married Women, have been re-written, and the rest of the book has undergone many minor alterations as the result of a general revision.

I should add one word as to the place assigned to Agency. It is a difficult subject to put precisely where the reader would expect to find it. It is a mode of forming the contractual relation: it is also a form of the Contract of Employment. From the first of these points of view it might form part of a chapter on Offer and Acceptance, regarding the agent as a mode of communication; or it might form part of a chapter on the Capacity of Parties, regarding Representation as an extension of contractual capacity; or, again, it might form part of a chapter on the Operation of Contract, regarding Agency as a means whereby two persons may make a contract binding on a third.

But upon the whole I think it is best to try and make the student understand that the agent represents his principal in virtue of a special contract existing between them, the Contract of Employment. There is a disadvantage, no doubt, in introducing into a treatise on the general principles of contract a chapter dealing with one of the special sorts of contract, but I believe that the student will find less difficulty in this part of the law if he is required to understand that the agent acquires rights and incurs liabilities for his principal, not in virtue of any occult

theory of representation, but because he is employed for the purpose, by a contract which the law recognizes.

I should not close the Preface without an expression of thanks to the friends who from time to time in the last ten years have helped me with suggestions or corrections of this book. To his Honour Judge Chalmers, to Sir Frederick Pollock, and in especial to the Vinerian Professor, Mr. Dicey, I owe much in the way of friendly communication on points of novelty or difficulty. Nor should a teacher of law be unmindful of his debt to the student. The process of explaining a proposition of law to a mind unfamiliar with legal ideas, necessitates a self-scrutiny which is apt to lead to a sad self-conviction of ignorance or confusion of thought; and the difficulties of the learner will often present in a new light what had become a commonplace to the teacher. Therefore I would not seem ungrateful to the law students of Trinity College, past and present, whom I have tried, and sometimes not in vain, to interest in the law of Contract.

I hope that the present edition of this book may be a little shorter than the previous one. I strongly desire to keep it within such limits as is proper to a statement of elementary principles, with illustrations enough to explain the rules laid down, and, as I hope, to induce the student to consult authorities for himself.

W. R. A.

All Souls College,
January, 1891.

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SOME ABBREVIATIONS USED IN REFERENCE

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A. & E.	Adolphus and Ellis	Q. B. 1834–1841
B. & Ad.	Barnwall and Adolphus	K. B. 1830–1834
B. & Ald.	Barnwall and Alderson	K. B. 1817–1822
B. & C.	Barnwall and Cresswell	K. B. 1822–1830
B. & P.	Bosanquer and Puller	C. P. 1796–1804
Beav.	Beavan	Rolls Court, 1838–1866
B. & S.	Best and Smith	Q. B. 1861–1866
Bing.	Bingham	C. P. 1824–1840
Bing. N. C.	Bingham's New Cases	
Bulst.	Bulstrode	K. B. 1610–1625
Burr.	Burrows	K. B. 1756–1772
Camp.	Campbell. K. B. & C. P.	Nisi Prius, 1807–1818
Carth.	Carthew	K. B. 1686–1701
C. B.	Common Bench	C. P. 1845–1865
C. B., N. S.	Common Bench, New Series	
Cl. & F.	Clark & Finelly	House of Lords, 1831–1846
Cr. & M.	Crompton and Meeson	Ex. 1834–1836
C. M. & R.	Crompton, Meeson, and Roscoe	
Co. Rep.	Coke's Reports	Eliz. and James
Com. Cas.	Commercial Cases	K. B. 1895–19—
Cowp.	Cowper	K. B. 1774–1778
Cox	Cox's Criminal Cases	1843–19—
C. Rob.	Christopher Robinson	Admiralty, 1798–1808
Cro. Eliz. or 1 Cro.	Croke, of the reign of Elizabeth.	
Cro. Jac. or 2 Cro.	,, ,, James.	
D. & J.	De Gex and Jones	Ch. App. 1857–1859
D. F. & J.	De Gex, Fisher, and Jones	,, 1859–1862
D. M. & G.	De Gex, Macnaghten, and Gordon	,, 1851–1857
Dow & Cl.	Dow and Clark	House of Lords, 1827–1832
Dr. & Sm.	Drewry and Smale	V.-C. Kindersley, 1859–1866
Dr. & War	Drury and Warren	Chancery, 1841–1843
E. & B.	Ellis and Blackburn	Q. B. 1852–1858
E. & E.	Ellis and Ellis	Q. B. 1859–1861
Esp.	Espinasse K. B. & C. P.	Nisi Prius, 1793–1806
Ex.	Exchequer	1847–1856
F. & F.	Foster and Finlason	Cases at Nisi Prius, 1856–1867
H. Bl.	Henry Blackstone	C. P. 1786–1788
H. L. C.	House of Lords Cases	1846–1866
H. & C.	Hurlstone and Coltman	Ex. 1862–1865
H. & N.	Hurlstone and Norman	Ex. 1856–1862
Ir. C. L.	Irish Common Law Reports.	
J. & H.	Johnson and Hemming	V.-C. Page Wood, 1859–1862
K. & J.	Kay and Johnson	V.-C. Page Wood, 1854–1856
L. J. Ex.	Law Journal Exchequer	
L. J. Q. B.	,, ,, Queen's Bench	1828–19—
L. J. Ch.	,, ,, Chancery	

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

L. T.	Law Times Reports		1859–19–
Lev.	Levinz	K. B. & C. P.	1660–1696
Madd.	Maddock	Vice-Chancellor's Court,	1817–1826
M. & G.	Manning and Granger	C. P.	1840–1845
M. & S.	Maule and Selwyn	K. B.	1813–1817
M. & W.	Meeson and Welsby	Ex.	1836–1847
Mer.	Merivale	Chancery,	1813–1817
Mod. Rep	Modern Reports, Common Law and	Chancery,	1660–1702
My. & K.	Mylne and Keen	Chancery,	1832–1837
P. Wms	Peere Williams	Chancery,	1695–1736
Ph.	Phillips	Chancery,	1841–1849
Q. B.	Queen's Bench		1841–1852
Rep. in Ch	Reports in Chancery		1625–1688
Rolle Abr.	Rolle's Abridgment		1614–1625
Russ.	Russell	Chancery,	1826–1829
R. & M	Russell and Mylne		1829–1831
Salk.	Salkeld	K. B. C. P. Ch. & Ex.	1689–1712
Sch. & L.	Schoales and Lefroy	Irish Chancery,	1802–1806
Sid.	Siderfin	K. B. C. P. & Ex.	1657–1670
Sim.	Simons	Chancery,	1826–1849
Sm. L. C	Smith's Leading Cases (12th ed.).		
Str.	Strange		1727–1784
Taunt.	Taunton	C. P.	1807–1819
T. R.	Term Reports, or Durnford and East's Reports	K. B.	1785–1796
T. L. R.	Times Law Reports		1884–19—
Ventr.	Ventris	K. B.	1660–1685
Vern.	Vernon	Chancery,	1680–1718
Ves.	Vesey junior	Chancery,	1789–1816
Ves. Senr.	Vesey senior	Chancery,	1746–1755
Y. & C.	Young and Collyer	V. C. Knight-Bruce,	1834–1842
Yelv.	Yelverton	K. B.	1601–1613
W. Bl.	William Blackstone	K. B.	1746–1779

LAW REPORTS, 1865–19—.

L. R. Q. B.		Queen's Bench	1865–1875
L. R. C. P.		Common Pleas	
L. R. Ex.		Exchequer	
L. R. Eq.		Equity	
L. R. Ch.		Chancery Appeals	
L. R. H. L.	House of Lords	English and Irish Appeals	
L. R. Sc. App.	House of Lords	Scotch Appeals	
Q. B. D.		Queen's Bench Division	1875–1891
C. P. D.		Common Pleas Division	1875–1891
Ex. D.		Exchequer Division	
Ch. D.		Chancery Division	1875–1891
App. Cas.	House of Lords and Privy Council Appeal Cases		1875–1891
[189–] Q. B.		Queen's Bench Division	1891–1900
[19—] K. B.		King's Bench Division	1901–19—
[189–] Ch.		Chancery Division	1891–19—
[189–] P.	Probate, Divorce, and Admiralty Division		1891–19–
[189–] A. C.	House of Lords and Privy Council Appeal Cases		1891–19–

PART I

THE PLACE OF CONTRACT IN JURISPRUDENCE

CHAPTER I

Meaning of Agreement, Contract, Obligation

Outline of the subject.

At the outset of an inquiry into the principles of the law of Contract it may be well to state the nature of the inquiry, its main purposes, and the order in which they arise for discussion.

Nature of Contract.

First, therefore, we must ask what we mean by Contract, and what is the relation of Contract to other legal conceptions.

Its formation

Next we must ask how a contract is made; what things are needful to the Formation of a valid contract.

Its operation.

When a contract is made we ask whom it effects, or can be made to affect. This is the Operation of contract.

Its interpretation.

Then we inquire how the Courts regard a contract in respect of the evidence which proves its existence, or the construction placed on its terms. This we may call the Interpretation of contract.

Its discharge.

Last we come to the various modes by which the contractual tie is unfastened and the parties relieved from contractual liability. This is the Discharge of contract

And first as to the nature of Contract.

The object of Law is Order, and the result of Order is that men are enabled to look ahead with some sort of security as to the future. Although human action cannot be reduced to the uniformities of nature, men have yet endeavoured to reproduce, by Law, something approaching to this uniformity. As the law relating to property had its origin in the attempt to ensure that what a man has lawfully acquired he shall retain, so the law of contract is intended to ensure that what a man has been led

to expect shall come to pass; that what has been promised to him shall be performed.

Such is the object of Contract, and we have to analyse this conception, and ascertain and test the machinery by which men are constrained to keep faith with one another.

Contract results from a combination of the two ideas of Agreement and Obligation. This statement must be limited in its application to a scientific system of Jurisprudence in which rights have been analysed and classified. The conception of Obligation, as we understand it, was probably not clearly present to the minds of the judges who first enforced promises to do or to forbear; and we may be quite sure that they did not rest their decisions, as to the validity of such promises, upon Agreement or the union of wills. But the analysis is none the less accurate because it has not always been made or understood.

Contract is that form of Agreement which directly contemplates and creates an Obligation; the contractual Obligation is that form of Obligation which springs from Agreement. We should therefore try to get a clear idea of these two conceptions, and to this end Savigny's analysis of them may well be considered with reference to the rules of English Law. We will begin with his analysis of Agreement.

§ 1. *Agreement.*

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

2. The intention of the parties must be distinct, and common to both. Agreement does not admit of Doubt or Difference; as an illustration will show —

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

Difference. 'Will you buy my horse for £50?' 'I will give £20 for it.'

3. The parties must communicate to one another their common intention. Thus a mere mental assent to an offer cannot constitute an agreement. *A* writes to *X* and offers to buy *X*'s horse for £50. *X* makes up his mind to accept, but never tells *A* of his intention to do so. He cannot complain if *A* buys a horse elsewhere. known to both,

4. The intention of the parties must refer to legal relations: it must contemplate the assumption of legal rights and duties as opposed to engagements of a social character. It is not easy to prescribe a test which shall distinguish these two sorts of engagements, for an agreement may be reducible to a pecuniary value and yet remain outside the sphere of legal relations. The Courts must decide such matters, looking at the conduct of the parties and all the circumstances of the case, and applying their own knowledge of human affairs. referring to legal relations, *Infra*, p 39.

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

Agreement then is the expression by two or more persons of a common intention to affect their legal relations.

But Agreement as thus defined by Savigny has a wider meaning and includes transactions of other kinds than Contract as we commonly use the term. Agreement a wider term than Contract

(1) There are Agreements the effect of which is concluded as soon as the parties thereto have expressed their common consent in such manner as the law requires. Such are Conveyances and Gifts, wherein the agreement of the parties effects at once a transfer of rights *in rem*, and leaves no outstanding obligation subsisting between them. It may not create Obligation. As to Gift, see Hill v Wilson, L R 8 Ch 888

(2) There are Agreements which effect their purpose immediately upon the expression of intention; but which differ from simple conveyance and gift in creating further Or may only create it incidentally.

outstanding obligations between the parties, and sometimes in providing for the coming into existence of other obligations, and those not between the original parties to the agreement.

Sottomayer v. De Barros 5 P.D. at p 101 per Lord Hannen

Marriage, for instance, 'is based upon the contract of the parties, but it is a status arising out of a contract'; at the same time it brings into existence obligations between the parties which are attached to the relationship by law.

So too a settlement of property in trust, for persons born and unborn, effects much more than the mere conveyance of a legal estate to the trustee; it imposes on him incidental obligations some of which may not come into existence for a long time; it creates possibilities of obligation between him and persons who are not yet in existence. These obligations are the result of Agreement. Yet they are not Contract.

Or may fail to do so through some legal flaw

(3) Savigny's definition would include Agreements which, though intended to affect legal relations, fail to do so because they do not satisfy some requirement of the law of the country in which they are made, or are to be performed, or become the subject of litigation.

It remains to ascertain the characteristic of Contract as distinguished from the forms of Agreement just described.

A promise essential to contract

An essential feature of Contract is a *promise* by one party to another, or by two parties to one another, to do or forbear from doing certain specified acts. By a *promise* we mean an accepted offer as opposed to an offer of a promise.

Nature of an offer;

An offer must be distinguished from a statement of intention; for an offer imports a willingness to be bound to the party to whom it is made. Thus, if *A* says to *X* 'I mean to sell one of my sheep if I can get £5 for it,' this is a mere statement which does not admit of being turned into an agreement: but if *A* says to *X* 'I will sell you whichever of my sheep you like to take for £5,' we have an offer.

A promise, again, must be distinguished from an offer

of a promise. An offer of a promise becomes a promise by acceptance: until acceptance it may be withdrawn; after acceptance its character is changed. If *A* says to *X* 'I will sell you my sheep for £5,' and *X* says 'I will buy it for that sum,' there is a promise by *A* to sell, a promise by *X* to buy, and a contract between the two. of a promise.

To make that sort of agreement which results in contract, there must be (1) an offer, (2) an acceptance of the offer, resulting in a promise, and (3) the law must attach a binding force to the promise, so as to invest it with the character of a legal obligation. Or we may say that such an agreement consists in an expression of intention by one or both of two parties, of expectation by one or both, wherein the law requires that the intention should be carried out according to the terms of its expression and the expectation thereby fulfilled[1].

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

§ 2 *Obligation.*

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

Savigny, Obl ch. 1 ss 2–4.

[1] Sir T. Erskine Holland's view is that the law does not require contracting parties to have a common intention but only to seem to have one, that the law 'must needs regard not the will itself, but the will as expressed.' The difference between the two views may be shortly stated. The one holds that the law does not ask for 'a union of wills' but only for the phenomena of such a union. The other is that the law does require the wills of the parties to be at one, but that when men present all the phenomena of agreement they are not allowed to say that they were not agreed. For all practical purposes the difference is immaterial. But, after all, it is the intention of the parties which the Courts endeavour to ascertain, and it is their intention to agree which is regarded as a necessary inference from words or conduct of a certain sort. See *per* Lord Watson in *Stewart v. Kennedy*, 13 App. Cas. 108, at p. 123. 'The appellant contracted, as every person does who becomes a party to a written contract, to be bound in case of dispute by the interpretation which a Court of Law may put upon the language of the instrument. The result of admitting any other principle would be that no contract in writing could be obligatory if the parties honestly attached in their own minds different meanings to any material stipulation.' Jurisprudence, ed 13, pp. 263 *et seq*

Its characteristics seem to be these:—

A control

1. It consists in a control exerciseable by one or both of two persons or groups over the conduct of the other. They are thus bound to one another by a tie which the Roman lawyers called *vinculum juris*, which lasts, or should last, until the objects of the control are satisfied, when their fulfilment effects a *solutio obligationis*, an unfastening of the legal bond. That this unfastening may also take place in other ways than by fulfilment will be shown hereafter.

needing two parties.

2. Such a relation as has been described necessitates two parties, and these must be definite.

Faulkner v Lowe, 2 Ex 595, Ellis v Kerr, [1910] 1 Ch 529.

There must be two, for a man cannot at Common Law be under an obligation to himself, or even to himself in conjunction with others[1].

The parties must be definite.

And the persons must be definite. A man cannot be obliged or bound to the entire community: his liabilities to the political society of which he is a member are matter of public, or criminal, law. Nor can the whole community be under an *obligation* to him: the right on his part correlative to his liabilities aforesaid would be a right *in rem*, would be in the nature of Property as opposed to Obligation. Thus it is of the essence of Obligation that the liabilities which it imposes are imposed on definite persons, and are themselves definite: the rights which it creates are rights *in personam*.

The liabilities also definite.

3. The liabilities of Obligation relate to definite acts or forbearances. The freedom of the person bound is limited only in reference to some particular act or series or class of acts. Thus if I contract to do work for *A* by a certain time and for a fixed reward, my general freedom is abridged by the special right of *A* to the performance by me of the stipulated work, and he too is in like manner obliged to receive the work and pay the reward.

The matter reducible to a money value.

4. The matter of the obligation, the thing to be done or forborne, must possess, at least in the eye of the law, a pecuniary value, otherwise it would be hard to distin-

[1] But see now Law of Property Act, 1925, § 82.

guish legal from moral and social relations. Gratitude for a past kindness cannot be measured by any standard of value, nor can the annoyance or disappointment caused by the breach of a social engagement. Courts of law can only deal with matters to which the parties have attached an importance estimable by the standard of value current in the country in which they are.

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

Sources of Obligation

We may note here the various sources of Obligation:—

Agreement

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

Delict

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

Breach of Contract.

3. Obligation may arise from Breach of Contract. While *A* is under promise to *X*, he is under an obligation to perform his promise to *X* when performance becomes due. But if *A* breaks his promise, the right of *X* to performance has been violated, and, even if the contract is not discharged, a new obligation to make due satisfaction to *X* is imposed by law on *A*, precisely similar in kind to that which arises upon a delict or breach of a Duty [1].

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

Holmes on the Common Law, p 300.

Judgment

4. Obligation may arise from the judgment of a Court of competent jurisdiction ordering something to be done or forborne by one of two parties in respect of the other. It is an obligation of this character which is unfortunately styled a Contract of Record in English Law. The phrase is unfortunate because it suggests that the obligation springs from Agreement, whereas it is really imposed upon the parties *ab extra*.

Quasi-Contract.

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

See Ch xxii

Acts springing from Agreement but wider than Contract.

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

Definition of Contract.

And so we are now in a position to attempt a definition of Contract, or the result of the concurrence of Agreement and Obligation. Contract is a *legally binding Agreement made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others* [1].

consequences of his conduct, and, in making a promise, to have in view not its performance but the payment of damages for its breach. But it is surely not desirable to push legal analysis so far as to disregard altogether the aspect in which men view their business transactions, and to treat contract as a wager in which performance is backed against damages. For Sir T. Erskine Holland's view see p. 5, note.

[1] This analysis, as will appear later, is not in every respect applicable to the anomalous contract under seal.

PART II

THE FORMATION OF CONTRACT

CHAPTER II

Elements of a Valid Contract

WE have now to ascertain how contracts are made. A part of the definition of contract is that it is a *legally binding* agreement: it follows therefore that we must try to analyse the elements of a contract such as the law of England will hold to be binding between the parties to it.

We look in the first instance for:—

Elements necessary to a valid contract

1. A distinct communication by the parties to one another of their intention to make an agreement affecting their legal relations; in other words, Offer and Acceptance.

2. The presence of either (*a*) Form, or (*b*) Consideration.

If (1) and (2) are satisfied we have a contract which, *primâ facie*, will hold, or at any rate we have the outward appearance of a contract; and yet some necessary elements of validity may be wanting. Such are:—

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

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

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

Results of their absence.

Where all these elements co-exist, there is a valid Contract: where one is absent the Contract may be either *void, voidable,* or *unenforceable.*

Termino-logy.

The student should note carefully these terms, because they are of constant use in the law of contract, because they are not infrequently used with insufficient precision, and because they signify very real differences in the rights arising out of contract.

A void contract is one which is destitute of legal effect. Strictly speaking, 'void contract' is a contradiction in

terms; for the words describe a state of things in which, despite the intention of the parties, no contract has been made. Yet the expression, though faulty, is a compendious way of putting a case in which there has been the outward semblance without the reality of contract.

A voidable contract is one which one of the parties may affirm or reject at his option.

An unenforceable contract is one which is good in substance, though, by reason of some technical defect, one or both of the parties cannot sue upon it.

Contract void.

A void contract may be void on the face of it, or proof may be required to show that it is void. Where offer and acceptance do not correspond in terms, or where the object of agreement is the commission of a crime, the transaction is plainly void. Where a contract is made under certain conditions of mistake or where an infant makes a promise which the Legislature has declared, in the case of infancy, to be void, it is necessary to prove in the one case the fact of mistake, in the other the fact of infancy. In default of such proof, such a transaction, good upon the face of it, and not shown to possess any legal flaw, would be enforced by the Courts.

But this does not alter the nature of the transaction, as will be seen when we compare that which is void, and that which is voidable.

Voidable.

When a contract is shown to be void it can create no legal rights. It is a nullity. But a voidable contract is a contract with a flaw of which one of the parties may, if he please, take advantage. If he chooses to affirm the contract, or if he fails to use his right of avoidance within a reasonable time so that the position of the parties becomes altered, or if he take a benefit under the contract, or if third parties acquire rights under it, he will be bound by it.

An illustration will show the essential difference between what is void and what is voidable.

(1) *A*, being led to think that *X* is *Y* and that he is

selling to Y, sends goods to X: X sells the goods to M. The transaction between A and X is void, and M acquires no right to the goods.

Cundy v Lindsay, 3 App. Ca 459.

(2) A sells goods to X, being led by the fraud of X to think that the market is falling. Before A has discovered the fraud or has acted on the discovery, X resells the goods to M, who is innocent of the fraud and gives value for the goods. As the transaction between A and X is voidable and not void, M acquires a good title to the goods, and A is left to his remedy against X by the action for Deceit, an action *ex delicto*.

Babcock v Lawson, 4Q B D 394.

In the first of these cases the nullity of the contract prevents any right arising under it at all when the mistake is proved. In the second there is a contract, and one capable of creating rights, and the person defrauded has a right to affirm or avoid, limited as above described.

Unenforceable

The difference between what is voidable and what is unenforceable is mainly a difference between substance and procedure. A contract may be good, but incapable of proof owing to want of written form, or failure to affix a revenue stamp. Writing in the first case, a stamp in the last, may satisfy the requirements of law and render the contract enforceable, but it is never at any time in the power of either party to avoid the transaction. The contract is unimpeachable, only it cannot be proved in Court.

Confusions of terminology.

This much will suffice to guide the student as to the meaning of these terms, but he must be prepared to find their distinction obscured by laxity in the uses of the word 'void.'

Not only is the term 'void contract' in itself technically inaccurate, but a contract is sometimes said to be void, not because it was destitute of legal effect from its commencement, but because it has been fully performed, and so has ceased to have legal operation. It would be more proper to describe such a contract as 'discharged.'

There may also be cases in which in certain circumstances 'void' must be practically construed as 'voidable.'

A contract or a statute may declare that in a specified event a transaction shall be 'void' or 'null and void'; but a party whose own wrongful act or default has brought about the avoidance of the transaction is never permitted to allege its invalidity and so take advantage of his own wrong. The operation of this rule in effect gives the innocent party an option whether he will or will not insist on the provision in the contract or statute that the transaction shall be void; and it is therefore for practical purposes equally true to say that the transaction is void as against the party in default or voidable at the option of the other.

Malins v Freeman, 4 Bing. N. C. 395

N. Z Shipping Co. v Soc. des Ateliers, [1919] A. C. 1.

It may be useful to the student at this point, and before considering in detail the various elements of validity in Contract, to take note of some rules of procedure, and some features of terminology which if not understood and kept in view may cause him difficulty and confusion of mind.

Procedure in actions on contract.

In working out the law of Contract mainly with the aid of decided cases it is important to know so much of procedure as will inform us what it is that the parties are asking or resisting. Under the same conditions of fact a suitor may succeed if he asks for the remedy appropriate to his case, or fail if he seeks one that is not appropriate.

Remedies.

A plaintiff in an action on a contract may ask for one of five things:—

Damages, or compensation for the non-performance of the contract:

Specific performance, or an order that the contract shall be carried into effect by the defendant according to its terms:

Injunction, or the restraint of an actual or contemplated breach of contract:

Cancellation, or the setting aside of the contract:

Rectification, or the alteration of the terms of the contract so as to express the true intention of the parties [1].

[1] A plaintiff may also ask for a Declaration from the Court as to the true

Jurisdiction.

The first of these is the remedy formerly obtainable in the Common Law Courts; the other remedies could only be obtained in the Court of Chancery as administering Equity. The Chancery Court did not give damages [1], but directed that certain things should be done or forborne, whereby the rights of the parties were adjusted. The Judicature Acts now enable the High Court of Justice, the Court of Appeal, and every Judge of those Courts, to give effect indifferently to all equitable, as well as to all legal, rights and remedies.

36 & 37 Vict. c. 66 s. 24

Nevertheless the remedy formerly given by the Common Law Courts only is not only different in kind from the remedies formerly given in the Court of Chancery, but is administered on different principles.

Legal remedies.

If *A* has made a valid contract with *B*, he is entitled *as of right* to damages from *B* if *B* breaks the contract—the measure of damages is a topic to be dealt with hereafter—but it does not follow that he can get a decree for the specific performance of the contract, or an injunction to restrain *B* from doing such acts as would amount to its violation.

Equitable remedies.

Equitable remedies are limited partly by their nature, partly by the principles under which they have always been administered in Chancery.

The remedy by specific performance is necessarily limited in application to cases in which a Court can enforce its directions. Engagements for personal service illustrate the class of cases in which it would be neither possible nor desirable for a Court to compel parties to a performance of their contract; and where the contract is such that a Court will not grant a decree for specific performance it will not, as a rule, grant an injunction restraining from breach.

terms of a contract or his rights under it. This can scarcely be described as a 'remedy,' though the ascertainment of his rights with the assistance of the Court may enable him the more effectively to enforce his remedy thereafter, if the need should arise.

Societé Maritime v. Venus Co., 9 Com. Cas 289

[1] The power of giving damages, conferred on the Chancery Courts by the Chancery Amendment Act, 1858, was rarely used.

Limitations of the latter.

The principles on which equitable remedies are given impose a further limit to their application. Their history shows that they were special interventions of the king's grace, where the Common Law Courts were unable to do complete justice. They are therefore supplemental and discretionary; they cannot be claimed *as of right*. The suitor must show that he cannot otherwise obtain a remedy appropriate to his case, and also that he is a worthy recipient of the favour which he seeks.

Hence we find that where damages afford an adequate remedy, Courts of equity will not intervene, a rule which is constantly exemplified in cases where specific performance is asked for, and the suitor is told that damages will give him all the compensation which he needs. And again we find that the application of equitable remedies is affected by the maxim, 'he who seeks equity must do equity.' One who asks to have his contract rectified or cancelled, on the ground that he has been the victim of mistake, fraud, or sharp practice (which is not technically the same as fraud), must show that his dealings throughout the transaction have been straightforward in every respect.

This rule applies to all equitable remedies, and should not be forgotten by the student. He will do well to inform himself, at the outset of a case, of the remedies which the parties seek; for a party to a suit may lose his case, not because he has no claim of right, but because he has sought the wrong remedy.

CHAPTER III

Offer and Acceptance

A CONTRACT consists in an actionable promise or promises. Every such promise involves two parties, a promisor and a promisee, and an expression of common intention and of expectation as to the act or forbearance promised. So on the threshold of our subject we must bring the parties together, and must ask, How is this expectation created which the law will not allow to be disappointed? This part of our subject may be set forth briefly in the rules which govern Offer and Acceptance.

§ 1. *Every contract springs from the Acceptance of an Offer.*

Agreement must originate in offer and acceptance.

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

Comm bk 2 c 30

There may be difficulty in the uniform application of this rule. Sir F. Pollock suggests cases to which it may

Contracts, ed. 9. p 7

not readily apply—the signature of a prepared agreement —the acceptance by two parties of terms suggested by a third. But in effect his instances are reducible to question and answer in an elliptical form. If *A* and *X* are discussing the terms of a bargain, and eventually accept a suggestion made by *M*, there must be a moment when *A*, or *X*, says or intimates to the other, 'I will accept if you will [1].' It is unwise, as Sir F. Pollock truly says, to push analysis too far: but on the other hand it is a pity to give up a good working principle because its application is sometimes difficult.

As a promise involves something to be done or forborne it follows that to make a contract, or voluntary obligation, this expression of a common intention must arise from an offer made by one party to another who accepts the offer made, with the result that one or both are bound by a promise or obligatory expression of intention.

The process of offer and acceptance may take place in any one of three ways.

How offer and acceptance must be made.

1. In the offer to make a promise followed simply by assent: this, in English law, applies only in the case of contracts under seal.

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

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

The foregoing modes of offer and acceptance need explanation.

Illustrations.

1. The first is, in English law, applicable only to such contracts as are made under seal; for no promise, not under seal, is binding unless the promisor obtains something from the promisee in return for his promise. This

[1897] A C 59.

[1] The case of *Clarke v. Dunraven* instanced by Sir F. Pollock will be discussed later: see p. 46. It suggests difficulties of a different character.

something, which may be an act, a forbearance, or a promise, is called Consideration. *Infra*, pp 88 *et seq.*

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

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

Difference between contracts on executed and executory considerations.

It will be observed that case (2) differs from (3) in an important respect. In (2) the contract does not come into existence until one party to it has done all that he can be required to do. It is performance on one side which makes obligatory the promise of the other; the outstanding obligation is all on one side. In (3) each party is bound to some act or forbearance which, at the time of entering into the contract, is future: there is an outstanding obligation on each side.

Where, as in case (2), it is the doing of the act which concludes the contract, then the act so done is called an 'executed [1] (i.e. present) consideration' for the promise. Where a promise is given for a promise, each forming the consideration for the other, such a consideration is said to be 'executory' or future.

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

'Executed consideration' as opposed to 'executory' means *present* as opposed to *future*, an *act* as opposed to a *promise*. Leake, ed. 7. p. 6

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

'Executed contract of sale' means a bargain and sale which has passed the property in the thing sold, while 'executory contracts of sale' are contracts as opposed to conveyances, and create rights *in personam* to a fulfilment of their terms instead of rights *in rem* to an enjoyment of the property passed. Chalmers' Sale of Goods Act, ed. 9. p. 8.

§ 2. *An Offer or its Acceptance or both may be made either by words or by conduct.*

The description which has been given of the possible forms of offer and acceptance shows that conduct may take the place of written or spoken words, in offer, in acceptance, or in both. A contract so made is sometimes called a tacit contract; the intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case.

Offer and acceptance by conduct

Pavnter v Williams, 1 C & M 810

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

A ordered of *X* a publication which was to be completed in twenty-four monthly numbers. He received eight and then refused to receive more. No action could be brought upon the original contract because it was a contract not to be performed within the year, and there was no memorandum in writing which (as will be seen later) is required in such cases to satisfy the Statute of Frauds, but it was held that, although *A* could not be sued on his promise to take twenty-four numbers, there was an offer and acceptance of each of the eight numbers received, and a promise to pay for them thereby created.

Infra, p 74

Mavor v Pyne, 3 Bing 289

Sometimes however the inference from conduct is not so clear, but the conduct of the parties may be inexplicable on any other ground than that they intended to contract. In the case of *Crears v. Hunter*, *X*'s father was indebted to *A*, and *X* gave to *A* a promissory note for the amount due with interest payable half-yearly at five per cent. *A* thereupon forbore to sue the father for his debt. The father died, and *A* sued *X* on the note. Was there evidence to connect the making of the note with the

19 Q. B. D 345

forbearance to sue? In other words, did *X* offer the note in consideration of a forbearance to sue?

'It was argued,' said Lord Esher, M. R., 'that the request to forbear must be express. But it seems to me that whether the request is express or is to be inferred from circumstances is a mere question of evidence. If a request is to be implied from circumstances it is the same as though there was an express request.'

The Court of Appeal held that the jury were entitled to infer a contract in which *X* made himself responsible for the debt if *A* would give time to the debtor.

§ 3. *An offer is made when, and not until, it is communicated to the offeree.*

This rule is not the truism that it appears.

Offer must be communicated.

(*a*) *X* offers a promise for an act. *A* does the act in ignorance of the offer. Can he claim performance of the promise when he becomes aware of its existence?

An American case—*Fitch v. Snedaker*—is directly in point. It is there laid down that a reward cannot be claimed by one who did not know that it had been offered. The decision seems undoubtedly correct in principle. One who does an act for which a reward has been offered, in ignorance of the offer cannot say either that there was a *consensus* of wills between him and the offeror, or that his conduct was affected by the promise offered. On no view of contract could he set up a right of action [1].

38 N Y. 248.

(*b*) *A* does work for *X* without the request or knowledge of *X*. Can he sue for the value of his work?

A man cannot be forced to accept and pay for that which he has had no opportunity of rejecting. In such circumstances acquiescence cannot be presumed from

The authority of the State Courts on this point is not uniform. See Ruling Cases, vol. vi. p. 138, American notes, and cases there cited.

Gibbons v. Proctor is the only English case which runs counter to the proposition above laid down, but it seems clear, as Sir F. Pollock says (ed. 9. p. 23), that it cannot be law as reported.

4 L. T. 594.

Williams v. Carwardine merely shows that the motive of the plaintiff's act was immaterial. The plaintiff in that case knew of the offer when she gave the information.

5 B. & Ad. 621. 5 C. & P. 574.

Silence does not give consent,

silence. Where the offer is not communicated to the party to whom it is intended to be made, there is no opportunity of rejection; hence there is no presumption of acquiescence.

where offer is uncommunicated.

Taylor was engaged to command Laird's ship; he threw up his command in the course of the expedition, but helped to work the vessel home, and then claimed reward for services thus rendered. It was held that he could not recover. Evidence 'of a recognition or acceptance of services may be sufficient to show an implied contract to pay for them, *if at the time the defendant had power to refuse or accept the services.*' Here the defendant never had the option of accepting or refusing the services while they were being rendered; and he repudiated them when he became aware of them. The plaintiff's offer, being uncommunicated, did not admit of acceptance and could give him no rights against the party to whom it was addressed.

Taylor v. Laird, 25 L. J. Ex 329.

Offer with numerous terms.

(*c*) Where an offer consists of various terms, some of which do not appear on the face of it, to what extent is an acceptor bound by terms of which he was not aware?

Railway companies, for instance, make continuous offers to carry or to take care of goods on certain conditions.[1] The traveller who takes a ticket for a journey, or for luggage left at a cloak-room, accepts an offer containing many terms. A very prudent man with abundance of leisure would perhaps inquire into the terms before taking a ticket. Of the mass of mankind some know that there are conditions and assume that they are fair, while the rest do not think about the matter.

10 Q. B. D. 178.

It was formerly held, e.g. in *Watkins v. Rymill*, that the acceptance of such a document amounted as a matter of law to the acceptance of all the terms in the offer. To this supposed rule of law certain exceptions were admitted;

[1] The conditions under which the liability of a Railway Company in respect of the carriage of goods can be limited, under the Railway and Canal Traffic Act, 1854, are a matter too special to be discussed here.

e.g., if the terms were printed in such a form as to be misleading. But this view can no longer be accepted. The question is one of fact. In *Richardson v. Rowntree* it was finally decided by the House of Lords that to accept a document does not necessarily make all the conditions contained in it a part of the contract, but that whether they are so or not is not a matter of law, but a question depending upon the answers of the jury to the following questions: (1) Did the person accepting it know that there was any writing on the document? If he did not, he will not be bound by the conditions. (2) If he knew there was writing, did he know or believe that it contained conditions? If he did, he will be bound by them, whether he took the trouble to ascertain what they were or not. (3) If he knew there was writing, but did not know or believe that it contained conditions, did the party delivering the document to him do what was reasonably necessary to give him notice that the writing contained conditions? In that case also he will be bound by them. These questions had been formulated in the earlier case of *Parker v. South Eastern Railway Company*, which was approved by the House of Lords in *Richardson v. Rowntree*. In *Parker's* case luggage was deposited in a cloak-room in return for a ticket. The conditions limiting the liability of the Company were printed on the back of the ticket and were indicated by the words 'See back' on the face of the ticket. The plaintiff, while he admitted a knowledge that there was writing on the ticket, denied all knowledge that the writing contained conditions. The Court of Appeal held that he was bound by the conditions if a jury was of opinion that the ticket amounted to a reasonable notice of their existence.

Marriott v Yeoward Bros., [1909] 2 K B 987.

[1894] A. C. 217

Henderson v Stevenson L R 2 H L Sc App 470

2 C P D. 416.

In *Richardson's case* a passenger sued for injuries sustained by the negligence of a steamship company; the company had limited its liability by a clause on the ticket which was printed in small type and further obscured by words stamped across it in red ink. Three questions, following those in *Parker's case*, were left to the jury.

[1894] A. C 217.

The first question was answered in the affirmative, the other two in the negative; and the House of Lords, being of opinion that the correct questions had been put and that there was evidence on which the jury could properly find as they did, held that judgment was rightly entered for the plaintiff.

Exceptional nature of offer under seal.

There is one exception to the inoperative character of an uncommunicated offer: this is the case of an offer under seal. But this matter is best dealt with under the head of the revocation of offers.

Infra, p. 34.

§ 4. *Acceptance must be made by words or conduct.*

Acceptance means in general communicated acceptance. What amounts to communication, and how far it is necessary that communication should reach the offeror, are matters to be dealt with presently. It is enough to say here that acceptance must be something more than a mere mental assent.

In an old case it was argued that where the produce of a field was offered to a man at a certain price if he was pleased with it on inspection, the property passed when he had seen and approved of the subject of the sale. But Brian, C. J., said:—

Year Book, 17 Ed. IV. 1.

'It seems to me the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased then you should have signified it to such an one, then I grant you need not have done more, for it is matter of fact.'

Brogden v. Metro. Ry. Co. 2 App. Cas 692.

This *dictum* was quoted with approval by Lord Blackburn in the House of Lords in support of the rule that a contract is formed when the acceptor has done something to signify his intention to accept, not when he has made up his mind to do so.

Mental acceptance ineffectual.

Two cases show that mental or uncommunicated consent does not amount to acceptance; and this is so even where the offeror has said that such a mode of acceptance will suffice.

Felthouse offered by letter to buy his nephew's horse for £30 15*s.*, adding, 'If I hear no more about him I shall consider the horse is mine at £30 15*s.*' No answer was returned to this letter, but the nephew told Bindley, an auctioneer, to keep the horse out of a sale of his farm stock, as it was sold to his uncle Felthouse. Bindley sold the horse by mistake, and Felthouse sued him for conversion of his property. The Court held that as the nephew had never signified to Felthouse his acceptance of the offer, there was no contract of sale, and that the horse did not belong to Felthouse at the time of the auctioneer's dealings with it. Felthouse v Bindley, 11 C B, N S 869

In *Powell v. Lee* the plaintiff was a candidate for the head-mastership of a school, and the board of managers, with whom the appointment lay, passed a resolution selecting him for the post. One of the managers, acting in his individual capacity, informed the plaintiff of what had occurred, but he received no other intimation. Subsequently, the resolution was rescinded and the Court held that in the absence of an authorized communication from the whole body of managers there was no completed contract. 99 L T 284

§ 5. *An offer is accepted when acceptance is made in a manner prescribed or indicated by the offeror.*

Contract is formed by the acceptance of an offer. When the offer is accepted it becomes a promise: till it is accepted neither party is bound, and the offer may be revoked by due notice of revocation to the party to whom it was made. Acceptance is necessarily irrevocable, for it is acceptance that binds the parties. Effect of Acceptance

We have seen that the acceptance of an offer requires more than a tacit formation of intention. There must be some overt act or speech to give evidence of that intention. But there is this marked difference between Offer and Acceptance, that whereas an offer is not held to be made until it is brought to the knowledge of the offeree, Communication of Acceptance

acceptance may in certain circumstances be held to be made though it has not come to the knowledge of the offeror.

In such cases two things are necessary. There must be an express or implied intimation from the offeror that a particular mode of acceptance will suffice. And some overt act must be done or words spoken by the offeree which are evidence of an intention to accept, and which conform to the mode of acceptance indicated by the offeror.

The law on this subject was thus stated by Bowen, L. J., in the *Carbolic Smoke Ball* case:— *Infra*, p 49

[1893] 1 Q B. 269

'One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who made the offer, in order that the two minds may come together. Unless this is so, the two minds may be apart, and there is not that *consensus* which is necessary according to the rules of English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so: and I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such an offer is made to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance, without notification.'

From this statement of the law we may draw the following conclusions.

Depend on terms of offer

The offeror may indicate a mode in which acceptance should be communicated, and he will then be bound by a communication so made, whether it reaches him or not. or the offeror may invite performance without communication of acceptance, and it will then be sufficient for the purpose of binding him that the offeree should 'act on the proposal.'

In either case we start with the general principle that acceptance must be communicated to the offeror, and we must then look to the terms and the nature of the offer,

and ascertain whether the offeror has committed himself to a particular mode of acceptance, or has invited the offeree to act on the proposal and accept by performance.

Offer of promise for act,

We will take the latter class of cases first. It is sometimes impossible for the offeree to express his acceptance otherwise than by performance of his part of the contract. This is specially true of what are called general offers, offers made to unascertained persons, wherein performance is expressly or impliedly indicated as a mode of acceptance. An offer of reward for the supply of information or for the recovery of a lost article does not contemplate an intimation from every person who sees the offer that he intends to search for the information or for the article: he may have already found or become possessed of the thing required, and can do no more than send it on to the offeror.

to unascertained persons,

to an individual.

But when a specified individual receives an offer capable of acceptance by performance we need to consider more carefully the nature and terms of the offer, and whether they entitle the offeree to dispense with notice of acceptance.

Harvey v Johnston, 6 C B. at p 304

If *A* tells *X* by letter that he will receive and pay for certain goods if *X* will send them to him, such an offer may be accepted by sending the goods. But if *A* tells *X* that he is prepared to guarantee advances made by *X* to *M*, notice of acceptance is required. In such a case where *X* without notice to *A* advanced money to *M* and afterwards charged *A* upon *M*'s default, it was held that *X* should have notified his acceptance to *A*, and that for want of such notification no contract had been made.

McIver v Richardson, 1 M & S 557

Offer of promise for promise.

When we pass from offers of a promise for an act to offers of a promise for a promise, that is, from offers capable of being accepted by performance to offers which require for their acceptance an expression of intention to accept, we need no longer consider whether the offeror asks for any notification at all, but must ask how far he

has bound himself as to the mode in which the acceptance should be communicated. If he requires, or suggests, a mode of acceptance which proves, as a means of communication, to be nugatory or insufficient, he does so at his own risk.

Offer determines mode of acceptance.

We obtain a good illustration of this rule in the case of contracts made by post. We may assume that an offer made by post invites an answer by post unless the intention should be otherwise definitely expressed. 'The post office is the ordinary mode of communication, and every person who gives any one the right to communicate with him, gives the right to communicate in an ordinary manner.'

Household Fire Ins Co v Grant, 4 Ex D 216, 233

Acceptance of offer by post.

The first things to bear in mind is that an offer made to one who is not in immediate communication with the offeror remains open and available for acceptance until the lapse of such a time as is prescribed by the offeror, or is reasonable as regards the nature of the transaction. During this time the offer is a continuing offer and may be turned into a contract by acceptance. This is clearly laid down in *Adams v. Lindsell.* Lindsell offered to sell wool to Adams by letter dated 2nd Sept. 1817, 'receiving your answer in course of post.' An answer might have been received on the 7th if the letter had been properly directed; but it was misdirected and did not reach Adams till the 5th, and his acceptance, posted on the same day, was not received by Lindsell till the 9th. On the 8th, that is, before the acceptance had arrived, Lindsell sold the wool to others. Adams sued for a breach of the contract made by the letters of offer and acceptance, and it was argued on behalf of Lindsell that there was no contract between the parties till the letter of acceptance was actually received. But the Court said:—

1 B & Ald 681

'If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs until the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad*

infinitum. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is concluded by the acceptance of it by the latter.'

Adams v. Lindsell establishes two points, first that the offer remains open for acceptance during a time prescribed by the offeror or reasonable under the circumstances; and secondly, that an acceptance in the mode indicated by the offeror concludes the contract.

Effect of lost acceptance

Dunlop v. Higgins, 1 H L C 381

Colson's case, L R 6 Ex 108

Harris' case, L R 7 Ch 587.

4 Ex D 216

The Courts showed some hesitation in applying this rule to cases where the letter of acceptance had been lost or delayed in transmission, but the matter is now settled by the decision in *Household Fire Insurance Co. v. Grant*. An offer was made to take shares in circumstances indicating that the answer was to come by post: it was accepted by letter, the letter never reached the offeror, but the Court of Appeal held that he was nevertheless liable as a shareholder:

'As soon as the letter of acceptance is delivered to the post office the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offeror himself as his agent to deliver the offer and receive the acceptance.'

These last words are one way of stating the reason for throwing on the offeror rather than the acceptor the risk of an acceptance going wrong. The offeror may indicate or require a mode in which acceptance should be signified, and the post office may be regarded as his agent to receive the acceptance, or it may be regarded as the ordinary channel of communication. This is the view expressed in the later case of *Henthorn v. Fraser*. A written offer, delivered by hand, was accepted by post; it was held that the contract was concluded from the moment of such acceptance, and Lord Herschell said:—

[1892] 2 Ch 27, 33.

'I should prefer to state the rule thus: where the circumstances are such that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.'

But the cases of contracts made by post are merely an illustration of the general rule that the offeror takes the risk as to the effectiveness of communication if the acceptance is made in a manner indicated by the offeror as sufficient. It would be hard on the acceptor if, having done all that was required of him, he lost the benefit of a contract because the offeror had chosen an ineffectual mode of communication.

Offeror determines mode of acceptance, and takes the risk.

Suppose that *X* sends an offer to *A* by messenger across a lake with a request that *A* if he accepts will at a certain hour fire a gun or light a fire. Why should *A* suffer if a storm render the gun inaudible, or a fog intercept the light of the fire? If *X* sends an offer to *A* by messenger with a request for a written answer by bearer—is it *A*'s fault if the letter of acceptance is stolen from the bearer's pocket?

But there is no lack of authority to show that if an acceptance is not made in the manner indicated by the offeror it is not communicated. Hebb applied to the agent of a company for shares; the directors allotted shares to him, but sent the allotment letter to their own agent for transmission to Hebb. Before the agent delivered the letter Hebb withdrew his offer. It was held that 'if Mr. Hebb had authorized the agent of the company to accept the allotment on his behalf there would have been a binding contract, but he gave no such authority.' Communication by the directors to their own agent was no communication to Hebb. Consequently he was entitled to withdraw his offer.

Hebb's case, L. R. 4 Eq 9.

Again, *X* offered by post to take an allotment of shares in the London and Northern Bank. A letter of allotment was made out, and given to a postman to post. The postman had no business to receive letters for the post outside his ordinary duty of collection. He did not post the letter until, as was proved by the postmark, a revocation of *X*'s offer had reached the bank, and the revocation was held to be good. Delivery into the hands of the

Re London & Northern Bank, [1900] 1 Ch 220.

postman was not the same as posting a letter, and so was not a communication of acceptance.

Place of acceptance.

The rule that a contract is made *when* the acceptance is communicated involves as a result the further rule that a contract is made *where* the acceptance is communicated. This may be of importance when we inquire, as is sometimes necessary, what is the law which governs the validity of the contract or the procedure by which it may be enforced.

20 Q. B. D. 640.

In *Cowan v. O'Connor* a contract was made by two telegrams—one of offer and one of acceptance. The amount at issue made it necessary that the whole cause of action should arise within the jurisdiction of the Court (the Mayor's Court in the City of London) in which the action was to be tried. The telegram of acceptance had been sent from the City, and the Court held that the contract was there made, and that consequently the whole cause of action arose within the jurisdiction of the Mayor's Court.

Can acceptance be revoked?

There is a result following from the foregoing decisions which has been the subject of criticism. Acceptance concludes the contract; so if acceptance takes place when a letter is put into the post office, a telegram revoking the acceptance would be inoperative, though it reached the offeror before the letter. It is not easy to see how the English courts could now decide otherwise. Nor is it easy to see that any hardship need arise from the law as it stands. The offeree need not accept at all: or he may send a qualified acceptance, 'I accept unless you get a revocation from me by telegram before this reaches you': or he may telegraph a request for more time to consider. If he chooses to send an unconditional acceptance there is no reason why he should have an opportunity of changing his mind which he would not have enjoyed if the contract had been made *inter praesentes*.

§ 6. *Offer creates no legal rights until acceptance, but may lapse or be revoked.*

Lapse and revocation of offer.

Acceptance is to Offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have lain till it has become damp, or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance.

Lapse.

Death of parties.

(*a*) The death of either party before acceptance causes an offer to lapse. An acceptance communicated to the representatives of the offeror cannot bind them. Nor can the representatives of a deceased offeree accept the offer on behalf of his estate.

(*b*) It has been shown that an offer is accepted when acceptance is made in a manner prescribed or indicated by the offeror.

Failure to accept in manner prescribed;

If the communication of the offer does no more than suggest a mode of acceptance, it would seem that the offeree would not be bound to this mode so long as he used one which did not cause delay, and which brought the acceptance to the knowledge of the offeror. A departure from the usual or the suggested method of communication would probably throw on the offeree the burden of ensuring a notification of his acceptance. Subject to this an offer made by post might be accepted by telegram, or by messenger sent by train.

But if a mode of acceptance is prescribed and the offeree departs from this, it is open to the offeror to treat the acceptance as a nullity.

Eliason v Henshaw, 4 Wheaton, 225.

Eliason offered to buy flour of Henshaw, requesting that an answer should be sent by the wagon which brought the offer. Henshaw sent a letter of acceptance by mail, thinking that this would reach Eliason more speedily. He was wrong and the Supreme Court of the United States held that Eliason was entitled to refuse to purchase.

'It is an undeniable principle of the law of contract, that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from these terms invalidates the offer unless the same be agreed to by the person who made it.'

(*c*) Sometimes the parties fix a time within which an offer is to remain open; more often it is left to a court of law, in the event of litigation, to say what is a reasonable time within which an offer may be accepted. Instances of a prescribed time are readily supplied. 'This offer to be left open till Friday, 9 a.m. 12th June,' allows the offeror to revoke, or the offeree to accept the offer, if unrevoked, at any time up to the date named, after which the offer would lapse.

or within time prescribed.

Dickinson v Dodds, 2 Ch D 463

An offer to supply goods of a certain sort at a certain price for a year from the present date—an offer to guarantee the payment of any bills of exchange discounted for a third party for a year from the present date—are offers which may be turned into contracts by the giving of an order in the one case, the discount of bills in the other. Such offers may be revoked at any time, except as regards orders already given or bills already discounted, and they will in any event lapse at the end of a year from the date of offer.

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

Offord v Davies, 12 C B, N S 748.

A promise to keep an offer open would need consideration to make it binding and would only become so if the party making the offer were to get some benefit by keeping it open. The offeree in such a case is said to 'purchase an option': that is, the offeror, in consideration usually of a money payment, binds himself not to revoke his offer during a stated period. In this case the offeror by his promise precludes himself from exercising his right to revoke the offer; but where he receives no consideration for keeping the offer open, he says in effect, 'You may accept within such and such a time, unless in the meantime I have revoked the offer.'

An instance of an offer lapsing by the efflux of a reason-

L. R. 1 Exch. 109.

able time is supplied by the case of the *Ramsgate Hotel Co. v. Montefiore*. Montefiore offered by letter dated the 28th of June to purchase shares in the Company. No answer was made to him until the 23rd of November, when he was informed that shares were allotted to him. He refused to accept them, and it was held that his offer had lapsed by reason of the delay of the Company in notifying their acceptance.

Revocation.

Revocation:

(1) An offer may be revoked at any time before acceptance.

(2) An offer is made irrevocable by acceptance.

(1) The first of these statements is illustrated by the case of *Offord v. Davies*. Messrs. Davies made a written offer to the plaintiff that, if the plaintiff would discount bills for another firm, they (Messrs. Davies) would guarantee the payment of such bills to the extent of £600 during a period of twelve calendar months.

12 C. B. N. S. 748

valid before acceptance,

Some bills were discounted by Offord, and duly paid, but before the twelve months had expired Messrs. Davies, the guarantors, revoked their offer and announced that they would guarantee no more bills. Offord continued to discount bills, some of which were not paid, and then sued Messrs. Davies on the guarantee. It was held that the revocation was a good defence of the action. The alleged guarantee was an offer, extending over a year, of promises for acts, of guarantees for discounts. Each discount turned the offer into a promise, *pro tanto*, but the entire offer could at any time be revoked except as regards discounts made before notice of revocation[1].

[1] It should be noticed that in the judgment in *Offord v. Davies*, and also to a less extent in the *Great Northern Railway Company v. Witham*, the word '*promise*' is used where '*offer of promise*' is clearly meant. A revocable promise is unknown to our law. A promise may be void, voidable, or unenforceable from defects in the formation of the contract, or it may be discharged by some subsequent event, but a promise, whether actionable or not, is not revocable at the pleasure of the promisor.

(2) The second statement is illustrated by the *Great Northern Railway Company v. Witham*, a transaction of the same character. The Company advertised for tenders for the supply of such iron articles as they might require between 1st November 1871 and 31st October 1872. Witham sent in a tender to supply the articles required on certain terms in such quantities as the Company 'might order from time to time,' and his tender was accepted by the Company. Orders were given and executed for some time on the terms of the tender, but after a while Witham refused to execute orders. The Company sued him for non-performance of an order already given and he was held liable.

L R 9 C P 16.

useless after acceptance

It is important to note the exact relations of the parties. The Company by advertisement invited all dealers in iron to make tenders, that is, to state the terms of the offers which they were prepared to make. The tender of Witham stated the terms of an offer which might be accepted at any time, or any number of times in the ensuing twelve months. The acceptance of the tender did not make a contract, but was merely an intimation by the Company that they regarded Witham's tender as an offer which on their part they were willing as a matter of business to accept, as and when they required the articles to be supplied. The Company were not bound to order any iron, and, though this point was left open by the Court, it is conceived that Witham might, at any time before an order was given, have revoked his offer by notice to the Company (unless for good consideration, such as a promise by the Company to purchase iron from no one else, he had bound himself not to do so for the whole twelve months): but each order given was an acceptance of Witham's standing offer, and bound him to supply so much iron as the order comprised. An order given after 31st October 1872 would have been an acceptance after the prescribed time, and inoperative.

In this class of case much turns on the forms of

invitation, tender, and acceptance actually adopted by the parties, and for that reason the decisions of the Courts upon them appear sometimes difficult to reconcile. The legal relations which may result from the acceptance of a tender are classified thus by Atkin, J.:—

Ford v. Newth, [1901] 1 K. B. 690.

R. v. Demers, [1900] A C. 103.

'It is quite common for large bodies that require supplies over a year to ask for tenders and to obtain them, and it sometimes happens that the effect of the form of the tender with an acceptance is to make a firm contract by which the purchasing body undertakes to buy all the specified material from the contractor. On the other hand, one knows that these tenders are very often in a form under which the purchasing body is not bound to give the tenderer any order at all; in other words the contractor offers to supply goods at a price, and if the purchasing body chooses to give him an order for goods during the stipulated time, then he is under an obligation to supply the goods in accordance with the order; but apart from that nobody is bound. There is also an intermediate contract that can be made in which, although the parties are not bound to any specified quantity, yet they bind themselves to buy and to pay for all the goods that are in fact needed by them. Of course, if there is a contract such as that, then there is a binding contract which will be broken if the purchasing body in fact do need some of the articles the subject of the tender, and do not take them from the tenderer.'

Percival, Ltd., v. L.C.C., 87 L. J. K. B. 677

Offer under seal is irrevocable.

An exception to this general rule as to the revocability of an offer must be made in the case of an offer under seal. It is said that this cannot be revoked: and that even though it is not communicated to the offeree it remains open for his acceptance when he becomes aware of its existence.

There is no doubt that a grant under seal is binding on the grantor and those who claim under him, though it has never been communicated to the grantee, if the deed has been duly 'delivered'[1]; and it would seem that an offer by deed is on the same footing. The offeror is bound, but the offeree need not take advantage of the offer unless he choose; he may repudiate it, and it then lapses.

Doe d Garnons v Knight, 5 B. & C. 71

Macedo v. Stroud, [1922] 2 A. C. 330.

The situation in such a case is anomalous. It is in fact irreconcilable with the modern analysis of Contract as meaning an expression by at least two persons of

[1] 'Delivery' of a deed does not necessarily involve the handing of it over to the other party to the contract; *infra*, p. 60.

a common intention whereby expectations are created in the mind of one or both.

An offer under seal is *factum*, a thing done beyond recall; and the offeror is in the position of one who has made an offer which he cannot withdraw, or a conditional promise depending for its operation on the assent of the promisee [1].

Revocation must be communicated.

It remains to state that Revocation, as distinguished from Lapse, if it is to be operative, must be communicated. In the case of Acceptance we have seen that it is operative, and the contract made, if the offeree does by way of acceptance that which the offeror has directly or indirectly indicated as sufficient. The posting of a letter, the doing of an act, may constitute an acceptance and make a contract. The question at once arises, Can revocation be communicated in the same way, by the posting of a letter of revocation, by the sale of an article offered for purchase?

The answer must be (subject to the consideration of two cases referred to hereafter), that revocation of an offer is not communicated unless brought to the knowledge of the offeree. The rule of law on this subject was settled in *Byrne v. Van Tienhoven*. The defendant, writing from Cardiff on October 1st, made an offer to the plaintiff in New York asking for a reply by cable. The plaintiff received the offer on the 11th, and at once accepted in the manner requested. On the 8th the defendant had posted a letter revoking the offer.

5 C. P. D 344

The questions which Lindley, J., considered to be raised were two. (1) Has a revocation any effect until communicated? (2) Does the posting of a letter of revocation amount to a communication to the person to whom the letter is sent?

[1] In *Xenos v. Wickham*, often cited as authority for the irrevocability of an offer under seal, there was in fact a *contract* already concluded between the parties. L. R. 2 H. L. 296.

He held (1) that a revocation was inoperative until communicated, (2) that the withdrawal of an offer was not communicated by the mere posting of a letter: and that therefore an acceptance made by post is not affected by the fact that a letter of revocation is on its way. He pointed out the inconvenience which would result from any other conclusion:—

'If the defendant's contention were to prevail no person, who had received an offer by post and had accepted it, would know his position until he had waited such time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principle and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.'

1892 2 Ch 27

The case of *Henthorn v. Fraser*, decided in the Court of Appeal, extends this rule to the case of a written offer delivered by hand and accepted by post. Lord Herschell there said:—

'The grounds on which it has been held that the acceptance of an offer is complete when it is posted, have I think no application to the revocation or modification of an offer. These can be no more effectual than the offer itself unless brought to the mind of the person to whom the offer is made.'

[1908] 1 K. B 293

The same principle is illustrated by *Curtice v. City of London and Midland Bank*. Payment of a cheque was countermanded by a telegram, which, possibly by the negligence of the bank's servants, was not brought to the notice of the manager until after the cheque was paid; it was held that the telegram was inoperative to countermand payment.

Cases conflicting with this rule.

The case of *Dickinson v. Dodds* has been thought to suggest that when the offer is an offer to sell property it may be revoked merely by the sale of the property to a third person, and without communication to the offeree.

Dickinson v. Dodds, 2 Ch D. 463.

The case was a suit for specific performance of a contract under the following circumstances. On the 10th of June, 1874, Dodds gave to Dickinson a memorandum in writing as follows:—'I hereby agree to sell to Mr. George Dickinson

the whole of the dwelling-houses, garden ground, stabling and out-buildings thereto belonging situated at Croft, belonging to me, for the sum of £800. As witness my hand this 10th day of June, 1874.

£800. (*Signed*) John Dodds.

PS. This offer to be left over until Friday, 9 o'clock a.m. J. D. (the twelfth) 12th June, 1874.

(*Signed*) J. Dodds.'

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

The Court of Appeal held that there was no contract. James, L. J., after stating that the promise to keep the offer open could not be binding, and that at any moment before a complete acceptance of the offer one party was as free as the other, went on to say:—

'It is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "now I withdraw my offer." I apprehend that there is neither principle nor authority for the proposition that there must be an actual and express withdrawal of the offer, or what is called a retractation. It must to constitute a contract appear that the two minds were one at the same moment of time, that is, that there was an offer continuing up to the moment of acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer."' at p 472

If and so far as the above language was intended to suggest that a revocation in fact of an offer without the knowledge of the offeree would avail against an acceptance by the offeree within the prescribed time, it must no doubt be regarded as overruled by subsequent decisions. But the language of the learned judges in

Dickinson v. Dodds may well be open to the construction that they treated the question as to the offeree's knowledge of the revocation as wholly one of fact and were satisfied in the case before them that he knew well enough, when he accepted, that the offer had already been withdrawn.

But can we hold that knowledge of the offeror's intention to revoke, from whatever source it reaches the offeree, is good notice of revocation? If this is correct the inconvenience might be grave. Suppose a merchant to receive an offer of a consignment of goods from a distant correspondent, with liberty to reserve his answer for some days. Meantime an unauthorized person tells him that the offeror has sold or promised the goods to another. What is he to do? His informant may be right, and then, if he accepts, his acceptance would be worthless. Or his informant may be a gossip or mischief-maker, and if on such authority he refrains from accepting he may lose a good bargain.

Such is the real and only difficulty created by *Dickinson v. Dodds*. The case is no authority for the validity of an uncommunicated revocation: but it does raise a question as to the effect of an unauthorized notice of revocation upon the rights of the offeree. The answer appears to be that it is open to an offeror, who has revoked an offer without direct communication to the offeree, to show that the offeree knew, from a trustworthy source, that the offer was withdrawn. The Court would thus decide every such case on the facts presented; and that this is the true explanation of *Dickinson v. Dodds* is borne out by the later decision in *Cartwright v. Hoogstoel*, where the facts were almost exactly similar, and which seems to be the only other case in which the point has come up for consideration.

105 L. T. 628.

We now come to two sets of rules relating to the serious and definite character with which Offer and Acceptance must be invested if they are to create legal relations.

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

Offer must be intended to create legal relations,

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

Weeks v. Tybald, Noy, 11

Balfour v Balfour, [1919] 2 K B 571.

Sometimes it is clear from the nature of the agreement that there was no intention to enter into a binding contract. On this footing stand engagements of pleasure, or agreements which from their nature do not admit of being regarded as business transactions. We cannot in all cases decline to regard such engagements as contracts on the ground that they are not reducible to a money value. The acceptance of an invitation to dinner or to play in a cricket match, of an offer by a husband to a wife to pay a certain sum each week as a household allowance, forms an agreement in which the parties may incur expense in the fulfilment of their mutual promises. The damages resulting from breach might be ascertainable, but the Courts would probably hold that, as no legal consequences were contemplated by the parties, no action would lie.

[1925] A C 445

In *Rose and Frank v. Crompton* we have a different and exceptional class of case, in which the parties to a business transaction deliberately stated that they did not intend to enter into any legal obligation at all. The defendants, a British firm of manufacturers had had business dealings for some years with the plaintiffs, an American firm. A document was drawn up by which it was in effect arranged

that the plaintiffs were to be the sole vendors of the defendant's goods in the United States; it contained detailed arrangements for carrying out the business, and proceeded to state that 'this arrangement is not entered into nor is this memo written as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts either of the United States or England'. A dispute having arisen, the defendants terminated the agreement without notice and contrary to its terms, and refused to carry out certain accepted orders then outstanding. The plaintiffs therefore sued them for breach of contract and for non-delivery of goods. It was held that the document was not legally binding, and that the plaintiffs were not entitled to damages for breach of its terms, but that the orders accepted under it constituted legally binding contracts and that they were entitled to damages for the non-delivery.

Atkin, L J in [1923] 2 K. B. at p. 293

'To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in *Balfour v. Balfour*. If the intention may be negatived impliedly it may be negatived expressly In this document, construed as a whole, I find myself driven to the conclusion that the clause in question expresses in clear terms the mutual intention of the parties not to enter into legal obligations in respect to the matters upon which they are recording their agreement. I have never seen such a clause before, but I see nothing necessarily absurd in business men seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour or self-interest, or perhaps both.'

[1919] 2 K B 571.

and capable of creating them.

And an offer must be capable of affecting legal relations. The parties must make their own contract: the Courts will not construct one for them out of terms which are indefinite or illusory. *A* bought a horse from *X* and promised that 'if the horse was lucky to him he would give £5 more or the buying of another horse' it was

Guthing v Lynn, 2 B. & Ad 232

held that such a promise was too loose and vague to be considered in a court of law.

A covenanted with *X* to retire wholly from the practice of a trade 'so far as the law allows': it was held that the parties must fix the limit of their covenant and not leave their agreement to be framed for them by the Court. Davies v Davies, 36 Ch. D 359

A made a contract with *X* and promised that if 'satisfied with you as a customer' he 'would favourably consider' an application for a renewal of the contract: it was held that there was nothing in these words to create a legal obligation. Montreal Gas Co v. Vasey, [1900] A C. 595.

A communicated with *X* by telegraphic code, and owing to a mistaken economy of words the parties differed in the construction of the contract. Here the party relying on the contract must fail, for the Court will not determine a question which the parties should not have left in doubt. Falck v Williams, [1900] A C 176. Miles v Haselhurst, 12 Com Cas 83

§ 8. *Acceptance must be absolute, and must correspond with the terms of the offer.*

If a contract is to be made, the intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance, or as to the correspondence of the terms of acceptance with those of the offer. Forms of acceptance which are inconclusive.

The forms of difficulty which arise in determining whether or no an acceptance is conclusive, may be said to be three. The alleged acceptance (1) may be a refusal and counter-offer, or a mere statement of fact relating to the proposed transaction: (2) may be an acceptance with some addition or variation of terms: (3) may be an acceptance of a general character, to be limited and defined by subsequent arrangement of terms.

(1) In the case of *Hyde v. Wrench*, *A* offered to sell a farm to *X* for £1,000. *X* said he would give £950. *A* refused, and *X* then said he would give £1,000, and, when *A* declined to adhere to his original offer, tried to 3 Beav. 334 Refusal and counter-offer

obtain specific performance of the alleged contract. The Court, however, held that an offer to buy at £950 in response to an offer to sell for £1,000 was a refusal followed by a counter-offer.

Stevenson v McLean, 5 Q. B. D. 346

An offer once refused is dead and cannot be accepted unless renewed; but an inquiry as to whether the offeror will modify his terms does not necessarily amount to a refusal.

[1893] A C 552. Statement of fact in answer to offer.

The case of *Harvey v. Facey*, decided by the Judicial Committee, was not one of counter-offer, but of a statement as to price which the intending acceptor chose to treat as an offer. *X* telegraphed to *A* 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price, answer paid.' *A* replied by telegram 'Lowest price for Bumper Hall Pen £900.' *X* telegraphed 'We agree to buy Bumper Hall Pen for £900 asked by you.'

The Committee pointed out that the first telegram of *X* asked two questions, (*a*) as to the willingness of *A* to sell, and (*b*) the lowest price, and that the word 'Telegraph' was addressed to the second question only. It was held that no contract had been made, that *A* in stating the lowest price for the property was not making an offer but supplying information, that the third telegram set out above was an offer by *X*—not the less so because he called it an acceptance—and that this offer had never been accepted by *A*.

We may perhaps doubt whether the Judicial Committee did not put a somewhat narrow construction on the telegrams of the parties, but the principle of the case is clearly sound, namely, that a man cannot accept an offer which has never been made. So too it has been held that a man is not bound by an offer wrongly transmitted by a telegraph clerk and accepted in the altered form by the offeree. The Post Office had no authority to convey the message except in the form presented to it.

Henkel v Pape, L R 6 Ex 7.

(2) The acceptance of an offer may introduce terms not comprised in the offer, and in such cases no contract is

made, for the offeree in effect refuses the offer and makes a counter-offer of his own.

In the case of *Jones v. Daniel*, *A* offered £1,450 for a property belonging to *X*. In accepting the offer *X* enclosed with the letter of acceptance a contract for signature by *A*. This document contained various terms as to payment of deposit, date of completion, and requirement of title which had never been suggested in the offer. The Court held that there was no contract; that it would be equally unfair to hold *A* to the terms of acceptance, and *X* to those of the offer.

[1894] 2 Ch. 332. New terms put into acceptance

The case of *Canning v. Farquhar* is decided substantially, though not so obviously, on the same ground. A proposal for life insurance was made by Canning to the defendant company, and was accepted at a premium fixed in their answer, subject to a proviso that 'no assurance can take place until the first premium is paid'. Before the premium was paid and the policy prepared Canning suffered a serious injury, and the company consequently refused to accept a tender of the premium and to issue the policy.

16 Q. B. D 727.

It was held that the company's acceptance of the proposal was really a counter-offer, and that the change in the risk which occurred between this counter-offer and the acceptance made by tender of the premium entitled the company to refuse to issue the policy.

(3) In cases where offer or acceptance is couched in general terms, but reference is made to a contract in which the intentions of the parties may be more precisely stated, it is important to note whether the terms of such a contract were in existence, and known to the parties, or whether they were merely in contemplation. In the former case the offer and acceptance are made subject to, and inclusive of, the fuller conditions and terms: in the latter case the acceptance is too general to constitute a contract.

Reference to existing terms—good.

A verbal offer was made to purchase land, the offeror was told that the land must be purchased under certain

Rossiter v Miller, 3 App. Ca 1124

printed conditions, and the offer, which was still continued, was accepted 'subject to the conditions and particulars printed on the plan'. As these were contemplated in the offer a completed contract was thus constituted.

Filby v Hounsell, [1896] 2 Ch. 737

An offer was made to buy land, and 'if offer accepted, to pay deposit and sign contract on the auction particulars'; this was accepted, 'subject to contract as agreed'. The acceptance clearly embodied the terms of the contract mentioned in the offer, and constituted a complete contract.

Reference to future terms—bad

On the other hand where an offer to sell property was accepted 'subject to the terms of a contract being arranged' between the solicitors of the parties, no contract was made. The acceptance was not, in fact, more than an expression of willingness to treat.

Honeyman v. Marryatt, 6 H L C. 113.

Winn v Bull, 7 Ch D. 29, 32 per Jessel, H R

'It comes therefore to this, that where you have a proposal or agreement made in writing expressed to be subject to a contract being prepared, it means what it says; it is subject to and dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail.'

Questions of evidence.

There are cases which at first sight may appear to be cases of doubt or difference in the acceptance of an offer, but really turn out to involve only questions of the admissibility of evidence or the interpretation of terms.

Such are cases in which the parties have made a written agreement, depending for its coming into effect on a verbal condition or stipulation. *Pym v. Campbell* and *Pattle v. Hornibrook* are instances of contracts, apparently complete, held in abeyance until a verbal condition is fulfilled; and this verbal condition is admitted in evidence as forming part of the written contract.

6 E. & B 370
[1897] 1 Ch. 25

or of interpretation.

Such too are cases in which a contract has to be made out of a correspondence involving lengthy negotiations. The parties discuss terms, approach and recede from an agreement; offers are made and met by the suggestion

of fresh terms; finally there is a difference; and one of the parties asserts that a contract has been made, and the other that matters have never gone beyond a discussion of terms.

Where such a correspondence appears to result, at any moment of its course, in a definite offer and acceptance, it is necessary to ask whether this offer and acceptance amounts to a completed agreement, for it is possible that there may be other terms under discussion which have not been settled between the parties. Where however the correspondence shows that the parties have definitely come to terms, a subsequent revival of negotiations cannot, except with the consent of both parties, affect the contract so made.

Hussey v Horne Payne, 4 App Ca 311
Bellamy v Debenham, 45 Ch D 481
Perry v Suffields, [1916] 2 Ch 187, 191

In the case of an alternative offer by letter to let the whole of an estate, called Minydon, or to sell a portion, the terms of each offer being stated, an acceptance couched in the terms, 'I accept your offer of Minydon on the terms named therein,' was held to be an acceptance of the offer to let Minydon, that is to say, the whole estate, the two letters making a complete contract.

Lever v Koffler, [1901] 1 Ch 543.

But these cases turn rather on the meaning to be given to the words of the parties, than on rules of law.

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

The proposition is best understood by an illustration.

An offer may be made to all the world; but becomes a promise only when it is accepted by one.

The offer, by way of advertisement, of a reward for the rendering of certain services, addressed to the public at large, becomes a contract to pay the reward so soon as an individual accepts the offer by rendering the services, but not before.

To hold that any contractual obligation exists before the services are rendered, would amount to saying that a man may be bound by contract to an indefinite and unascertained body of persons, or, as it has been expressed,

that a man may have a contract with the whole world. This view has never been seriously entertained in English law; the promise is regarded as being made, not to the many who *might* accept the offer, but to the person or persons by whom it *is* accepted.

The contract may assume a form not so simple. Where competitors are invited to enter for a race, subject to certain conditions, by a committee or other agency, each competitor who enters his name thereby offers, to such other persons as may also compete, an undertaking to abide by the conditions under which the race is run. The offer is made through an agent or a committee to uncertain persons who define themselves by entry under conditions which are binding on all. Such was the contract made in the case of the '*Satanita*', *Clarke v. Dunraven*: and such is the case of a lottery where each one of a number of persons unknown to one another places money in the hands of a stakeholder on the terms that the whole sum is to be paid to one of them on a given conclusion of an event uncertain at the time.

[1895] P 255 [1897] A. C. 59.

Barclay v. Pearson, [1893] 2 Ch. 154.

Difficulties.

Such offers suggest more practical difficulties.

(1) The offer may be susceptible of acceptance by a number of persons.

When it is a conditional offer of reward to any person who does a specified act, the number of persons who may do the act and satisfy the conditions does not appear to affect the validity of the offer.

But where there is an offer of reward for the supply of a specified piece of information the offeror clearly does not mean to pay many times over for the same thing. So where information has been collected and contributed by various persons the question arises, Which of these has accepted the offer?

Who is entitled?

In *Lancaster v. Walsh* it was held that he who gave the earliest information was entitled to the reward.

4 M. & W. 16.

What is acceptance?

(2) Where a constable has given information for which reward has been offered, it may be asked whether he has

done more than in the ordinary course of duty he is bound to do. It would seem from the case of *England v. Davidson*, where a policeman not only gave information but collected evidence, and was thereupon held entitled to the reward, that unless a police constable does something more than the ordinary course of duty would require, he cannot claim a reward.

11 A. & E. 856.

(3) It is often difficult to distinguish statements of intention which cannot, and are not intended to, result in any obligation *ex contractu* from offers which admit of acceptance, and so become binding promises. Such statements may relate to the whole transaction or only to a subordinate part of the transaction. A man announces that he will sell goods by tender or by auction, or that he is prepared to pay money under certain conditions: or again, a railway company offers to carry passengers from *A* to *X* and to reach *X* and the intermediate stations at certain times. In such cases it may be asked whether the statement made is an offer capable of acceptance or merely an invitation to make offers, and do business; whether the railway company by its published time-table makes offers which become terms in the contract to carry, or whether it states probabilities in order to induce passengers to take tickets.

Distinction between offer and invitation to treat.

We may note the distinction in the following cases.

An invitation to compete for a scholarship does not import a promise that the scholarship will be given to the candidate who obtains the highest marks, if examiners report that he is not of sufficient merit to receive the scholarship.

Rooke v. Dawson, [1895] 1 Ch 480

An announcement that goods would be sold by tender, unaccompanied by words indicating that they would be sold to the highest bidder, was held to be 'a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.'

Spencer v Harding, L. R. 5 C P. 561

An advertisement by an auctioneer, that a sale of certain articles would take place on a certain day, was held not to bind the auctioneer to sell the goods, nor to

Harris v. Nickerson, L. R. 8 Q. B. 286

make him liable upon a contract to indemnify persons who were put to expense in order to attend the sale.

'Unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, we cannot hold the defendant liable.'

Payne v Cave, 3 T R 148

It was indeed decided as long ago as 1789 that a bid at an auction is only an offer, not binding on either side until it is accepted, and that acceptance by the seller is signified by the fall of the hammer. This rule has now been made statutory by S. 58 of the Sale of Goods Act, 1893. It is clear therefore that the advertisement of an auction is not an offer to sell the goods advertised, but a mere invitation to treat, and that no contract for the sale of the goods comes into existence until a bid is accepted.

There is however some authority for saying that, when an auction is advertised as 'without reserve', an auctioneer who refuses to accept the bid of the highest bona fide bidder makes himself liable for breach of a contract with such bidder. In *Warlow v. Harrison* the defendant, an auctioneer, advertised 'a brown mare, Janet Pride', for sale by auction 'without reserve'. The owner's name was not disclosed. The plaintiff attended the sale and bid 60 guineas; the owner then bid 61 guineas, and the defendant knocked down the mare to him. Warlow claimed the mare as being the highest bona fide bidder.

1 E & E 295

The Court of Exchequer Chamber thought that on these facts, if they had been properly pleaded, he would be entitled to succeed, though the actual decision was to give him leave to amend his declaration with a view to a new trial. Three judges, Martin, B., Byles, J., and Watson, B., compared the case to that of the loser of property offering a reward, and thought that the defendant was liable 'as upon a contract that the sale shall be without reserve'; the two remaining judges, Willes, J., and Bramwell, B., preferred to rest their decision on the ground 'that the defendant undertook to have, and yet

there was evidence that he had not, authority to sell without reserve.' These two judges appear to have thought that the doctrine of 'warranty of authority,' which will be more fully discussed later in this book, was applicable to the case. The decision was criticized by the Court of Queen's Bench in *Mainprice v. Westley*, but in that case, although the other facts were very similar to those in *Warlow v. Harrison*, the name of the auctioneer's principal had been disclosed, and the Court held that the action should have been brought against the principal and not against the auctioneer. The case, however, has been supported by a dictum of Cozens Hardy, L. J., in more recent times.

Infra, pp 186, 426

6 B & S 420

McManus v Fortescue, [1907] 2 K B at p 6

In the 'Smoke Ball' case we find an instance of a contract made by acceptance of a general offer, such acceptance being signified by performance of its terms. The Carbolic Smoke Ball Company offered by advertisement to pay £100 to any one 'who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions.' It was added that £1,000 was deposited with the Alliance Bank 'showing our sincerity in the matter.'

[1892] 2 Q B. 484 [1893] 1 Q B 256

Mrs. Carlill used the Smoke Ball as required by the directions; she afterwards suffered from influenza and sued the Company for the promised reward. The Company was held liable. It was urged that a notification of acceptance should have been made to the Company. The Court held that this was one of the class of cases in which, as in the case of reward offered for information or for the recovery of lost property, there need be no acceptance of the offer other than the performance of the condition. It was further argued that the alleged offer was an advertisement or puff which no reasonable person would take to be serious. But the statement that £1,000 had been deposited to meet demands was regarded as evidence that the offer was intended to be sincere.

A bookseller's catalogue, with prices stated against the names of the books, might seem to contain a number of offers. But if the bookseller receives by the same post five or six letters asking for a particular book at the price named, to whom is he bound? To the man who first posted his letter of acceptance? How is this to be ascertained? The catalogue is clearly an invitation to do business, and not an offer.

Grainger v. Gough, [1896] A C 325, 334

In all these cases the same question presents itself under various forms. Is there an offer? And, to constitute an offer, the words used, however general, must be capable of application to specific persons, and must be distinguishable from mere statements of intention, from invitations to transact business, and from advertisement or puffery which does not contemplate legal relations.

CHAPTER IV

Form and Consideration

Historical Introduction.

Necessity for one of these marks in English law.

OFFER and Acceptance bring the parties together, and constitute the outward semblance of contract; but most systems of law require some further evidence of the intention of the parties, and in default of such evidence refuse to recognize an obligation. In English law this evidence is supplied by Form and Consideration: sometimes one, sometimes the other, sometimes both, are required to be present in a contract to make it enforceable. By Form we mean some peculiar solemnity attaching to the expression of Agreement, which of itself gives efficacy to the contract; by Consideration we mean some gain to the party making the promise, arising from the act or forbearance, given or promised, of the promisee.

History of the matter

Alike in English and Roman law, Form, during the infancy of the system, is the most important ingredient in Contract. The Courts look to the formalities of a transaction as supplying the most obvious and conclusive evidence of the intention of the parties; the notion of Consideration, if not unknown, is at any rate imperfectly developed. This is no place for an antiquarian discussion, however interesting, but we may say that English law starts, as Roman law may perhaps have started, with two distinct conceptions of Contract. One, that a promise is binding if expressed in Form of a certain kind: the other, that the acceptance of benefits of a certain kind imports a liability to repay them. The history of the Roman Contracts is difficult and obscure. The theory of Sir Henry Maine, that they developed out of Conveyance in an order of moral progression, has long been abandoned. But under many varieties of procedure we detect two leading ideas—the binding character of an

Common features history of Roma and English law.

undertaking clad in solemn form and the readjustment of proprietary right where money or goods had been lent for consumption or use. In English law we find that before the end of the thirteenth century there were two liabilities analogous in character to those just described: one Formal, the promise under seal which was looked on as something in the nature of a present grant: one Informal, arising from sale and delivery of goods, or loan of money, in which consideration has passed on one side, and the liability was expressed in the action of Debt. Beyond this, the idea of enforcing an informal promise, simply because a benefit was accruing or was about to accrue to the promisor by the act or forbearance of the promisee, does not appear to have been entertained before the middle or end of the fifteenth century.

The formal contract in English law.

The Formal Contract of English law is the Contract under Seal. Only by the use of this Form could a promise, as such, be made binding, until the doctrine of consideration began to prevail. We have to bear in mind that it was to Form only that the Courts looked in upholding this Contract: the *consensus* of the parties had not emerged from the ceremonies which surrounded its expression. Courts of law would not trouble themselves with the intentions of parties who had not couched their agreement in the solemn Form to which the law attached legal consequences. Nor, on the other hand, where Form was present would they demand or admit further evidence as to intention.

It was probably due to the influence of the Court of Chancery that, later on, the Common Law Courts began to take account of the intention of the parties. The idea of the importance of Form thenceforth undergoes a curious change. When a contract comes before the Courts, evidence is required that it expresses the genuine intention of the parties; and this evidence is found either in the solemnities of the Contract under Seal, or in the presence of Consideration, that is to say, in some benefit to the promisor or loss to the promisee, granted or incurred

by the latter in return for the promise of the former. Gradually Consideration comes to be regarded as the important ingredient in Contract, and then the solemnity of a deed is explained as making a contract binding because it 'imports consideration,' though in truth there is no question of consideration; it is the Form alone which brings about legal consequences

But we must return to the Informal promise

The informal promise

As has been said above, the only contracts which English law originally recognized were the Formal contract under Seal, and the Informal contract in which what we now call Consideration was executed upon one side. How then do we arrive at the modern breadth of doctrine that *any* promise based upon Consideration is binding upon the promisor? This question resolves itself into two others. How did informal executory contracts become actionable at all? How did Consideration become the universal test of their actionability?

Remedies for breach of promise in Bracton.

To answer the first question we must look to the remedies which, in the early history of our law, were open to persons complaining of the breach of a promise, express or implied. The only actions of this nature, during the thirteenth and fourteenth centuries, were the actions of Covenant, of Debt, and of Detinue. Covenant lay for breach of promises made under Seal: Debt for liquidated or ascertained claims, arising either from breach of covenant, or from non-payment of a sum certain, due for goods supplied, work done, or money lent: Detinue [1] lay for the recovery of specific chattels kept back by the defendant from the plaintiff. These were the only remedies based upon contract. An executory agreement therefore, unless made under seal, was remediless.

[1] Detinue has been the subject of contention from the thirteenth century as to whether it is founded on contract or in wrong (Pollock and Maitland, Hist. of English Law, ed. 2. II. 180). In our own time the action of Detinue has been decided to be an action of *tort*. Detinue is in fact founded in bailment, but the contract of bailment imposes general common law duties the breach of which may be treated, and should be treated, as a wrong. The judgment of Collins, L. J., in *Turner v. Stallibrass* states this clearly.

Bryant v Herbert, 3 C. P. D 389

[1898] 1 Q 1 59.

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

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

Origin of action of assumpsit.

Note the process whereby this action came to be applied to contract. It lay originally for a malfeasance, or the doing an act which was wrongful *ab initio*: it next was applied to a misfeasance, or improper conduct in doing what it was not otherwise wrongful to do, and in this form it was applicable to promises part-performed and then abandoned or negligently executed to the detriment of the promisee: finally, and not without some resistance on the part of the Courts, it came to be applied to a mere non-feasance, or neglect to do what one was bound to do. It was in this last form that it adapted itself to executory contracts. The first reported attempt so to apply it was in the reign of Henry IV, when a carpenter was sued for a non-feasance because he had undertaken (*quare assumpsisset*) to build a house and had made default. The judges in that case held that the action, if any, must be in covenant, and it did not appear that the promise was under seal. But in the course of time the desire of the Common Law Courts to extend their jurisdiction, and their fear lest the Chancery by means of the doctrine of Consideration, which it had already applied to the transfer of interests in land, might enlarge its jurisdiction over contract, produced a change of view. Early in the sixteenth century it was settled that the form of Trespass on the Case known henceforth as the action of Assumpsit would lie for the non-feasance, or non-performance, of an executory contract; and the

Pollock, ed 9 p 150

Reasons for its extension.

form of writ, by which this action was commenced, perpetuated this peculiar aspect of a breach of promise until recent enactments for the simplification of procedure.

Result in simplifying law.

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

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

Consideration as a test of actionability

It is a hard matter to say how Consideration came to form the basis upon which the validity of informal promises might rest. Probably the *quid pro quo* which furnished the ground of the action of Debt, and the detriment to the promisee on which was based the delictual action of Assumpsit, were both merged in the more general conception of Consideration as it was developed in the Chancery.

For the Chancellor was wont to inquire into the

intentions of the parties beyond the Form, or even in the absence of the Form in which, by the rules of Common Law, that intention should be displayed, and he would find evidence of the meaning of men in the practical results to them of their acts or promises. It was thus that the Covenant to stand seised and the Bargain and Sale of lands were enforced in the Chancery before the Statute of Uses; and the doctrine once applied to simple contract was found to be of great practical convenience. When a promise came before the Courts they asked no more than this, 'Was the party making the promise to gain anything from the promisee, or was the promisee to sustain any detriment in return for the promise?' if so, there was a *quid pro quo* for the promise, and an action might be maintained for the breach of it [1].

Gradual growth of doctrine

So silent was the development of the doctrine as to the universal need of Consideration for Contracts not under seal, and so marked was the absence of any express authority for the rule in its broad and simple application, that Lord Mansfield in 1765 raised the question whether, in the case of commercial contracts made in writing, there was any necessity for Consideration to support the promise. In the case of *Pillans v. Van Mierop* he held that consideration was only required as evidence of intention, and that where such evidence was effectually supplied in any other way, the want of consideration would not affect the validity of a parol promise. This doctrine was emphatically disclaimed in the opinion of the judges delivered not long afterwards in the House of Lords, in *Rann v. Hughes*. The logical completeness of our law of Contract as it stands at present is apt to make us think that its rules are inevitable and must

3 Burr 1663.

7 T R 350

[1] The citation of authorities for the purpose of the foregoing historical sketch would encumber with detail a part of this book in which brevity is essential to the general plan. The student may now be referred to the chapter on Contract in the History of English Law, by Pollock and Maitland, ed. 2. vol. ii. pp. 184–233, or to Holdsworth, History of English Law, vol. iii. ch. 3.

have existed from all time. To such an impression the views set forth by Lord Mansfield in 1765 are a useful corrective

Classification of Contracts.

English law recognizes only two kinds of contract, formal and simple; that is, the Deed, or Contract under Seal, and the contract which depends for its validity on the presence of consideration. The Legislature has, however, imposed upon certain of these simple contracts the necessity of some kind of Form, either as a condition of their existence or as a requisite of proof, and these stand in an intermediate position between the *Deed* to which its form alone gives legal force, and the *Simple Contract* which rests upon Consideration and is free from the imposition of any statutory form. In addition to these a certain class of Obligation has been imported into the law of contract under the title of Contracts of Record, and though these obligations are wanting in the principal features of Contract, it is necessary, in deference to established authority, to treat of them here.

Contracts are Formal, or Simple

Formal and Simple contracts may then be further classified as follows:—

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

Classification of contracts.

It will be best to deal first with the essentially formal

contracts, then with those forms which are superimposed upon certain simple contracts, and then with Consideration, the requisite common to all simple contracts.

Formal Contracts.

§ 1. *Contracts of Record.*

Contracts of Record.

The obligations which are styled Contracts of Record are Judgment and Recognizance [1].

(1) Judgment

And first as to Judgment. The proceedings of Courts of Record are entered upon parchment rolls, and upon these an entry is made of the judgment in an action, when that judgment is final. A judgment awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded. Such an obligation may be the final result of a lawsuit when the Court pronounces judgment; or the parties may agree to enter judgment in favour of one of them. This may be done before litigation has commenced or while it is pending; and it is done by a contract of a formal character. A *warrant of attorney* gave authority from one party to the other to enter judgment upon terms settled; a *cognovit actionem* was an acknowledgment by one party of the right of the other in respect of a pending dispute and conferred a similar authority. Since the Debtors Act, 1869, both have been in practice replaced by a judge's order made by consent authorizing the plaintiff forthwith or at any future time to enter up judgment or issue execution [2].

How it originates.

Its characteristics.

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

Estoppel by Record.

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

[1] Statutes Merchant and Staple, and Recognizances in the nature of Statute Staple, are contracts of record long since obsolete; they were once important, because they were acknowledgments of debt, which, when duly made, created a charge upon the lands of the debtor.

[2] See s. 27 of the Act. Warrants of attorney are, however, mentioned in the schedule to the Stamp Act, 1891.

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

3. Such a creditor has certain advantages which an ordinary creditor does not possess. He has a double remedy for his debt; he can have execution levied upon the personal property of the judgment-debtor and so can obtain directly the sum awarded; he can also bring an action for the non-fulfilment of the obligation. For this purpose the judgment not only of a Court of Record [1], but of any Court of competent jurisdiction, British or foreign, is treated as creating an obligation upon which an action may be brought for money due.

Williams v Jones, 13 M & W 628
Grant v Easton, 13 Q B D 302 303

Before the Judgments Act, 1864, the judgment creditor had, during the lifetime of the debtor, a charge upon his lands; but since the passing of that statute lands are not affected by a judgment until they have been formally taken into execution.

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

(2) Recognizance Pollock, ed 9 p 154

The following is an example:—

'Be it remembered, that on ——, A.B. of ——, comes into the King's Bench Division of the High Court of Justice before me, one of His Majesty's Justices, and acknowledges to owe our Sovereign Lord the King the sum of £——, to be levied upon his goods and chattels, lands and tenements, to His Majesty's use upon condition that if the said

Crown Office Rules, 1906, App Form 198

[1] The essential features of a Court of Record are (1) that its 'acts and judicial proceedings are enrolled for a perpetual testimony,' (2) that it can fine or imprison for contempt.

A.B. shall be of good behaviour for the space of ——, to be computed from and after ——, and keep the peace towards all His Majesty's liege subjects, and especially towards C.D. and not depart that Court without leave, then this recognizance to be void, or else to remain in full force.'

There is little of the true nature of a contract in the so-called Contracts of Record. *Judgments* are obligations dependent for their binding force, not on the consent of the parties, but upon their promulgation by a court of law. *Recognizances* are promises made to the crown with whom, by the technical rules of English law, the subject cannot contract. We need consider these obligations no further.

§ 2. *Contract under Seal.*

Contract under Seal.

The only 'formal' Contract of English law is the *Contract under Seal*, sometimes also called a Deed and sometimes a Specialty. It is the only 'formal' Contract, because it derives its validity neither from the fact of agreement, nor from the consideration which may exist for the promise of either party, but from the *form* in which it is expressed. Let us then consider (1) how the contract under seal is made; (2) in what respect it differs from simple contracts; (3) under what circumstances it is necessary to contract under seal.

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

Sheppard Touchstone, 53

A deed must be in writing or printed, on paper or parchment. It is often said to be executed, or made conclusive as between the parties, by being 'signed, sealed, and delivered.' Of these three things there was formerly some doubt as to the necessity of a signature, but now by the Law of Property Act, 1925, s. 73, a person executing a deed must either sign or make his mark, and sealing alone is not sufficient. Delivery is effected either by actually handing the deed to the other party to it, or to a stranger for his benefit, or by words indicating an intention that the deed should become operative though

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

it is retained in the possession of the party executing. In the execution of a deed seals are commonly affixed beforehand, and the party executing the deed signs his name, places his finger on the seal intended for him, and utters the words 'I deliver this as my act and deed.' Thus he at once identifies himself with the seal and indicates his intention to *deliver*, that is, to give operation to the deed.

Macedo v. Stroud, [1922] 2 A C 330

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

Escrow

Sheppard Touchstone, 58

London Freehold Co. v. Lord Suffield, [1897] 2 Ch at p. 621

The distinction between a *Deed Poll* and an *Indenture* is no longer important since the Law of Real Property Amendment Act, 1845, s. 5. Formerly a deed made by one party had a polled or smooth-cut edge; a deed made between two or more parties was copied for each on the same parchment, and the copies cut apart with indented edges, so as to enable them to be identified by fitting the parts together. Such deeds were called Indentures. An indented edge is not now necessary to give the effect of an Indenture to a deed purporting to be such.

Indenture and deed poll.

(2) *Characteristics of Contract under Seal.*

(*a*) Estoppel is a rule of evidence whereby a man is not allowed to disprove facts in the truth of which he has by words or conduct induced others to believe, knowing that they might or would act on such belief. This rule of evidence is of strict application to recitals and statements made under seal. If these are express and clear, they are conclusive against the parties to it in any litigation

(*a*) Estoppel by Deed.

Onward Building Society v. Smithson, [1893] 1 Ch

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

arising upon the deed. 'Where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted.'

Pearl life Insurance Co v. Johnson, [1909] 2 K.B. 288

An insurance Company disputed payment on a life policy on the ground of misrepresentation made by the assured in the proposal which was recited in the policy. It was found as a fact that the proposal was not made by the assured, and the Company then contended that if there was no proposal there could be no policy. The Court held that the Company, by issuing a policy in which the proposal was recited and by receiving premiums, were estopped from denying the existence of the proposal.

(*b*) Merger.

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

(*c*) Limitation of actions

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

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

Infra, pp. 399

These general statements must be taken with some qualifications to be discused hereafter.

(*d*) Gratuitous promise under seal is binding.

(*d*) A gratuitous promise, or promise for which the promisor obtains no consideration present or future, is binding if made under seal, but is of no legal effect if made verbally, or in writing not under seal. We have noted above that this feature of contracts under seal has been explained by the solemnity of their form which is said to import consideration, and so to supply evidence of intention. But we have seen that this is historically untrue. The Form made the contract binding upon the promisor, and not the intention of which the Form was the expression. The doctrine of Consideration is of later date, and as it has developed, has tended to limit this

peculiarity of the promise under seal by the introduction of exceptions to the general rule that a gratuitous promise so made is binding.

At Common Law, contracts in restraint of trade, though under seal, must be shown to be reasonable; and one test of the reasonableness of the transaction is the presence of Consideration. And the rule is general that if there be in fact Consideration for a deed, the party sued upon it may show that the Consideration was illegal, or immoral; in which case the deed will be void.

Mallan v May, 11 M & W. 665

Collins v Blantern, 1 Sm L C 12th ed. p 412

But it is in the Chancery that we find this privilege most encroached upon. The idea of Consideration as a necessary element of Contract as well as of Conveyance, if it did not actually originate in the Chancery, has always met with peculiar favour there. It was by means of inferences drawn from the presence or absence of Consideration that the Covenant to stand seised, the Bargain and Sale of lands, and the Resulting Use first acquired validity. And in administering its peculiar remedies, where they are applicable to Contract, Equity followed the same principles.

Equitable view of absence of consideration.

The Court will not grant specific performance of a gratuitous promise, whether or no the promise is made by deed. And absence of Consideration is, or may be, corroborative evidence of the presence of Fraud or Undue Influence, on sufficient proof of which the court will rectify or cancel the deed.

Infra, p 394.

Infra, p. 213.

Bonds.

The best illustration of a gratuitous promise under seal is supplied by a *Bond*. A Bond may be technically described as a promise defeasible upon condition subsequent; that is to say, it is a promise under seal by *A* to pay a sum of money, which promise is to cease to be binding upon him if a condition stated in the bond is performed. The promise, in fact, imposes a penalty for the non-performance of the condition which is the real object of the bond. The condition desired to be secured

may be a money payment, an act or a forbearance. In the first case the instrument is called a common money bond: in the second a bond with special conditions.

For instance:—

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

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

Legal aspect of a bond.

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

Common law took the contract in its literal sense and enforced the fulfilment of the entire promise upon breach of the condition.

Equitable aspect.

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

8 & 9 Will 3, c 11. 4 & 5 Anne, c 3

Statutes have long since limited the rights of the promisee to the actual loss sustained by breach of the condition.

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

Requirements by Statute:

It is sometimes necessary for the validity of a contract to employ the form of a deed.

A transfer of shares in companies governed by the Companies Clauses Act [1]; a transfer of a British ship or any share therein [2]; a lease of lands, tenements, or hereditaments for more than three years, must be made under seal [3].

at Common Law.

Common Law requires in two cases that a contract should be made under seal.

gratuitous promises,

(*a*) A gratuitous promise, or contract in which there is

[1] 8 & 9 Vict. c. 16. s. 14.

[2] Merchant Shipping Act, 1894, s. 24. See Form in Schedule A of the Act.

[3] Law of Property Act, 1925, ss. 52, 54.

no consideration for the promise made on one side and accepted on the other, is void unless made under seal

(*b*) A corporation aggregate can only be bound by contracts under the corporate seal.

contracts with corporations

'The seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting however numerously attended is, after all, not the act of the whole body. Every member knows he is bound by what is done under the common seal and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing. Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation.'

Mayor of Ludlow v Charlton, 6 M & W 81

To this rule there are certain exceptions. Matters of trifling importance, or daily necessary occurrence, do not require the form of a deed. The supply of coals to a workhouse, the hire of an inferior servant, furnish instances of such matters. And where a municipal corporation owned a graving dock in constant use, it was held that agreements for the admission of ships might be made by simple contract.

Exceptions.

Nicholson v Bradfield Union, L R 1 Q B 620

Wells v Mayor of Kingston-on Hull, L R 10 C P 402

Trading corporations may through their agents enter into simple contracts relating to the objects for which they were created. 'A company can only carry on business by agents,—managers and others; and if the contracts made by these persons are contracts which relate to the objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding on the company, though not under seal.'

South of Ireland Colliery Co v Waddle, L R 3 C P 463 at p. 468

The Companies (Consolidation) Act, 1908, s. 76 (re-enacting a similar provision in an earlier Act) enables a company incorporated under the Companies Acts to enter, through its agents, into contracts in writing or by parol, in cases where such contracts could be entered into by private persons in like manner; and the Legislature has also in some other cases freed corporations from the necessity of contracting under seal and provided

different forms in which their common assent may be expressed. Indeed, at the present time, and especially since companies incorporated under the Companies Acts far exceed in number corporations of other kinds, the cases which are covered by the exceptions to the rule which requires a corporation to contract under seal are infinitely greater than those to which the rule itself still applies.

Effects of performance by one party.

There was for some time a conflict of judicial decision as to the liability of a corporation in cases where no contract has been made under seal but where goods have been supplied, or work done for the purpose for which the corporation exists. The point was finally settled in *Lawford v. Billericay R.D.C.*

Clarke v Cuckfield Union, 21 L J Q. B 349. [1903] 1 K.B 772.

A Committee of a Rural District Council employed an engineer, already engaged by the Corporation for certain purposes, to do a number of acts in reference to work for which he had not been engaged. The Committee had no power to bind the corporation by entering into contracts, but their minutes were approved, and their acts thereby affirmed and adopted by the Council. The Court held that the work done was work for the doing of which the corporation was created, and that having taken the benefit of the work they could not refuse to pay for it. It should be noted that breach of an executory contract of employment made with an engineer, not under seal, would clearly have given no right of action to the engineer or to the corporation.

Fishmongers' Company v Robertson, 5 M & Gr 192

It would appear that where a corporation has done all that it was bound to do under a simple contract it may in like manner sue the other party for a non-performance of his part.

The decision in *Lawford v. Billericay R.D.C.* illustrates the manner in which the Courts endeavour to mitigate a common law rule where its strict application would lead to manifest injustice. The case however is different where the rule is one prescribed by statute. By s. 174 of the Public Health Act, 1875, contracts made by an urban

authority under the powers and for the purposes of the Act, of a value or amount exceeding £50, must be under seal, and in the face of this positive direction of the statute the common law exceptions above referred to have no application. An urban authority may therefore take the full benefit of such contracts and yet set up afterwards the absence of a seal as a complete defence. But the Courts have shown themselves unwilling to extend a principle which enables local authorities to avoid payment of their debts, and have held that the decision in *Lawford v. Billericay R.D.C.* continued to apply even in the case of an urban authority, where the contract sued upon was made under powers given by a special Act, and not by the Act of 1875.

Young v. Leamington Corporation, 8 App. Cas 517.

Douglas v. Rhyl U.D.C [1913] 2 Ch 407

Simple Contracts.

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

We have now dealt with the contract which is valid by reason of its Form alone, and we pass to the contract which depends for its validity upon the presence of Consideration.

Simple contracts

All require consideration.

In other words, we pass from the Formal to the Simple Contract, or from the Contract under Seal to the *parol* Contract, so called because, with certain exceptions to be mentioned immediately, it can be entered into by word of mouth.

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

Some must also be expressed in writing.

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

The principal statutory requirements of form in simple contract are briefly as follows:—

Statutory requirements.

1. A bill of exchange needed to be in writing by the custom of merchants, adopted into the Common Law. A promissory note was subject to a like requirement by 3 & 4 Anne, c. 8. Both documents are now governed by the Bills of Exchange Act, 1882, which further provides that the acceptance of a bill of exchange must also be in writing.

2. Assignments of copyright under the Copyright Act, 1911, must be in writing.

54 & 55 Vict. c. 36 s. 93
6 Edw 7, c. 41 s. 22

3. Contracts of Marine Insurance must be made in the form of a policy.

4. The acceptance or transfer of shares in a company is usually required to be in a certain form by the Acts of Parliament which govern companies generally or refer to particular companies.

9 Geo. 4 c 14. s 1.
19 & 20 Vict c. 97. s. 13.

5. An acknowledgment of a debt barred by the Statutes of Limitation must be in writing signed by the debtor, or by his agent duly authorized.

6. Certain special contracts are required to be in writing by particular statutes: e.g. special contracts with Railway Companies for the carriage of goods, under the Railway and Canal Traffic Act, 1854, s. 7.

Statute of Frauds.

7. The Statute of Frauds, 1677, s. 4 requires written evidence in the case of certain contracts.

Sale of Goods Act.

8. The Sale of Goods Act, 1893, s. 4 requires, in the absence of certain specified conditions, written evidence in the case of contracts for the sale of goods worth £10 or upwards.

The requirements of the Statute of Frauds and of the Sale of Goods Act are those which need special treatment, and with these we may now deal.

Statute of Frauds, 1677, Section 4.

S. 4. 'No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another

person; or to charge any person upon any agreement made in consideration of marriage; [or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them;] or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.'

The words in brackets have been repealed, and s. 40 (1) of the Law of Property Act, 1925, has now substituted the words 'any contract for the sale or other disposition of land or any interest in land.'

We have to consider three matters.

(1) The nature of the contracts specified.

(2) The form required.

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

(1) We will first note the characteristics of the five contracts specified.

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

Nature executc liability

The liabilities of an executor or administrator in respect of the estate of a deceased person are of two kinds. At Common Law he may sue and be sued upon obligations devolving upon him as representative of the deceased. In Equity he may be compelled to carry out the directions of the deceased in respect of legacies, or to give effect to the rules of law relating to the division of the estate of an intestate. In neither case is he bound to pay anything out of his own pocket: his liabilities are limited by the assets of the deceased. But if, in order to save the credit of the deceased, to avoid a forced sale, or for any other reason, he choose to promise to answer damages out of his own estate, that promise must be in writing together with the consideration for it, such as a forbearance by the creditor of the estate to sue, and must be signed by him or his agent. It is almost needless to add that in

Rann v. Hughes, 7 T. R. 350 (n).

this, and in all other contracts under the section, the presence of writing will not atone for the absence of consideration.

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

This is a promise of guarantee or suretyship. It is always reducible to this form: 'Deal with *X*, and if he does not pay you, I will.'

The promise differs from indemnity.

(*a*) This promise must be carefully distinguished from a contract of indemnity, or promise to save another harmless from the result of a transaction into which he enters at the instance of the promisor. The distinction is of great practical importance, because a contract of indemnity, unlike that of guarantee, does not require to be evidenced by writing of any sort.

In a contract of guarantee there must always be three parties in contemplation; a principal debtor (whose liability may be actual or prospective), a creditor, and a third party who in consideration of some act or promise on the part of the creditor, promises to discharge the debtor's liability, *if the debtor should fail to do so*.

[1894] 2 Q. B. 884.

The case of *Guild v. Conrad* affords a good illustration both of a guarantee and of an indemnity. The plaintiff at the request of the defendant accepted the bills of exchange of a firm of Demerara merchants, receiving a guarantee from the defendant that he would, if necessary, meet the bills at maturity. Later the firm got into difficulties and the defendant promised the plaintiff that if he would accept their bills the funds should in any event be provided. The first promise was a guarantee, the second an indemnity.

'In my opinion,' said Davey, L. J., 'there is a clear distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter into a contract of liability, indemnified against that liability independently of the question whether a third person makes default or not.'

There must, in fact, be an expectation that another 'person' will pay the debt for which the promisor makes himself liable, and in the absence of such expectation the contract is not a contract of suretyship.

Harburg India Rubber Comb Co. v. Martin, [1902] 1 K. B. 77

X, the bailiff of a County Court, was about to arrest a debtor; A promised to pay the debt if X would forbear to arrest the debtor. This was held to be a promise of indemnity from A to X, since the debtor was under no liability to X, and X was not authorized by the creditor to make this arrangement.

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

But it should be noted that a promise to answer for the debt of another, where the guarantee is merely incidental to a larger contract and not the sole object of the parties to the transaction, has been held not to be within the section. So in *Sutton v. Grey*, where A entered into an oral arrangement with a stock-broker to introduce business to him on the terms that A was to receive half the commissions earned and to pay half the losses incurred in the event of a client introduced by him failing to pay, it was held that his promise to answer for the debt of such a client did not fall within the section.

[1894] 1 Q. 285.

Davys v. Buswell, [1913] 2 K 47, and in p 424.

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

Necessitates primary liability of third party,

'If two come to a shop and one buys, and the other, to gain him credit, promises the seller "*If he does not pay you, I will*," this is a collateral undertaking and void[1] without writing by the Statute of Frauds. But if he says, "*Let him have the goods, I will be your paymaster*," or "*I will see you paid*," this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act as but his servant.'

Per curiam in Birkmyr v. Darnel 1 Sm. L. C 12th ed. 3

(*c*) The liability may be prospective at the time the promise is made, as, for example, a promise by A to X that if M employs X, he (A) will go surety for payment of the services rendered; yet there must be a principal debtor

and a r liability

[1] The word 'void' is used incorrectly where 'unenforceable' is meant.

at some time: else there is no suretyship, and the promise, though not in writing, will nevertheless be actionable. Thus if *X* says to *A* 'If I am to do this work for *M* I must be assured of payment by some one,' and *A* says 'do it; I will see you paid,' there is no suretyship, unless *M* should incur liability by giving an order: if he gives no order and the work is nevertheless done by *X*, *A* would be liable, not as surety, but as principal debtor, by reason of his oral promise.

Mountstephen v. Lakeman L R 7 H L 17, *and see* L R 7 Q B 202

(*d*) If there be an existing debt for which a third party is liable to the promisee, and if the promisor undertake to be answerable for it, still there is no guarantee if the terms of the arrangement are such as to effect an extinguishment of the original liability. If *A* says to *X*, 'give *M* a receipt in full for his debt to you, and I will pay the amount,' this promise would not fall within the statute, for there is no suretyship, but a substitution of one debtor for another. The liability of the third party must be a continuing liability.

Goodman v. Chase, 1 B & Ald 297

and continuous

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

May arise from wrong

2 B & Ald 613

(*f*) It has been necessary in the case of this contract to point out that the words of the Statute only apply to promises on which an action *at law* can be brought. It might be possible so to frame a guarantee, as between partners, that it could only be enforced by equitable remedies, and in such a case it does not fall within the statute.

Re Hoyle, [1893] 1 Ch. at p 97

(*g*) This contract is an exception to the general rule that 'the agreement or some memorandum or note thereof,' which the statute requires to be in writing,

Consideration need not be expressed.

must contain the consideration as well as the promise: Mercantile Law Amendment Act, 1856. *Infra*, p 78

Agreement made in consideration of Marriage.

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

Contract for the sale or other disposition of land or any interest in land. Law of Property Act, 1925, s 40 (1).

It is conceived that the decisions on the old wording contained in the Statute of Frauds are still applicable to this contract. The section deals with agreements made in view of leases or sales, but it is not always easy to say what constitutes an interest in land. Contracts which are preliminary to the acquisition of an interest, or such as deal with a remote and inappreciable interest, are outside the section. Such would be an agreement to pay for an investigation of title; to put a house into repair for a prospective tenant; or to transfer shares in a railway company which, though it possesses land, gives no appreciable interest in the land to its shareholders. What is an interest in land. Angell v Duke, L R 10 Q B 174 Boston v Boston, [1904] 1 K B 124

The difficulties which have arisen in interpreting this section may be illustrated by reference to contracts for the sale of crops.

A distinction has been drawn as to these between what are called emblements, crops produced by cultivation, or *fructus industriales*, and growing grass, timber, or fruit upon trees, which are called *fructus naturales*. The law is now settled thus. If the property is to pass after the crops are severed from the soil then both *fructus naturales* and *fructus industriales* are goods within the meaning of the 4th section of the Sale of Goods Act, 1893. If the property is to pass before severance *fructus* *Fructus industriales et naturales.*

industriales are goods, but *fructus naturales* are an interest in land.

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

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

If the contract is for an indefinite time but can be determined by either party with reasonable notice within the year the statute does not apply. A contract to pay a weekly sum for the maintenance of a child, or of a wife separated from her husband, has been held on this ground to be outside the section.

McGregor v. McGregor, 21 Q. B. D. 429.

This is what is meant by the *dictum* that to bring a contract within the operation of the statute it must 'appear by the whole tenor of the agreement that it is to be performed after the year.' If the contract is for a definite period, extending beyond the year, then, though it might be concluded by notice within the year, on either side, the statute operates.

Hanau v. Ehrlich, [1911] 2 K.B 1056, [1912] A. C. 39.

If all that one of the parties undertakes to do is intended to be done, and is done, within the year, the statute does not apply. *A* was tenant to *X*, under a lease for twenty years. He promised verbally to pay an additional £5 a year for the remainder of the term in consideration that *X* laid out £50 in alterations. *X* did this and *A* was held liable on his promise.

Donellan v Read, 3 B & A. 899.

But if the undertaking of one of the parties cannot be performed, while that of the other might be, but is not intended to be, performed within the year, the contract falls under the section.

Reeve v. Jennings, [1910] 2 K.B. 522.

Lastly it should be noticed that where services have been rendered under a contract unenforceable by virtue of the section a claim for their value can be brought on an implied promise to pay for them. Such an action is not based on the contract expressed to be made between the parties, which is unenforceable, but on a contract implied by law from

Scott v. Pattison, [1923] 2 K.B. 723.

the conduct of the parties. Under the old forms of pleading the action would have been in *indebitatus assumpsit*[1].

(2) The form required is the next point to be considered. What is meant by the requirement that 'the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized'? Requirements of form.

We may, with regard to this part of the subject, lay down the following rules [2].

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

It is not difficult to illustrate this proposition. Thus, the note in writing may be made so as to satisfy the statute, at any time between the formation of the contract and the commencement of an action: or the signature of the party charged may be affixed before the conclusion of the contract. Illustrations.

Again, one party to the contract may sign a rough draft of its terms, and acknowledge his signature by way of concluding the contract when the draft has been corrected. Stewart v. Eddowes, L. R. 9 C P 311. Koenigsblatt v. Sweet, [1923] 2 Ch 314.

And an offer containing the names of the parties and the terms of an offer signed by the offeror will bind him though the contract is concluded by a subsequent parol acceptance. In the first of these cases the signature of the party charged—in the third not the signature only but the entire memorandum—was made before the contract was concluded. It may even happen that one of the parties to a contract which he has not signed may acknowledge it in a letter which supplies his signature and contains at the same time an announcement of his intention Reuss v. Picksley, L R 1 Exch. 342 Buxton v. Rust, L. R. 7 Exch. 1 & 279

[1] *Infra*, p. 443.

[2] With the exception of rule (*d*), what is said under this head may be taken to apply to the 4th section of the Sale of Goods Act, as well as to the 4th section of the Statute of Frauds.

Thirkell v Cambi, [1919] 2 K. B. 590.

to repudiate the contract. He has then supplied the statutory evidence, and, as the contract had already been made, his repudiation is nugatory.

Grindell v Bass, [1920] 2 Ch. 487

In fact the memorandum need not even be a document made as a record of the contract, but may have been intended for some entirely different purpose. Thus the Defence in an action, signed by defendant's counsel, and containing all the terms of a contract, has been held to be a sufficient memorandum signed by an agent 'thereunto lawfully authorized.'

The parties must appear.

(*b*) The parties and the subject-matter of the contract must appear in the memorandum.

The parties must be named, or so described as to be identified with ease and certainty. A letter beginning 'Sir,' signed by the party charged but not containing the name of the person to whom it is addressed, has more than once been held insufficient to satisfy the statute.

Williams v Lake, 2 E & E 349. Williams v Jordan, 6 Ch. D. 517 Pearce v. Gardner, [1897] 1 Q B 688

But, if the letter can be shown to have been contained in an envelope on which the name appears, the two papers will be regarded as one document, and the statute is satified.

Where one of the parties is not named, but is described, parol evidence will be admitted for the purpose of identification if the description points to a specific person, but not otherwise. If *A* contracts with *X* in his own name, being really agent for *M*, *X* or *M* may show that *M* was described in the memorandum in the character of *A*.

See Commins v Scott, L R 20 Eq. 15, 16 Trueman v. Loder, 11 A & E 589

If property is sold by an agent on behalf of the 'owner' or 'proprietor' it may be proved by parol that *X* was the owner or proprietor; but if the sale was made by the agent on behalf of the 'vendor,' of his 'client,' or his 'friend,' there would be no such certainty of statement as would render parol evidence admissible.

Rossiter v Miller, 3 App. Ca 1141. Potter v Duffield, 18 Eq 4

The same principle is applied to descriptions of the subject-matter of a contract.

Plant v Bourne, [1897] 2 Ch

Where *X* agreed to sell and *A* to buy '24 acres of land freehold and all appurtenances thereto at Totmanslow in

the parish of Draycott in the County of Stafford' parol evidence was admitted to identify the land. But a receipt for money paid by *A* to *X* 'on account of his share in the Tividale mine' was held to be too uncertain as to the respective rights and liabilities of the parties, to be identified by parol evidence.

Caddick v Skidmore, 2 De G & 52.

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

The terms may be collected from various documents

The statute requires that the terms, and all the terms of the contract, should be in writing, but these terms need not appear in the same document; a memorandum may be proved from several papers or from a correspondence, but the connexion must appear from the papers themselves.

Stokes v Whicher, [1920] 1 Ch 411.

Parol evidence is admissible to connect two documents where each obviously refers to another, and where the two when thus connected make a contract without further explanation. This is the principle laid down in *Long v. Millar*, and adopted in more recent cases. It is not inconsistent with the decision in the often-cited case of *Boydell v. Drummond*. There two forms of prospectus were issued by the plaintiff, inviting subscriptions to an illustrated edition of Shakespeare. Subscribers might purchase the prints only, or the work in its entirety. The defendant entered his name in a book in the plaintiff's shop, entitled 'Shakespeare Subscribers, their signatures'; afterwards he refused to carry out his purchase; and it was held that the subscription book and the prospectus were not connected by documentary evidence, and that parol evidence was not admissible to connect them. But though the rule as to the admission of parol evidence has been undoubtedly relaxed since 1809, it seems that *Boydell v. Drummond* would not now be decided differently, for the evidence sought to be introduced went further than the mere connexion of two documents and seems to have dealt with the nature and extent of the defendant's liability.

but must be connected on the face of them; 4 C. P D 454.

11 East, 142

must be complete.

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

Greaves v. Ashlin, 3 Camp 426

Consideration must appear in writing.

(*d*) The consideration must appear in writing as well as the terms of the promise sued upon. This rule has been settled since the year 1804. It is not wholly applicable to the sale of goods (see p. 87) and is subject to an exception, created for reasons of commercial convenience by the Mercantile Law Amendment Act, 1856, s. 3, in the case of the 'promise to answer for the debt, default or miscarriage of another': such a promise shall not be—

Wain v Warlters, 5 East, 10.

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

Signature of party or agent.

(*e*) The memorandum must be signed *by the party charged* or *some other person thereunto by him lawfully authorized.*

Daniels v. Trefusis, [1914] 1 Ch 788.

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

But it must be intended to be a signature, and as such to be a recognition of the contract, and it must govern the entire contract. Hucklesby v. Hook, 82 L. T. 117.

These rules are established by a number of cases turning upon difficult questions of evidence and construction, and a further discussion of them would here be out of place.

(3) It remains to consider what is the position of parties who have entered into a contract specified in section 4, but have not complied with the provisions of the section. Such a contract is neither void nor voidable, but it cannot be enforced by action against a party who has not signed a memorandum because it is incapable of proof. On the other hand a party who has not signed a memorandum can enforce the contract against one who has. There is also authority for saying that a defendant may set up a parol agreement within the Statute by way of defence, for that is not to 'charge' any one on the contract. Statute does not avoid contract, Laythorp v Bryant, 2 Bing. N. C. 735. Miles v New Zealand Alford Estate Co, 32 Ch D per North, J, at p. 279

It has been shown that a memorandum in the requisite form, whether made before or after the fact of agreement, will satisfy the requirements of the statute. But the nature of the disability attaching to parties who have not satisfied these requirements may be illustrated by cases in which they have actually come into Court without supplying the missing form. *Ante*, p

In the case of *Leroux v. Brown*, the plaintiff sued upon a contract not to be performed within the year, made in France and not reduced to writing. French law does not require writing in such a case, and by the rules of private international law the formal validity of a contract is determined by the *lex loci contractus*, the law of the place where it is made. The mode of proof of the contract, however (as being a matter of procedure), is governed by the *lex fori*, the law of the place where the action is brought. If, therefore, the 4th section *avoided* contracts made in breach of it, the plaintiff could have recovered, for his contract was good in France where it was made, 12 C B 801 but contract cannot be proved.

and the *lex loci contractus* would have been applicable. If, on the other hand, the 4th section affected the mode of proof only, the contract, though not void, was incapable of proof in England, because the necessary evidence was wanting.

Leroux tried to show that the 4th section would have avoided his contract, if it had been an English contract. He would then have succeeded, for he could have proved, first, his contract, and then the French law which made it valid. But the Court held that the 4th section dealt only with matters of proof, and did not avoid the contract, but only made it incapable of proof, unless he could produce a memorandum of it. This he could not do, and so lost his suit.

The doctrine of part performance.

Under the equitable doctrine of Part Performance the courts will in certain cases allow a contract, even though of a kind which the Statute of Frauds requires to be proved by writing, to be proved by parol evidence, when one of the parties has done acts in performance of his obligations under it. The doctrine, however, is strictly limited, and the conditions of its application are stated in a passage of Fry on Specific Performance, 6th ed., p. 276, which has been judicially approved, as follows:—

Chaproniere v. Lambert, [1917] 2 Ch at p. 361

Rawlinson v. Ames, [1925] 1 Ch at p. 114

'In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: first, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; secondly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; thirdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and fourthly, there must be proper parol evidence of the contract which is let in by the acts of part performance.'

The first of these conditions means that the acts of performance which are relied upon to take a contract out of the Statute must of themselves suggest the existence of a contract such as it is desired to prove. For example, in an old case when the plaintiff, in pursuance of a verbal agreement for a lease, had entered on the

Lester v. Foxcroft, (1701) Colles' P. C. 108.

land of the defendants' testator, pulled down an existing messuage, and built new houses thereon, the House of Lords ordered the defendants to execute the lease. In a recent case the parties entered into a verbal contract for the lease of a flat, and the plaintiff, the lessor, proceeded to have certain alterations, which had been agreed upon, made in the flat. This of itself was not an act such as would have taken the case out of the Statute, since the plaintiff might obviously have desired to improve her own property whether she had agreed to let it or not. But in fact the alterations were made at the request of the defendant, who constantly inspected their progress and made suggestions about the work, and it was held by Romer, J., that in those circumstances the acts of the plaintiff, when construed in the light of the defendant's acts, inevitably suggested the conclusion that the defendant must have a contract giving her some interest in the property. They were consequently acts of part performance sufficient to let in parol evidence of the agreement for a lease. The reason of this limitation is that the equitable doctrine does no more than allow an alternative to the memorandum required by the Statute; the memorandum, as we have seen, is required by the Statute as evidence of the contract, and equity requires the acts relied upon as part performance to fulfil the same function.

Rawlinson v. Ames, [1925] 1 Ch 96

Conversely acts of performance which do not of themselves involve any inference of the existence of a contract will not bring the doctrine into play. In the leading case of *Maddison v. Alderson*, where the whole doctrine was exhaustively discussed by the House of Lords, the appellant had served as Alderson's housekeeper for many years without wages, and alleged that she had done so in consideration of his verbal promise to make a will leaving her the Manor House Farm for life. Alderson died intestate, and, the appellant having possessed herself of the title-deeds, his heir-at-law brought an action to recover them. It was held by the House of Lords that

8 App. Cas 467.

since the appellant's continuance in Alderson's service was easily explicable without supposing any contract relating to Alderson's land, it was not an act which would take the alleged contract out of the Statute. For the same reason it is well settled that the payment of a sum of money, either as purchase money or as rent in advance, is not a sufficient act of part performance, for 'the payment of money is an equivocal act, not (in itself), until the connexion is established by parol testimony, indicative of a contract concerning land.'

per Lord Selborne, ibid., at p 479

The second of the above conditions of the application of the doctrine requires that the plaintiff, by acting on the faith of the promises of the other party, must have changed his position for the worse, so as to render it unfair that the other should not be bound by the contract: there would otherwise be no 'equity' for the court to enforce in his favour. The exclusion of a money payment from admissible acts of part performance has also been explained on this ground, for the money can be recovered back by action if the contract is not performed.

Chaproniere v. Lambert, [1917] 2 Ch 356

The third condition arises from the history of the doctrine, which is wholly the creation of courts of equity; and although since the Judicature Acts it may be administered in any court, it still has the limitations which were impressed upon it by the nature of equitable jurisdiction over contracts before the amalgamation of the courts. Thus in *Britain v. Rossiter* an action was brought for wrongful dismissal, in breach of a verbal contract of service not to be performed within a year. The contract had been performed in part, and the doctrine of equity was invoked to dispense with the need of writing. The Court of Appeal held, however, that the doctrine did not apply, since courts of equity had exercised it only in cases concerning land, and had never entertained suits for specific performance of contracts of service. Lord Selborne also in *Maddison v. Alderson* concluded from an examination of the cases that acts of part performance have been

11 Q. B. D 123

at p. 480

almost, if not quite, universally relative to the possession, use, or tenure, of land. It may be, however, though the practical importance of the distinction is not very great, that the true limitation of the doctrine was expressed by Kay, J., in *McManus v. Cooke*, where he says 'It is probably more accurate to say that the doctrine of part performance applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing.'

35 Ch. D 681.

The Judicature Acts, therefore, have not extended the remedy, but only the jurisdiction through which the remedy may be obtained, and as the Chancery could not have given damages in lieu of specific performance before the Acts, so damages can still not be obtained where parol evidence is admitted under the doctrine.

Lavery v Pursell, 39 Ch D. 508, at p 519

The justification of the doctrine of part performance has been stated to be that 'courts of equity will not permit the statute to be made an instrument of fraud,' but this is 'not an adequate explanation, either of the precise grounds, or of the established limits' of the doctrine. Courts of equity are no more able than courts of law to overrule a statute because it may lead to results which are contrary to conscience. Moreover it would follow from such an explanation that *any* act whereby one of the parties had changed his position on the faith of a parol contract would take the case out of the Statute, whether the act was in itself evidence of the existence of the contract alleged or not, for from a moral point of view the fraud is the same in either case; but this, as we have seen, is not the law. Lord Selborne in *Maddison v. Alderson* suggested a more adequate explanation:—

How to be reconciled with the Statute of Frauds.

Maddison v Alderson, per Lord Selborne, at p. 474

at p. 475

'In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow. . . . It is not arbitrary or unreasonable to hold that when the Statute says that no action is to be brought to charge any person upon

a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestae* subsequent to and arising out of the contract. So long as the connexion of those *res gestae* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestae* themselves, justice seems to require some such limitation of the scope of the Statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement.'

at p. 489. On the other hand in the same case Lord Blackburn inclined to the view that the doctrine was an anomaly which could not be reconciled with the words of the Statute; but, he added, 'if it was originally an error, it is now I think communis error, and so makes the law.'

Sale of Goods Act, 1893, Section 4.

(1) A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf [1].

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery [2].

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

We have here to consider, as in the case of the 4th section of the Statute of Frauds—

(1) The nature of the contract.

This sub-section contains the substance of s. 17, now repealed, of the Statute of Frauds. The language is altered so as to leave no doubt that the effect of this section, both as to the form required and the effect of its absence, is identical with that of s. 4 of the Statute of Frauds.

[2] This sub-section embodies the section, now repealed, of Lord Tenterden's Act, which settled the doubt as to the operation of the 17th section of the Statute of Frauds upon an agreement to sell.

(2) The form required.

(3) The effect of non-compliance with these requirements.

Contract of sale.

(1) The Statute deals with the sale of goods, and goods are defined therein as 'chattels personal other than things in action and money'; but the words 'contract of sale' include two sorts of agreement—a 'sale' and an 'agreement to sell,' and the 4th section deals with both. The essential difference appears in an earlier section of the Act:—

s. 1 (3).

'Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at some future time, or subject to some condition thereafter to be fulfilled, the contract is called "an agreement to sell."'

The contract for the sale of goods may therefore contemplate either an instantaneous, or a future or conditional, transfer of property in the goods; and a subsequent section of the Act supplies us with the tests which determine whether a contract is a 'sale' or an 'agreement to sell.'

includes a sale,

To constitute a 'sale' the goods sold must be *specific*, they must be *in a deliverable state*, and the sale must be *unconditional*.

and an agreement to sell.

If *A* orders any ten sheep out of *X*'s flock the goods are not specific. If he orders a table which he sees in course of making in *X*'s shop the goods are incomplete. If he buys *X*'s stack of hay at so much a ton, the price to be ascertained when the hay is taken down and weighed, there is yet something to be done to fix the price.

Where the conditions of a sale are satisfied the contract operates as a transfer of property, as a conveyance. When, and so soon as, the parties are agreed the property in the goods passes to the buyer: he has the remedies of an owner in respect of the goods themselves, besides an action *ex contractu* against the seller if the latter fail to carry out his bargain or part with the goods to a third

party: the goods stand at his risk, and if they are destroyed the loss falls on him and not on the seller.

It is further important to bear in mind, not only that the difference between a sale and an agreement to sell is the difference between conveyance and contract, but that an agreement to sell may become a sale on the fulfilment of the conditions on which the property in the goods is to pass to the buyer.

As a rule there is no great difficulty in determining whether, as a fact, these conditions have been fulfilled. But questions sometimes arise which admit of some doubt, in cases where there is an agreement for the purchase of goods which are not specific, and the seller has to *appropriate the goods to the contract.* Upon such appropriation the contract becomes a sale: it is therefore desirable to ascertain the precise moment at which property and risk pass to the buyer.

Infra, p. 361.

If the buyer selects the goods to be appropriated, if he approves the selection made by the seller, or if the goods are delivered to a carrier on the authority of the buyer, the appropriation takes place at the moment of approval, or of delivery. If however the seller has selected the goods on the authority of the buyer, but without his express approval, doubts may arise whether his selection is irrevocably binding upon him or whether it merely expresses an intention which he may alter. The question is one which need not be discussed here; it is a part of the law of the special contract of sale.

A different sort of question has arisen in cases where skilled labour has been expended on the thing sold in pursuance of the contract, and before the property is transferred. It has been asked whether the contract is a contract of sale or for the hire of services. The law may be taken to be now settled, that, whatever the respective values of labour and the materials, if the parties contemplate the ultimate delivery of a chattel the contract is for the sale of goods.

'I do not think,' said Blackburn, J., in *Lee v. Griffin*, 'that the test to apply in these cases is whether the value of the work exceeds that of the materials used in its execution; for if a sculptor was employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would in my opinion be nevertheless for the sale of a chattel.' 1 B. & S. 272

(2) As to the form, it is enough to say that where, in absence of a part acceptance and receipt or part payment, a note or memorandum in writing is required, the rules applicable to contracts under section 4 of the Statute of Frauds apply to contracts under the Sale of Goods Act with one exception. Difference as to form from s. 4 of Statute of Frauds.

The consideration for the sale need not, under this section, appear in writing unless the price is fixed by the parties. It then becomes a part of the bargain and must appear in the memorandum. Since the enactment only applies to contracts for the sale of goods, it will be presumed, if no consideration for the sale be set forth, that there is a promise to pay a reasonable price: but this presumption may be rebutted by evidence of an express verbal agreement as to price, so as to show that a memorandum which does not contain the price is insufficient. Hoadley v M'Laine, 10 Bing. 482

The definition of 'acceptance' in sub-section (3) should be noted. As the sub-section states it is not necessary that there should be 'an acceptance in performance of the contract' (which is defined in section 35 of the Act); but there is an acceptance within the meaning of section 4 when the buyer 'does any act in relation to the goods which recognizes a pre-existing contract of sale.' An example will make this clear. *A* verbally ordered hay of a certain quality over the value of £10. On its arrival he took a sample to test the quality, and after examining it, said, 'The hay is not to my sample and I shall not have it.' It was held that his action 'recognized a pre-existing contract of sale'; that is, it was only to be explained on the hypothesis that a contract existed. He had therefore supplied the evidence necessary to prove the 'Acceptance.' *Infra*, p 360. Abbott & Co v Wolsey, [1895] 2 Q B 97

existence of the contract; though this would of course not preclude him from proving, if he could, that the hay was not up to sample [1].

Prested v. Gardner, [1910] 2 K. B. 776; [1911] 1 K. B. 425.

It is to be observed that s. 4 of the Statute of Frauds, so far as relates to contracts not to be performed within a year, is not repealed by s. 4 of the Sale of Goods Act where contracts for the sale of goods are concerned. Acceptance or receipt of the goods in these circumstances does not therefore dispense with the note or memorandum in writing required by the earlier statute.

Effect of non-compliance with section.

(3) It remains to note that if there be no acceptance and receipt, no part payment, and no memorandum or note in writing, the section declares that the contract shall not be 'enforceable by action.'

The Sale of Goods Act has thus set at rest another question which, though practically settled, had remained for a long time uncertain in the case of the 17th section of the Statute of Frauds. Like the 4th section of that Statute, the requirements of the Sale of Goods Act do not affect the validity of the contract, but only impose conditions as to its proof.

Taylor v. Gt. E Railway, [1901] 1 K.B. 774 at p. 779.

§ 4. *Consideration.*

It has already been stated that Consideration is the universal requisite of contracts not under seal, and this is generally true of such contracts, even when the law has prescribed a form in which they should be expressed, so long as the form is not that of a Deed. It will be well therefore to start with a definition of Consideration; and we may take that which is given in the case of *Currie v. Misa*:—

Consideration defined.

L. R. 10 Exch. 162

'A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.'

[1] For what does and what does not constitute acceptance see *Page v. Morgan*, 15 Q. B. D. 228; *Taylor v. Smith*, [1893] 2 Q. B. 65 (C. A.); and *Taylor v. Great Eastern Railway Co.*, [1901] 1 K. B. 774.

Consideration is something done, forborne, or suffered, or promised to be done, forborne, or suffered by the promisee in respect of the promise of the other party. It must necessarily be *in respect of the promise*, since consideration gives to the promise a binding force.

A benefit conferred or a detriment suffered otherwise than in respect of, or in return for, the promise of the other party can, therefore, never constitute consideration, and this point received a rather curious illustration in the case of *Wigan v. English and Scottish Law Life Assurance Association*. One Hackblock had insured his life with the defendant company by a policy which was to be void 'if the life assured died by his own hands,' but this condition was not to prejudice 'the bona fide interests of third parties based on valuable consideration.' Hackblock, being pressed by Wigan for payment of a debt, executed a mortgage of the policy to Wigan, but left it with his own solicitors, who succeeded in getting further time for the payment of the debt without using or even mentioning the mortgage. They subsequently, at Hackblock's request, destroyed the mortgage, and it was only brought to the knowledge of the plaintiffs, the executors of Wigan, after Hackblock had committed suicide. The plaintiffs then claimed the policy moneys from the insurance company. Parker, J., held that Wigan had not given consideration for the interest, if any, which he had acquired in the policy by virtue of the mortgage. [1909] 1 Ch 291.

'It appears to me to be reasonably clear that the mere existence of a debt[1] from A. to B. is not sufficient valuable consideration for the giving of a security from A. to B. to secure that debt. If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration

[1] A statutory exception to this principle exists under § 27 of the Bills of Exchange Act, 1882. Valuable consideration for a bill may be constituted by:—(a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability.

of the security being given. And further than that, if there is no express agreement, and no agreement can be implied at the time and under the circumstances at and under which the indenture giving the further security is executed, yet if that security be communicated to a person who could otherwise sue on the debt, and on the strength of that security he does in fact forbear to sue on the debt, he does give that time with the object of securing which the security is presumably given, [and] then I think it appears on the cases that there is sufficient consideration, though in a sense it is an *ex post facto* consideration, for the security which is given.

'On the other hand, it appears to me that where there is no communication of the security, where there is no express agreement, and there are no circumstances from which the Courts can imply any agreement, then there is no possibility of its being said with any justice that any consideration has been given at all.'

We may now lay down some general rules as to Consideration:—

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

2. It need not be adequate to the promise, but must be of some value in the eye of the law.

3. It must be legal.

4. It must be either present or future, it must not be past.

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

3 Burr. 1663. Necessity of consideration.

The case of *Pillans v. Van Mierop* shows that the rule laid down above was still open to question in the year 1765. Lord Mansfield held that consideration was only one of several modes for supplying evidence of the promisor's intention to bind himself; and that if the terms of a contract were reduced to writing by reason of commercial custom, or in obedience to statutory requirement, such evidence dispensed with the need of consideration.

The question arose again in 1778. In *Rann v. Hughes*, Mrs. Hughes, administratrix of an estate, promised in writing to pay out of her own pocket money which was due from the estate to the plaintiff. There was no con-

sideration for the promise, and it was contended that the observance of the form required by section 4 of the Statute of Frauds made consideration unnecessary. The case went to the House of Lords. The opinion of the judges was taken, and was thus delivered by Skynner, C. B.:— 7 T. R 350 (n)

'It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such an 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. . . . All contracts are by the law of England divided into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved.'

Exceptions to general rule.

We here get a rule of universal application, a uniform test of the actionability of every promise made by parol. In each case we must ask, Does the promisor get any benefit or the promisee sustain any detriment, present or future, in respect of the promise? If not, the promise is gratuitous, and is not binding. In working out this doctrine to its logical results it has, no doubt, happened from time to time that the Courts have been compelled to hold a promise to be invalid which the parties intended to be binding, or that the slightness of the benefit or detriment which may constitute a consideration has tended to bring the requirement into ridicule. Thus we find a learned Law Lord, trained under another system of jurisprudence, commenting as follows on a case before him in the House of Lords:—

'I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce. Notwithstanding these considerations I cannot say that I have ever had any doubt that the judgment of the Court of Appeal was right.' Lord Dunedin in Dunlop v Selfridge, [1915] A. C. 847, 855.

But the value of the rule must be tested by its practical convenience. We need some means of ascertaining whether the maker and receiver of a promise contemplated the creation of a legal liability. The rule, or doctrine, of consideration affords a uniform test for this purpose; and it may be questioned whether the general convenience is not better served by adopting this test in its logical completeness than by allowing distinctions and subtleties to refine the rule away. Two exceptions, however, we may note to the universality of the rule.

See p. 100. (1) The promise of a gratuitous service, although not enforceable as a promise, involves a liability to use ordinary care and skill in performance.

(2) In dealings arising out of negotiable instruments, such as bills of exchange and promissory notes, a promise See p 302. to pay money may be enforced though the promisor gets nothing and the promisee gives nothing in respect of the promise.

These two exceptions represent legal obligations recognized in the Courts before the doctrine of Consideration was clearly formulated; they were engrafted upon the Common Law, in the first case from the historical antecedents of contract, in the second from the law merchant. It is better to recognize these exceptions, to define them and to note their origin, than to apply the doctrine of Consideration by forced and artificial reasoning to legal relations which grew up outside it.

2. *Consideration need not be adequate to the promise, but must be of some value in the eye of the law.*

Adequacy of consideration

Courts of law will not make bargains for the parties to a suit, and, if a man gets what he has contracted for, will not inquire whether it was an equivalent to the promise which he gave in return. The consideration may be a benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promisee: in any case 'its adequacy is for the

parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced.'

Per Blackburn, J., Bolton v. Madden, L. R. 9 Q. B. 55.

The following cases will illustrate the rule.

Bainbridge owned two boilers, and at the request of Firmstone allowed him to weigh them on the terms that they were restored in as good a condition as they were lent. Firmstone took the boilers to pieces in order to weigh them and returned them in this state, and for breach of his promise Bainbridge sued him. The defendant was held liable.

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

not regarded by the courts

'The consideration is that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit: at any rate there is a detriment to the plaintiff from his parting with the possession for ever so short a time.'

In *Haigh v. Brooks*, the consideration of a promise to pay certain bills was the surrender of a document supposed to be a guarantee, which turned out to be unenforceable. The worthlessness of the document surrendered was held to be no defence to an action on the promise. 'The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise.'

10 A. & E. 309

In *De la Bere v. Pearson*, Vaughan Williams, L. J., thus described the contract sued upon:—

[1908] 1 K. B. 280 at p. 287.

'The defendants advertised, offering to give advice with reference to investments. The plaintiff, accepting that offer, asked for advice, and asked for the name of a good stockbroker. The questions and answers were, if the defendants chose, to be inserted in their paper as published; such publication might obviously have a tendency to increase the sale of the defendants' paper. I think that this offer, when accepted, resulted in a contract for good consideration.'

Equity treats inadequacy of consideration as affording corroborative evidence of fraud or undue influence, such as may enable a promisor to resist a suit for specific performance, or get his promise cancelled. But mere inadequacy of consideration, unless, in the words of Lord Eldon,

except in granting equitable remedies.

Cole v. Trecothick, 9 Ves. 246.

it is so gross as 'to shock the conscience and amount in itself to conclusive evidence of fraud,' is not of itself a ground on which specific performance of a contract will be refused.

Reality of consideration.

Though consideration need not be adequate it must be real. This leads us to ask what is meant by saying that consideration must be 'something of some value in the eye of the law.'

L. R. 10 Exch. 162.

The definition of Consideration, supplied by the Court of Exchequer Chamber in *Currie v. Misa*, amounts to this —that consideration is something done, forborne, or suffered, or promised to be done, forborne, or suffered, by the promisee in respect of the promise. Therefore it may be (1) a present act, forbearance, or sufferance, constituting either the offer or the acceptance of one of the parties, and being all that can be required of him under the contract; or (2) a promise to do, forbear, or suffer, given in return for a like promise. In the first case the consideration is present or executed, in the second it is future or executory.

Forms of consideration.

The offer of a reward for information, accepted by the supply of the information required; the offer of goods, accepted by their use or consumption, are illustrations of executed consideration. Mutual promises to marry; a promise to do work in return for a promise of payment, are illustrations of executory considerations. And the fact that the promise given for a promise may be dependent upon a condition does not affect its validity as a consideration. *A* promises *X* to do a piece of work for which *X* promises to pay if the workmanship is approved by *M*. The promise of *X* is consideration for the promise of *A*.

Tests of reality.

In the application of this rule we must ask, when action is brought upon a promise:—

(*a*) Did the promisee do, forbear, suffer, or promise *anything* in respect of the promise to him?

(*b*) Was his act, forbearance, sufferance, or promise of any ascertainable value?

(*c*) Was it more than he was already legally bound to do, forbear, or suffer?

On the answer to these questions depends the *reality* of the consideration.

(*a*) Apart from the opinions expressed by Lord Mansfield, we find cases in comparatively modern times which have raised a doubt whether consideration, under certain circumstances, is necessary to make a promise actionable. *Ante*, p. 90

The cases have resulted in the establishment of two rules:—

Motive is not the same thing as consideration.

Consideration must move from the promisee.

Motive must be distinguished from consideration.

In *Thomas v. Thomas*, a widow sued her husband's executor for breach of an agreement to allow her to occupy a house, which had been the property of her husband, on payment of a small portion of the ground-rent. The executor in making the agreement was carrying out a wish expressed by the deceased that his wife should have the use of the house. The Court held that the desire to carry out the wishes of the deceased would not amount to a consideration. 'Motive is not the same thing with consideration. Consideration means something of some value in the eye of the law, moving from the plaintiff.' But it was further held that the undertaking by the plaintiff to pay ground-rent was a consideration for the defendant's promise, and that the agreement was binding. 2 Q B 851 Motive and consideration,

The confusion of motive and consideration has appeared in other ways.

The distinction between *good* and *valuable* consideration, or family affection as opposed to money value, is only to be found in the history of the law of Real Property. Motive has most often figured as consideration in the form of a moral obligation to repay benefits received in the past. It is clear that the desire to repay or reward a benefactor is indistinguishable, for our purpose, from a desire *good* consideration,

on the part of an executor to carry out the wishes of a deceased friend, or a desire on the part of a father to pay the debts of his son. The mere satisfaction of such a desire, unaccompanied by any present or future benefit accruing to the promisor or any detriment to the promisee, cannot be regarded as of any value in the eye of the law.

Mortimore v. Wright, 6 M. & W. 482.

past consideration.

At the end of the eighteenth and beginning of the nineteenth century, the moral obligation to make a return for past benefits had obtained currency in judicial language as an equivalent to consideration. The topic belongs to the discussion of past as distinguished from executed or present consideration, but it is well here to insist on the truth that past consideration is no consideration, and that what the promisor gets in such a case is the satisfaction of motives of pride or gratitude. The question was settled once for all in *Eastwood v. Kenyon*, and a final blow given to the doctrine that past benefits would support a subsequent promise on the ground of the moral obligation resting on the promisor. 'The doctrine,' said Lord Denman, 'would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

11 A. & E. 438.

Consideration must move from the promisee.

Consideration must be furnished by promisee,

This means that it is for the party who wishes to enforce a contract to show that he has furnished consideration for the promise of the other party.

It has been argued that where two persons make a contract in which one of them promises to confer benefits upon a third party, the third party can sue upon the contract for the money or other benefit which it is agreed that he should receive.

The matter concerns mainly the operation of contract, but it is plain that if such a contention were well founded, a man could sue on a promise not made to him, nor supported by any consideration which he had furnished.

It was at one time held that where *A* made a binding

promise to *X* to do something for the benefit of the son or daughter of *X*, the nearness of relationship, and the fact that the contract was prompted by natural affection, would give a right of action to the person interested.

Dutton v Poole, 2 Lev 210

This however is no longer law. 'Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.'

Lord Haldane, Dunlop v Selfridge, [1915] A C. 847, 853

But where an agent is instructed to obtain a promise for his principal and to provide consideration, the consideration moves from the principal, not from the agent.

or by his agent.

Fleming v Bank of New Zealand, [1900] A C 577

The rule therefore holds good that a promisor cannot be sued on his promise if he made it merely to satisfy a motive or wish, nor can he be sued on it by one who did not furnish the consideration on which the promise is based.[1]

(*b*) We now come to the class of cases in which the consideration turns out to be of no ascertainable value.

Physical or legal impossibility, obvious upon the face of the contract, makes the consideration unreal. The impossibility must be obvious, such as is, 'according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted.' If it is only a practical impossibility, present or subsequent, such as would arise from the death or destruction of the subject of the contract, unknown to the parties or unexpected by them when the contract was made, the effect would be different. The contract might be avoided in the first case on the ground of mistake, or discharged in the second case on the ground of subsequent impossibility.

Prima facie impossibility.

Clifford v Watts, L R 5 C P 577, 588

But a promise to pay money in consideration of a promise to discover treasure by magic, to go round the world in a day, or to supply the promisor with a live pterodactyl, would be void for unreality in the consideration furnished.

Physical

[1] This matter is more fully dealt with at p. 275, *infra*.

or legal.

And an old case furnishes us with an instance of a legal impossibility. A bailiff was promised £40 in consideration of a promise made by him that he would release a debt due to his master. The Court held that the bailiff could not sue; that the consideration furnished by him was 'illegal,' for the servant cannot release a debt due to his master. By 'illegal' it is plain that the Court meant legally impossible.

Harvey v Gibbons, 2 Lev. 161

Uncertainty.

Again, a promise which purports to be a consideration may be of too vague and unsubstantial a character to be enforced.

A son gave a promissory note to his father. the father's executors sued him upon the note, and he alleged that his father had promised to discharge him from liability in consideration of a promise on his part that he would cease from complaining, as he had been used to do, that he had not enjoyed as many advantages as his brothers. It was said that the son's promise was no more than a promise 'not to bore his father,' and was too vague to form a consideration for the father's promise to waive his rights on the note.

White v Bluett, 23 L. J. Exch. 36.

So too promises to pay such remuneration 'as shall be deemed right'; to retire from the practice of a trade 'so far as the law allows,' have been held to throw upon the Courts a responsibility of interpretation which they were not prepared to assume. These cases correspond with offers held to be incapable of creating legal relations, as described on p. 41.

Taylor v Brewer, 1 M. & S. 290 Davies v. Davies, 36 Ch. D 359.

Cases occur in which it is hard to determine whether the consideration is or is not real. A good illustration of such cases is afforded by promises of forbearance to exercise a right of action or agreements to compromise a suit.

Forbearance to sue.

A forbearance to sue, even for a short time, is consideration for a promise, although there is no waiver or compromise of the right of action.

In the *Alliance Bank v. Broom* Messrs. Broom were asked to give security for moneys owing by them to the Bank. They promised to assign the documents of title to certain goods; they failed to do so and the Bank sued for specific performance of the promise. The Court held that— 2 Dr & Sm 289

'Although there was no promise on the part of the Bank to abstain for any certain time from suing for the debt, the effect was that the Bank did give and Messrs. Broom received the benefit of some degree of forbearance, not indeed for any definite time, but at all events some degree of forbearance.'

To use the expression adopted by the Court in a similar case, the promise to give security 'stayed the hand of the creditor.'

But in order that forbearance should be a consideration some liability must be shown to exist, or to be reasonably supposed to exist by the parties. In *Jones v. Ashburnham* action was brought on a promise to pay £20 to the plaintiff in consideration of his forbearance to sue for a debt which he alleged to be due to him from a third party deceased. The pleadings did not state that there were any representatives of the dead man towards whom this forbearance was exercised, nor that he had left any assets to satisfy the claim. It was a mere promise not to sue persons unknown for a sum which was not stated to be in existence or recoverable, and was held to be no consideration. 'How,' said Lord Ellenborough, 'does the plaintiff show any damage to himself by forbearing to sue when there was no fund which could be the object of suit, when it does not appear that any person *in rerum natura* was liable to him?' 4 Last, 455

Compromise of suit.

The compromise of a suit furnishes consideration of the same character. In the case of forbearance the offer may be put thus: 'I admit your claim but will do or promise something if you will stay your hand.' In the case of a compromise the offer is 'I do not admit your claim' (or 'defence' as the case may be), 'but I will do or promise something if you will abandon it.'

But it has been argued that if the claim or defence is of an unsubstantial character the consideration fails. The answer is to be found in the judgment of Cockburn, C. J., in *Callisher v. Bischoffsheim*:—

L. R. 5 Q. B. 449

'Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes that he has a fair chance of succeeding he has a reasonable ground for suing and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action and the other party gets an advantage, and instead of being annoyed with an action he escapes the vexations incident to it. It would be another matter if a person made a claim which he knew to be unfounded and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent.'

Wade v. Simeon, 2 C. B. 548.

If therefore it is clear that one of the parties to the compromise has no case, and knows that he has none, the agreement to compromise would not be held binding.

Gratuitous bailment.

A different kind of difficulty has arisen in cases of the gratuitous bailment or deposit of chattels, and in cases of gratuitous employment. Here the law imposes a liability, independent of contract, upon the depositary or the person employed. The relations of the parties therefore originate sometimes in contract, sometimes in the voluntary act of the party liable, and the cases need to be carefully studied in order to ascertain the precise legal relation with which the Courts are dealing.

A chattel may be bailed, or placed in the charge of a bailee or depositary, for various purposes—for mere custody, for loan, for hire, for pledge, for carriage, or in some other way to be dealt with or worked upon. The relations of the parties may or may not originate in contract: but in every case a duty to use reasonable care is imposed *by law* on the bailee, and failure to use such care constitutes a wrong independently of contract.

Turner v. Stallibrass, [1898] 1 Q. B 60

The bailor has always a remedy for failure to use care. he can bring an action *ex delicto*, for negligence. If his matter of complaint extends beyond this he must rely upon the terms of a contract, and if the bailment itself is gratuitous, and an action is brought *ex contractu*,

we must seek for the consideration which supports the contract.

Thus *A* allowed two bills of exchange to remain in the hands of *X*, and *X* thereon promised that if he could get the bills discounted he would do so and pay the proceeds to the account of *A*. This promise was held to be made on good consideration, namely the permission given to *X* to retain the custody of the bills. Hart v. Miles, 4 C.B., N S 571

It will be noted that the bailee here undertook something more than mere custody, that the action was *ex contractu*, and that therefore consideration was required to be shown.

In the case of bailment of a chattel a consideration may sometimes be found in the owner having parted with the possession at the request of the bailee, but no such consideration is to be found in cases of gratuitous employment.

A offers to do *X* a service without reward: the offer is accepted: no action would lie if the service were not performed, because there is no consideration for the promise of *A*: and yet there is abundant authority for saying that if the service is in fact entered upon, and performed so negligently that *X* thereby suffers loss or injury, there is a liability which the Courts would recognize. Gratuitous employment

A promised *X* to build him a warehouse by a certain day. *X* sued *A* for non-completion of the warehouse within the promised time, and also for having increased the cost of the building by having used new materials instead of old materials, which he was ordered to use as far as they would go. Elsee v Gatward, 5 T R 143

The promise of *A* was gratuitous, and the Court held that, on this account, he was not liable on his promise to complete within a given time; but that, having entered on the work and by disobedience to orders increased its cost, he was liable for a misfeasance.

Either we must dismiss the conception of agreement from these cases and place them on the broad ground

L. R. 2 C. P. 636

adopted by Willes, J., in *Skelton v. L. & N. W. Railway*: 'If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it'; or else we must follow the analogy of the contract *Mandatum*. In that contract no liability was created until the service asked for was entered upon; thenceforward the one party was bound to use reasonable care in performance, the other to indemnify against loss incurred in doing the service. Such liabilities, reasonable enough in themselves, are difficult to reconcile with a logical use of the English doctrine of Consideration; and they may well be exceptions to its universal application in Contract.

Perhaps analogous to *Mandatum*.

Coggs v. Bernard, 1 1 Sm. L. C. 191

(*c*) Does the promisee do, forbear, suffer, or promise more that that to which he is legally bound? If the promisor gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal.

Performance of public duty.

This may occur where the promisee is under a public duty to do that which he promises to do. Where a witness has received a subpœna to appear at a trial, a promise to pay him anything beyond his expenses, is based on no consideration; for the witness is bound to appear and give evidence.

Collins v. Godefroy, 1 B. & A. 950

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

But where a police-constable who sued for a reward offered for the supply of information, leading to a conviction, had rendered services outside the scope of his ordinary duties, he was held entitled to recover.

On the same principle a promise not to do what a man legally cannot do is an unreal consideration. The case of *Wade v. Simeon*, cited in discussing forbearance as a consideration, is a sufficient illustration of this point.

2 C. B. 548.

Promise to perform existing contract.

Again, we find unreality of consideration where the promisee undertakes to fulfil the conditions of an existing contract with the promisor.

In the course of a voyage from London to the Baltic

and back two seamen deserted, and the captain, being unable to supply their place, promised the rest of the crew that if they would work the vessel home the wages of the two deserters should be divided amongst them. The promise was held not to be binding.

'The agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. . . . The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to bring the ship in safety to her destined port.' Stilk v Myrick, 2 Camp 317

But the decision would have been otherwise if uncontemplated risks had arisen. There is an implied condition in the contract into which a seaman usually enters, that the ship should be seaworthy. So where a seaman had signed articles of agreement to help navigate a vessel home from the Falkland Isles, and the vessel proved to be unseaworthy, a promise of extra reward to induce him to abide by his agreement was held to be binding. Hartley v Ponsonby, 7 E & B 872. Turner v Owen, 3 F & F 176

It is not difficult to see that consideration is unreal if it consist in a promise given to perform a public duty, or to perform a contract already made with the promisor. It is harder to answer the question whether the performance or promise to perform an existing contract with a third party is a real consideration. Promise to perform contract with third party

We must note two cases dealing with this form of consideration.

In *Shadwell v. Shadwell*, *A* had written to the plaintiff, his nephew, as follows: 'I am glad to hear of your intended marriage with *X*; and as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life or until your annual income derived from your profession as a Chancery barrister shall amount to six hundred guineas.' The plaintiff married *X*; the annuity fell into arrear; the uncle died, and the plaintiff sued his executors. The Court differed as to 9 C B, N S 159

the existence of a consideration for the uncle's promise. Erle, C. J., and Keating, J., inclined to regard it as the offer of a promise capable of becoming a binding contract when the marriage took place. Byles, J., dissented, holding that the plaintiff had done no more than he was legally bound to do, and that his marriage was therefore no consideration for the uncle's promise [1].

6 H. & N. 295

In *Scotson v. Pegg*, Scotson promised to deliver to Pegg a cargo of coal then on board a ship belonging to Scotson, and Pegg promised in return to unload and discharge the coal at the rate of forty-nine tons a day during each working day after the ship was ready to discharge. This he failed to do, and when sued for breach of his promise, pleaded that Scotson was under contract to deliver the coals to *X* or to *X*'s order, and that *X* had made an order in favour of Pegg. Scotson therefore in promising to deliver the coals promised no more than he was bound to perform under his contract with *X*, and there was therefore no consideration for his promise to unload in the manner specified.

The Court held that Pegg was liable. 'It is consistent with the declaration,' said Martin, B., 'that there may have been some dispute as to the defendant's right to have the coals or it may be that the plaintiffs detained them for demurrage; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship.' But Wilde, B., said, 'If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding.'

[1] In other cases where there is a promise to pay money in consideration of a marriage taking place, the promise is a part of the engagement to marry, as in *Synge v. Synge*, [1894] 1 Q. B. 466, or an inducement to the engagement as in *Hammersley v. de Biel* 12 Cl. & F. 62, or is made in consideration of an immediate fulfilment of the promise, as in *Skeete v. Silberbeer*, 11 T. L. R. 491.

Neither of these cases can be regarded as authoritative decisions on the point under discussion.

Difficulties presented by *Shadwell v Shadwell* and *Scotson v Pegg*

In *Shadwell v. Shadwell* it is permissible to doubt whether there was in fact any contract at all, or anything but one of those promises which are not intended to create legal relationship. As Byles, J., pointed out in his dissenting judgment, the words 'to assist you at starting' would more naturally refer to the nephew's start in his profession than to his marriage, the marriage itself being rather the occasion than the inducement of the promise. The case would have been different, if (to adopt a suggestion made by Martin, B., in the course of the argument in *Scotson v. Pegg*) the nephew had had it in mind to break his engagement and the uncle to induce him to keep it had promised to pay him the annuity.

In *Scotson v. Pegg*, the facts of the case are not very clearly stated, but the Court apparently thought that the promise to deliver coals to the defendant might have been something more than the existing promise to a third party; that there might have been a right waived or claim forgone which did not appear on the pleadings.

There are nevertheless *dicta* in the two cases which seem to show that two judges in the first, and Baron Wilde in the second, thought that a promise given in consideration of the performance or promise to perform a contract with a third party was binding.

The decisions inconclusive

It may well be argued that there is a distinction between a promise by *B* to perform an obligation which already exists as between himself and *A* alone, and a promise to perform an obligation to a third party with which *A* has no concern. The two contracts are wholly distinct from one another, and indeed *A* may not even know that *B* is under an obligation to any one to perform the act in question; nor is the performance of a contractual obligation to a third party on the same footing as the performance of a public duty. On the other hand, it may be urged that we beg the question if we say that the

consideration is the detriment to the promisee in exposing himself to two suits instead of one for the breach of contract, for we assume that an action would lie on such a promise. But if we say that the consideration is the fulfilment of the promisor's desire to see the contract carried out (assuming that he knows of its existence), we are in danger of confounding motive and consideration.

Yet, on the whole, it seems not unreasonable to say that the performance of or the promise to perform an outstanding contract with a third party may be good consideration for a promise, for, as Martin, B., pointed out in *Scotson v. Pegg*, the defendant is a stranger to the prior contract, and 'we must deal with this case as if no prior contract had been entered into.' The point however awaits an authoritative determination.

Unreality of consideration in discharge of contract by performance.

Foakes v Beer, 9 App Cas 605

The principle that a promise to perform an existing promise already made to the promisor is an unreal consideration has been applied to the discharge of a contract by performance, and has given rise to the rule that the payment by a debtor of a smaller sum in satisfaction of a larger is not a good discharge of a debt [1]. Such payment is no more than a man is already bound to do, and is no consideration for a promise, express or implied, to forgo the residue of the debt. The thing done or given must be somehow different from that which the recipient is entitled to demand, in order to support his promise. The fact that the difference is slight will not destroy its efficacy in constituting a consideration, for if the Courts inquired whether the thing done in return for a promise was sufficiently unlike that to which the promisor was already bound, they would inquire into the adequacy of the consideration. Thus,

What is done must be different:

'the gift of a horse, a hawk or a robe, in satisfaction, is good. For it

1 Sm. L. C. 376. ed. 12.

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

shall be intended that a horse, a hawk or a robe might be more beneficial to the plaintiff than money, in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction.' Pinnel's case, 5 Co Rep 117

It would hardly seem open to doubt that a promise, not under seal, to forgo legal rights, must needs depend for its validity upon the rules common to all promises. But the general rule is subject to some variations of detail in cases where the promise is made *before* the contract is broken and when it is made *after*. else no consideration for the promise to forgo

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

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

Foster v Dawber, 6 Ex 839 See pp. 328 *et seq*

9 Q.B.D 37.

amount was the giving of something different in kind, and therefore that there was consideration for forgoing part of the debt. Doubt however has been thrown on the correctness of this decision, since it would appear that on the facts the cheque was accepted, not in substitution for the debt, but only conditionally upon its being honoured, so that the case really stood on the same footing as the payment of a less amount in discharge of a greater.

Hirachand Punamchand v. Temple, [1911] 2 K. B. at p. 340.

See *infra*, p. 340.

Contract broken:

(2) We now come to cases where the contract is broken and a promise made to forgo the right arising from the breach.

right in dispute.

Where the right itself is in dispute the suit may be compromised as already described.

Right admitted:

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

damages uncertain.

Wilkinson v Byers, 1 A. & E. 106.

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

Right admitted: damages certain.

If it is certain, the promise to forgo the claim or any portion of it can only be supported by the giving of something different in kind, or by a payment in different manner to that agreed on.

Peytoe's case, 9 Rep 77.

As a general rule the cause of action arising from the breach of contract is not discharged so long as the satisfaction remains executory, that is, so long as the agreement has not been carried out. As is said in an old case, 'accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent.' But the question is really one of the construction of the agreement; and the promise only, as distinct from the actual performance of it, may be a good satisfaction and discharge of the cause of action, if it clearly appears that the parties so intended.

Lynn v. Bruce, 2 H. Bl 319.

Morris v. Baron, [1918] A. C. 1, 35.

Infra, p. 397.

Some denunciation and some ridicule have been expended on the rule that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt. And yet, as was said in a judgment in which the House

of Lords affirmed the rule, 'it is not really unreasonable, or practically inconvenient, that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation.' Foakes v Beer, 9 App Ca. 605

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

A composition with creditors appears at first sight (apart from any statutory provisions of the Bankruptcy Acts) to be an infraction of the rule, inasmuch as each creditor undertakes to accept a less sum than is due to him in satisfaction of a greater. There is no difficulty as to the consideration between the creditors *inter se*; it is clearly the forbearance on the part of each of them to claim the whole amount of his debt so that no one creditor may gain at the expense of the others. But as regards the debtor the promise to pay, or the payment of, a portion of the debt, is not the consideration upon which the creditor renounces the residue. That this is so is apparent from the case of *Fitch v. Sutton*. There the defendant, a debtor, compounded with his creditors and paid them 7*s*. in the pound; he promised the plaintiff, who was one of the creditors, that he would pay him the residue when he could; but the plaintiff nevertheless gave him a receipt of all claims which he might have against him 'from the beginning of the world to that day.' The plaintiff subsequently brought an action for the residue of his claim the defendant pleaded the acceptance of 7*s*. in the pound in full of all demands: but Lord Ellenborough said— Composition with creditors. Good v Cheesman, 2 B. & Ad per Parke, B., at p 335 5 East, 230.

'It is impossible to contend that acceptance of £17 10*s*. is an extinguishment of a debt of £50. There must be some consideration for

a relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*.'

The consideration then furnished by the debtor, if indeed he furnishes any at all, must be something other than the payment of a smaller sum in satisfaction of a larger.

In previous editions of this book it was suggested that the consideration furnished by the debtor was the procuring of a promise from each creditor to accept less than the full amount of his debt, thereby conferring a benefit on the creditors generally. This solution of the difficulty is perfectly satisfactory so far as it goes, for there is no doubt that such a consideration would be sufficient, but it cannot apply to a case in which the debtor does not in fact procure the creditors' promises. In *Good v. Cheesman*, the case cited in support of this view, the agreement was not merely that each creditor should accept a lesser sum in money in satisfaction of a greater, but 'a consent, by the parties signing the agreement, to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney, which would have given the trustee an immediate right for their benefit.' It does not appear in fact whether the debtor actually procured this agreement, but he assented to it, and it must be observed that he did more than merely join in the agreement by undertaking to assign one third of his income to a trustee and to give a warrant of attorney as collateral security. This has been pointed out by Horridge, J., in *West Yorkshire Darracq Co. v. Coleridge*. In that case the directors of a company in liquidation mutually agreed to forgo their claims to fees, the liquidator being made a party to the agreement. Later one of the directors, when sued for money which he owed to the company, counterclaimed for the amount of his fees, and it was held that as the liquidator (who represented the company)

2 B. & Ad 328

per Lord Tenterden, at p 333

[1911] 2 K. B. 328

was a party to the agreement, he thereby obtained the benefit of the consideration which each director gave to his co-directors by waiving his right to fees, and that the agreement was therefore binding on the director. It is not easy, however, to see how the liquidator, by becoming a party to the agreement, furnished any consideration at all, and both this case and the cases of composition with creditors can be explained on another and more satisfactory ground, referred to by Horridge, J., namely, that a party to such an agreement cannot claim his original debt because to do so would be to commit a fraud on the other creditors.

This principle has also been applied in another class of case, of which *Welby v. Drake* and *Hirachand Punamchand v. Temple* are examples. In the former of these cases the creditor had received £9 from the debtor's father in satisfaction of a debt of £18. Abbott, C. J., said that proceedings against the son for the balance of the debt, would be a fraud on the father, and held that the payment by the father was a bar to recovery against the son. In the latter case the debtor had told the plaintiffs, his creditors, to apply to his father, and the father in response to their letter sent a cheque for a sum less than the debt in satisfaction, requesting the creditors to return the son's promissory note in return for the cheque. The creditors cashed the cheque, and then sued the son for the balance. The Court of Appeal held that the creditors must be deemed to have accepted the cheque in full satisfaction, and that the son's debt was extinguished. They approved a dictum of Willes, J., in *Cook v. Lister*:—

1 C. & P. 357.

[1911] 2 K. B. 330

13 C. B. (N. S.), at p. 595

'if a stranger pays a part of a debt in discharge of the whole, the debt is gone because it would be a fraud on the stranger to proceed. So, in the case of a composition made with a body of creditors, the assent to receive the composition discharges the debt, because otherwise fraud would be committed against the rest of the creditors.' [1]

[1] The judges in the Court of Appeal suggested other grounds in support of their decision, but they were unanimous in holding that the principle laid down in *Cook v. Lister* applied.

3. *Consideration must be legal.*

Legality of consideration.

This rule should be mentioned here, but we must deal with it later when the time comes to consider, as an element in the Formation of Contract, the legality of the objects which the parties have in view when they enter into a contract.

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

Consideration, executory, executed, and past.

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

Executory consideration.

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

Executed consideration.

A contract arises upon executed consideration when one of the two parties has, either in the act which constitutes an offer or the act which constitutes an acceptance, done all that he is bound to do under the contract, leaving an outstanding liability on one side only.

Offer of an act for a promise.

In the first case a man offers his labour or goods under such circumstances that he obviously expects to be paid for them; the contract arises when the labour or goods are accepted by the person to whom they are offered, and he by his acceptance becomes bound to pay a reasonable price for them. So in *Hart v. Mills* the defendant had ordered four dozen of wine and the plaintiff sent eight; the defendant retained thirteen bottles and sent back the rest, and the plaintiff sued him on the original contract for the purchase of four dozen. It was held that the retention of thirteen bottles was not an acquiescence in

15 M & W 87

the misperformance of the original contract, but a new contract arising upon the acceptance of goods tendered, and that the plaintiff could only recover for thirteen bottles. 'The defendant orders two dozen of each wine and you send four: then he had a right to send back all; he sends back part. What is it but a new contract as to the part he keeps?'

It must, however, be borne in mind that where the person to whom such an offer is made has no opportunity of accepting or rejecting the things offered, an acceptance to which he cannot assent will not bind him. The case of *Taylor v. Laird*, already cited, illustrates this proposition. The difficulty which would arise, should such an enforced acceptance create a promise, is forcibly stated by Pollock, C. B.:—'Suppose I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?'

25 L J Exch. 329

Supra, p. 20.

A contract which arises on the acceptance by act of the offer of a promise, is best illustrated by the case of an advertisement of a reward for services, which becomes a promise to give the reward when the service is rendered. In such cases it is not the offeror, but the acceptor, who has done his part at the moment when he enters into the contract. If *A* makes a general offer of reward for information and *X* supplies the information, *A*'s offer is turned into a promise by the act of *X*, and *X* simultaneously concludes the contract and performs his part of it.

Offer of a promise for an act.

England v Davidson, 11 A. & E 856

And this form of consideration will support an implied as well as an express promise where a man is asked to do some service which will entail risk or expense. The request for such services embodies or implies a promise, which becomes binding when liabilities or expenses are incurred. A lady employed an auctioneer to sell her estate; he was compelled in the course of the proceedings to pay certain duties to the Crown, and it was held that

Brittain v Lloyd, 14 M. & W 762

the fact of employment implied a promise to indemnify for money paid in the course of the employment. 'Whether the request be direct, as where the party is expressly desired by the defendant to pay; or indirect, as where he is placed by him under a liability to pay, and does pay, makes no difference.'

1 Sm. L. C 12th ed. 159. Hob. 105.

It is probably on this principle, the implication of a promise in a request, that the case of *Lampleigh v. Braithwait* is capable of explanation.

It remains to distinguish executed from past consideration.

Present distinguished from past consideration.

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

Roscorla v. Thomas, 3 Q. B. 234

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

To the general rule thus laid down certain exceptions are said to exist: they are perhaps fewer and less important than is sometimes supposed.

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

Consideration moved by previous request.

In *Lampleigh v. Braithwait*, which may be regarded as the leading case upon the subject, the plaintiff sued the defendant for £120 which the defendant had promised to pay to him in consideration of services rendered at his request. The Court here agreed 'that a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *assumpsit* it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit.'

1 Sm. L. C. 12th ed. 159 Hobart, 105

The case of *Lampleigh v. Braithwait* was decided in the year 1615, and for some time before and after that decision, cases are to be found which, more or less definitely, support the rule as stated above [1]. But from the middle of the seventeenth century until the present time no direct authority can be discovered, except the case of *Bradford v. Roulston*, decided in the Irish Court of Exchequer in 1858.

8 Ir C L. 468 Langdell, 432

In *Kennedy v. Broun*, in 1863, Erle, C. J., explains the case of *Lampleigh v. Braithwait* from a modern point of view.

13 C. B, N. S 677

'It was assumed,' he says, 'that the journeys which the plaintiff performed at the request of the defendant and the other services he rendered would have been sufficient to make any promise binding if it had been connected therewith in one contract: the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably at the present day, such service on such a request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount.'

This would seem to be the *ratio decidendi* in *Wilkinson v. Oliveira*, where the plaintiff at the defendant's request gave him a letter for the purposes of a lawsuit. The

1 Bing. N. C. 490

[1] See cases collected in the note to *Hunt v. Bate*, 3 Dyer, 272 a.

letter proved the defendant's case, by which means he obtained a large sum of money, and he subsequently promised the plaintiff £1,000. Here the plaintiff evidently expected some return for the use of the letter, and the defendant's request for it was, in fact, an offer that if the plaintiff would give him the letter he would pay a sum to be hereafter fixed.

Regarded from this point of view the rule which we are discussing is no departure from the general doctrine as to past consideration. When a request is made which is in substance an offer of a promise upon terms to be afterwards ascertained, and services are rendered in pursuance of that request, a subsequent promise to pay a fixed sum may be regarded as a part of the same transaction, or else as evidence to assist the jury in determining what would be a reasonable sum.

This view is supported by the language of Bowen, L. J., in a more recent case:—

Stewart v. Casey, [1892] 1 Ch 115

'The fact of a past service raises an implication that at the time it was rendered it was to be paid for, and if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered.'

We may say, therefore, that the rule once supposed to have laid down in *Lampleigh v. Braithwait* cannot now be received in such a sense as to form a real exception to the principle that a promise, to be binding, must be made in contemplation of a present or future benefit to the promisor.

Voluntarily doing what another was legally bound to do.

(*b*) We find it laid down that 'where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, *and* the defendant afterwards, in consideration thereof, *expressly* promises,' he will be bound by such a promise. But it is submitted that the authority for this rule wholly fails in so far as it rests on the cases which are habitually cited in support of it.

1 Sm. L. C. 12th ed. 167.

The cases all turn upon the liability of parish authorities

for medical attendance on paupers who are 'settled' in one parish but resident in another, but it is not easy to ascertain the grounds of these decisions from the judgments. Some sentences suggest that they held that a moral obligation would support a promise, but this, since the decision in *Eastwood v. Kenyon*, would be insufficient; others suggest that they held that there was a legal obligation cast on the parish of residence to do that which the parish of settlement might legally have been compelled to do, and that the relation between the parties was not contractual but quasi-contractual, in which case no question of consideration would arise; others again suggest that the promise was an acknowledgment of an existing liability arising from a contract which might be implied by the acts of the parties,—a liability which clearly does not need a subsequent promise to create it.

Watson v. Turner, (1767) Buller, Nisi Prius, p. 147. 11 A. & E 438. See chapter on Quasi-Contract

Paynter v Williams, 10 & N 810.

1 Selwyn's Nisi Prius, ch V, 'Assumpsit.'

It seems clear therefore that these cases do not constitute any exception to the general rule as to past consideration.

(c) Another exception[1] to the general rule has sometimes been found in the cases in which a person has been held capable of reviving an agreement by which he has benefited, although by rules of law since repealed, incapacity to contract no longer existing, or mere lapse of time, the agreement is not enforceable against him. The principle upon which these cases rest is—

Revival of promise

'that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law: and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it.'

Parke, B, in Earle v. Oliver, 2 Ex 90.

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

(1) A promise by a person of full age to satisfy debts

[1] For a statutory exception created by the Bills of Exchange Act, v. *supra*, p. 89.

Williams v. Moor, 11 M. & W. 256.

contracted during infancy was binding upon him, before the Infants' Relief Act, 1874, made it impossible to ratify, on the attainment of majority, a promise made during infancy.

21 Jac 1 c. 16

(2) A debt barred by the Statute of Limitations is revived by a subsequent promise to pay it.

5 Taunt 36

(3) In *Lee v. Muggeridge* a married woman (who, as the law then stood, was incapable of contracting) gave a bond for money advanced at her request to her son by a former husband. Afterwards, when a widow, she promised that her executors should pay the principal and interest secured by the bond, and it was held that this promise was binding.

1 H & C 703

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

The only one of these cases which can arise under the present law is the second, the revival of a debt barred by the Statute of Limitations. As to this there is indeed authority in the reports for holding that the subsequent promise creates a *new* cause of action based upon the original, that is to say, upon a past, consideration. On this view we must say that we have here a real exception to the rule that a past consideration is no consideration at all, which we may perhaps explain on the principle that when two persons have made an agreement, from which one has got all the benefit he expected, but that person is protected by technical rules of law from liability to do what he had promised in return, he will be bound if, when those rules have ceased to operate, he renews his original promise. *Quisque potest renuntiare juri pro se introducto.*

But, as will appear later, the revival of a statute-barred debt by a subsequent promise to pay it admits of another explanation, and probably the true view is that the subsequent promise only renews or revives the original promise, and does not create a new cause of action. If this be so, there is here no question of a past consideration. The further discussion of the matter belongs however to that of the effect of the Statutes of Limitation in general.

Spencer v Hemmerde, [1922] 2 A.C. 507

Infra, pp. 401 et seq

The language used in some of the cases cited above was calculated to make the validity of contracts turn upon a series of ethical problems; and when once the law of contract was brought into the cloudland of moral obligation, it became extremely hard to say what promises might or might not be enforced. In *Lee v. Muggeridge*, Mansfield, C. J., says, 'It has long been established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is whether upon this declaration there appears a good moral obligation.'

5 Taunt 46

In no case did 'moral obligation' play a more prominent part than in *Lee v. Muggeridge*; but the doctrine, after it had undergone some criticism from Lord Tenterden, was finally limited by the decision in *Eastwood v. Kenyon*. Eastwood had been guardian and agent of Mrs. Kenyon, and, while she was a minor, had incurred expenses in the improvement of her property: he did this voluntarily, and in order to do so was compelled to borrow money, for which he gave a promissory note. When the minor came of age she assented to the transaction, and after her marriage her husband promised to pay the note. Upon this promise she was sued. The moral duty to fulfil such a promise was insisted on by the plaintiff's counsel, but was held by the Court to be insufficient where the consideration was wholly past. 'Indeed,' said Lord Denman in delivering judgment, 'the doctrine

Littleheld v Shee, 2 B & Ad 811

would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.'

11 A. & E. 450.

Thus was finally overthrown the doctrine formulated by Lord Mansfield that consideration was only one of various modes, by which it could be proved that parties intended to contract: a doctrine which, in spite of the decision in *Rann v. Hughes*, survived in the theory that the existence of a moral obligation was evidence that a promise was intended to be binding.

7 T. R. 350 (n).

Foreign contracts and the doctrine of consideration.

We have been discussing throughout this chapter the rules of English law relating to consideration. It must not, however, be forgotten that English courts may from time to time have to entertain actions relating to contracts which are not governed by English law. The rules which determine the law which governs a contract, or, as it is called, the 'proper law' of the contract, are a branch of private international law and cannot be discussed at length in this place. It is sufficient to say that the intention of the parties is the determining factor, and, where that intention has either not been expressed or cannot be collected from the terms and circumstances of the contract, the *lex loci contractus*, the law of the place where the contract is made, is presumed to be the law by which the parties intended their contract to be governed. The student will do well to refer to the case of the *British South Africa Company v. De Beers Mines*, where he will find all the authorities upon the subject reviewed. If therefore it should be ascertained that the proper law of the contract before the Court is not the law of England, the question whether the contract is a valid one will not be determined by English law, and reference must be made to the proper law of the contract to determine whether consideration is required for its validity. This is what happened in the case of *In re Bonacina*, where the effect of a 'privata scrittura' in Italian law was considered. It

[1910] 1 Ch. 354; 2 Ch 502.

[1912] 2 Ch 394.

was proved that a promise in this form based upon the moral obligation to pay a just debt created according to Italian law a new and valid legal obligation which would be enforced in the Italian courts. The proper law of the contract being Italian law, the Court of Appeal held that the English doctrine of consideration did not apply, and that the contract, being valid by its proper law, was enforceable in England.

CHAPTER V

Capacity of Parties

Further subjects of inquiry.

In the topics which we have hitherto discussed we have dealt with the primary elements of Contract. The parties must be brought together by Offer and Acceptance, and they must make an agreement which the Courts will regard as a legal transaction either by reason of its Form, or because of the presence of Consideration.

But such a transaction may take place between parties, one or both of whom are under some disability for making a valid contract: it is therefore necessary to deal with disabilities: in other words, with the Capacity of Parties.

Capacity of parties. How it may be affected.

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

(1) Political or professional status.

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

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

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

(5) Marriage. Until the 1st of January 1883 marriage effected a merger of the contractual capacity of the wife in that of her husband, subject to certain exceptions. The Married Women's Property Acts of 1882 and 1893 have greatly changed the law in this respect.

§ 1. *Political or Professional Status.*

Aliens.

An alien has ordinarily the contractual capacity of a natural-born British subject, except that he cannot

acquire property in a British ship: Merchant Shipping Act, 1894, s. 1.

Alien enemies.

In time of war, however, an alien who is an enemy, so far as concerns his capacity to contract or to enforce contracts already made, is subject to severe restrictions. For the purposes of the late war these restrictions were still further increased by Trading with the Enemy Acts which made commercial dealings of all kinds, direct and indirect, with the King's enemies a criminal offence; but it will be sufficient here to indicate the Common Law rules upon the subject.

[1915] 1 K B 857

We must note in the first place that nationality is not the test of enemy status for this purpose. The full Court of Appeal in *Porter v. Freudenberg*, after reviewing all the authorities, has laid it down that the place where the person in question voluntarily resides or carries on business is the determining factor; so that an enemy subject who resides or carries on business exclusively in a neutral country or (with the licence of the Crown) in Great Britain itself, may contract or sue on the same footing as an alien friend. Conversely, a British subject or a neutral residing or carrying on business in an enemy country is in the same position as an alien enemy.

The Hoop, 1 C Rob. 196.

Porter v Freudenberg, [1915] 1 K B. 857

Rodriguez v Speyer Bros., [1919] A. C. 59

The position of an alien enemy as above defined appears to be as follows. (1) He cannot enter into any contract with a British subject during the continuance of the war. (2) He cannot until the war is over sue in the King's Courts on any cause of action which has accrued before the war, but this rule is not an inflexible rule of law but one of public policy, and will therefore not be enforced where the effect of enforcing it would be to do injustice to British subjects, e.g. where it is necessary in order that an action may proceed to join an alien enemy as a co-plaintiff. (3) He may, if he can be duly served with a writ, be sued on a cause of action which has accrued before the war and may appear and defend the action, and, if unsuccessful, may appeal to a higher tribunal. (4) Contracts

made before the war between a British subject and an alien enemy which involve intercourse between the parties or the continued existence of which is contrary to public policy are wholly dissolved by the outbreak of war. An obvious example of the former is a partnership; of the latter a contract which if performed would be of assistance to the commerce or economic interests of the enemy state or detrimental to those of this country. (5) In the case of contracts not falling within the above description, performance is prohibited for the duration of the war, and therefore no cause of action can be maintained subsequently in respect of non-performance during the war. Often this will be practically equivalent to a dissolution, as, for example, in the case of a contract to deliver goods within a specified time; but there are others, for the most part of a continuing nature and (as has been said) 'really the concomitants of rights of property,' which are not dissolved at all. The contract between landlord and tenant, between insurance company and policy-holder, supply examples.

Stevenson v. Atk. für Cartonnagen-Industrie, [1918] A. C. 239.

Zinc Corporation v. Hirsch, [1916] 1 K. B.

Halsey v Lowenfeld, [1916] 2 K. B. 707. *In re* Seligman, [1917] 1 Ch 519

Contracts have sometimes been framed with elaborate clauses providing that on the outbreak of war their obligations shall be wholly suspended for the time being but shall revive at the conclusion of peace. The Courts regard very jealously contracts of this kind and have not hesitated to declare them to be wholly at an end, if public policy appeared to demand it. Private individuals, it has been observed, are not to be allowed to dictate the conditions under which a contract shall or shall not be finally determined by the outbreak of war. Nor are the obligations of a contract suspended only by the outbreak of war and not dissolved, if the practical effect of suspension would involve the making of a new contract between the parties. The performance of mutual obligations under an executory contract cannot be postponed until the war is over, if the postponement would effect a substantial alteration in the terms of the original contract; and where this

Ertel Bieber v. Rio Tinto, [1918] A. C. 260.

Distington Iron Co. v. Possehl, [1916] 1 K. B. 811.

is the case, the contract is at an end. But these matters relate rather to the discharge than to the formation of contract.

The Crown may at its discretion grant a licence to an alien enemy to contract and sue in time of war, and in that case his position will be exactly the same as that of an alien friend.

Schaffenius v. Goldberg, [1916] 1 K.B 284.

The position of foreign states and sovereigns may also be conveniently referred to in this place. They have full *capacity* to enter into contracts in England, but neither they nor their representatives nor the officials and household of their representatives are in any way subject to the jurisdiction of the English Courts. Their contracts cannot therefore be enforced against them, although they are capable of enforcing them. This immunity extends to a British subject accredited to Great Britain by a foreign state.

Foreign sovereigns.

7 Anne, c 12 Taylor v. Best, 14 C. B. 487. *In re* Bolivia Syndicate, [1914] 1 Ch. 139

Macartney v Garbutt, 24 Q. B. D 368.

The following case illustrates the rule. A foreign sovereign residing in this country as a private person, made a promise of marriage under an assumed name. He did not thereby subject himself to the jurisdiction of our courts and so could not be sued for breach of his promise.

Mighell v The Sultan of Johore, [1894] 1 Q B 149

A person convicted of treason or felony cannot, during the continuance of his sentence, make a valid contract; nor can he enforce contracts made previous to conviction: but these may be enforced by an administrator appointed for the purpose by the Crown.

Felon undergoing sentence.

33 & 34 Vict c 23 ss 8, 9, 10

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

Barrister.

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

A physician, until the year 1858, was so far in the position of a barrister that the rendering of services on request raised no implied promise to pay for them, though the patient might bind himself by express contract. The

Physician.

Medical Act, 1858, s. 31, enabled every physician to sue on such an implied contract, subject to the right of any College of physicians to make by-laws forbidding its Fellows to sue for their fees—a right which has been exercised by the Royal College of Physicians. And this is re-enacted in substance by the Medical Act, 1886.

§ 2. *Infants.*

The rights and liabilities of infants under contracts entered into by them during infancy rest upon Common Law rules which have been materially affected by statute. It will be convenient first to state the Common Law upon the subject.

General rule of Common Law.

At Common Law there were but two classes of contracts which though made by an infant were as valid as though made by a person of full age; namely, contracts for necessaries and (in certain cases) contracts for the infant's benefit.

Contracts voidable by infant.

9th ed. 59-63.

In all other cases Common Law treated an infant's contracts as being voidable at his option, either before or after the attainment of his majority; and Sir F. Pollock in an exhaustive argument has shown that this was so, even where the contract was not for the infant's benefit. But these voidable contracts must be divided under two heads:—

(*a*) Contracts which were valid and binding on the infant *until he disaffirmed them*, either during infancy or within a reasonable time after majority;

(*b*) Contracts which were not binding on the infant *until he ratified them* within a reasonable time after majority.

Contracts valid till rescinded.

(*a*) Where an infant acquired an interest in permanent property to which obligations attach, or entered into a contract involving continuous rights and duties, benefits and liabilities, and took some benefit under the contract, he would be bound, unless he expressly disclaimed the contract.

Illustrations may be found in the following cases. They do not appear to be affected by subsequent legislation.

An infant lessee is liable for rent until he disclaims the lease; and if he does not disclaim before or within a reasonable time after majority, he will lose the right to disclaim at all. N. W Ry Co v McMichael, 5 Exch at pp. 127–8.

An infant shareholder is under a similar liability for calls on his shares. He may avoid the liability by disclaiming the shares, even though the disclaimer only takes place when the call is made, but if he does not disclaim either before or at majority he will lose the right.

The grounds of an infant's liability in such cases have been thus stated:—

'They have been treated therefore as persons in a different situation from mere contractors, for then they would have been exempt: but in truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it which they are bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate; for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission in the case of a copyhold to which an infant has been admitted, unless they have elected to waive or disagree the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so.' Ibid, pp. 123–4.

The effect of the disclaimer of such a contract either during minority or within a reasonable time after majority is to release the infant from his obligations under it. But it will not entitle him to recover anything that he may have already paid under the contract unless there has been a total failure of the consideration for which the money has been paid. In *Steinberg v. Scala* an infant was allotted shares in a company, and paid the amounts due on application and allotment, and on the first call. She received no dividends and attended no meetings of the company, and after eighteen months she claimed to repudiate the allotment and recover the amounts paid. It was held by the Court of Appeal that while she was [1923] 2 Ch 452

entitled to rescind the contract by having her name removed from the register of shareholders, and thus to avoid liability for the unpaid instalments, she was not entitled to recover back the money she had paid, since she had received something which both had a marketable value and was in any case the very consideration for which she had bargained.

The following cases illustrate the conditions which must be satisfied in order that an infant's disclaimer of a contract of this character may take effect:—

In re Yeoland's Consols, 58 L T 922.

An infant received an assignment of shares in 1883: he said he would repudiate them, but did not do so. He reached full age in 1886: in 1887 the Company was wound up and he was not permitted to take his name off the list of contributories.

Whittingham v. Murdy, 60 L T 956

An infant became a member of a building society, received an allotment of land, and for four years after he came of age paid instalments of the purchase money. Then he endeavoured to repudiate the contract. He was not permitted to do so.

Carter v Silber, [1892] 2 Ch 278 Edwards v Carter, [1893] A. C 360

An infant became a party to a marriage settlement, under which he took considerable benefits. Nearly four years after coming of age he repudiated the settlement. It was held that a contract of this nature was binding unless repudiated within a reasonable time of the attainment of majority, and that he was too late [1].

The position of an infant member of a partnership differs from that of an infant shareholder. It is true that partnership is a continuous relationship between the partners, but by becoming a partner an infant does not acquire an interest in a subject of a permanent nature to which obligations are attached.

Equity indeed will not allow an infant, in taking the partnership accounts, to claim to be credited with profits

Lovett v. Lovett, [1898] 1 Ch 82.

[1] Note however that by the Infant's Settlement Act, 1855, a male infant if over twenty and a female infant if over seventeen, can, with the sanction of the Court, make a binding marriage settlement; and this may be done either before or after the marriage.

and not debited with losses. But he is not liable, either during minority or after majority, and whether or not he disclaims the partnership, to creditors of the firm for debts incurred by it during his infancy. If he continues to act as a partner after majority he will, of course, be liable, equally with his co-partners, for the debts subsequently incurred, and he may also make himself liable for such debts if, though ceasing to act as a partner he does not notify his withdrawal from the partnership to persons dealing with the firm. Thus where an infant held himself out as in partnership with *X*, and continued to act as a partner till shortly before he came of age, and then, though ceasing to act as a partner, did nothing to disaffirm the partnership, he was held liable on debts which accrued, after he came of age, to persons who supplied *X* with goods. The liability in this case, however, merely illustrates a general rule of the law of partnership applicable to any retired partner, and does not depend on any principle peculiar to the law of infancy.

Lovell & Christmas v. Beauchamp, [1894] A. C. 607.

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

(*b*) In the case of contracts that are not thus continuous in their operation, the infant was not bound unless he expressly ratified them upon coming of age. Thus a promise to perform an isolated act, such as to pay a reward for services rendered, or a contract wholly executory, and indeed all other contracts other than continuing contracts or contracts for necessaries or for the infant's benefit, required an express ratification.

Contracts not binding unless ratified.

Such was the Common Law upon the subject; let us consider how it has been affected by legislation.

The Infants' Relief Act of 1874 appears to have been designed to guard not merely against the results of youthful inexperience, but against the consequences of honourable scruples as to the disclaimer of contracts upon the attainment of majority. Its provisions are as follows:—

Infants' Relief Act.

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

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

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

The precise meaning of the provisions of this Act is not at first easy to ascertain, but its effect may be summarized as follows:

Effect of Act, s. 1.

1. Three classes of infants' contracts are, for the first time, made absolutely void; namely, for money lent or to be lent; for goods supplied or to be supplied (other than necessaries); and accounts stated.

2. (*a*) Contracts for necessary goods supplied or to be supplied are valid and binding on an infant (as they have always been), and so also are (*b*) contracts into which an infant could validly enter at the date of the Act and which at the same time were not voidable by him; that is, certain contracts for the infant's benefit.

s. 2.

3. It is no longer possible for an infant to ratify after majority that class of contracts which before the Act were not binding unless ratified; and this is so, whether there is a new consideration for the promise or ratification after majority or not.

4. Contracts which before the Act were binding until disaffirmed are not affected by the Act.

We may now consider these four points in greater detail.

(1) The following cases illustrate the meaning of the words 'absolutely void' in Section 1:—

Decisions on s. 1.

An infant who had contracted trading debts was convicted on an indictment charging him with having defrauded his creditors within the meaning of the Debtors' Act, 1869. The conviction was quashed on the ground

[1] For the meaning of the term 'account stated', v. *infra*, p. 444.

that the transactions which resulted in debts were void under the Infants' Relief Act. There were consequently no creditors to defraud. On the same reasoning an infant cannot be made a bankrupt in respect of such debts.

R. v. Wilson, 5 Q. B. D. 28

Ex parte Jones, 18 Ch. D. 109.

And the Court of Appeal has held that a false representation by an infant that he was of full age, whereby the plaintiff was induced to lend him money, cannot impose any contractual liability upon him by way of estoppel or otherwise; for the Act makes such a contract absolutely void.

Levene v. Brougham, 25 T. L. R. 265.

On the other hand it is difficult to believe that the Section was intended in all circumstances to deprive the contracts which it declares 'absolutely void' of legal consequences, and it has been held, for example, that if an infant has paid money and taken benefit under the contract he cannot recover the money so paid.

An infant hired a house and agreed to pay the landlord £100 for the furniture. He paid £60 and gave a promissory note for the balance. After some months' use of the house and furniture he came of age, and then took proceedings to get the contract and the promissory note set aside, and to recover the money which he had paid. He obtained relief from future liabilities on the contract and note, but could not recover money paid for furniture of which he had enjoyed the benefit. 'No doubt,' said Lord Coleridge, C. J., 'the words of the Infants' Relief Act, 1874, are strong and general; but a reasonable construction ought to be put upon them. . . . When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid.' It would appear to follow from this reasoning as well as from the words of the Section that if the infant has taken no benefit under such a contract, he may recover back money paid under it. It appears also to follow that if goods are delivered under a contract void under the Section, the property in them will pass to the infant.

Valentini v. Canali, 24 Q. B. D. 166.

Goods paid for and used.

Stocks v. Wilson, [1913] 2 K.B. at p. 246.

Contracts for necessary goods.

(2) (*a*) A contract 'for goods supplied or to be supplied,' where the goods are 'necessaries' is excepted from the operation of Section 1, and such a contract is therefore still governed by the Common Law. But a part, if not the whole, of the Common Law in this matter has been given statutory form by the Sale of Goods Act, 1893, which enacts in s. 2:—

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

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

Grounds of liability.

The basis and the extent of the liability of the infant under this section should be noted. They have been explained as follows by Fletcher Moulton, L. J., in *Nash v. Inman*:—

[1908] 2 K. B. 1, 8.

'An infant like a lunatic is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic, the law will imply an obligation to repay him for the services so rendered and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* and not *consensu*.'

Goods to be supplied.

It will be observed that the Sale of Goods Act deals only with 'necessaries sold and delivered,' and says nothing of necessaries sold to an infant, but *not* delivered, that is to say, of a contract of sale which is still executory. It is quite possible, for instance, that an infant might order goods which were undoubtedly necessaries when ordered, but that his needs might be met from some other source before the goods were delivered. It is conceived that his liability in such a case would rest on the Common Law, and there does not appear to be any case in which an infant has been held liable for the non-acceptance of necessaries or on a contract for necessaries bargained and sold. It has indeed been held by the Court of Appeal that a contract of apprenticeship, which, as we shall see,

Roberts v. Gray, [1913] 1 K. B. 520.

is a 'necessary' in the wider sense of that term, cannot be repudiated by an infant on the ground that it is partly executory, but the case is not conclusive of the question under discussion.

Loan for necessaries.

A loan of money to an infant to pay for necessaries was not recoverable at Common Law; but in Chancery it was held that if an infant borrowed money to pay a debt for which by law he was liable, and the debt was actually paid therewith, the lender 'stood in the place of the person paid' and was entitled to recover the money lent. The liability in respect of such a loan rests therefore on a principle of equity which is of wider application than the rule as to necessaries.

Martin v. Gale, 4 Ch D. 428.

What are necessaries'?

We must next consider what the phrase 'necessaries' includes.

It has always been held that an infant may render himself liable for the supply to him, not merely of the necessaries of life, but of things suitable to his station in life and to his particular circumstances at the time. The *locus classicus* on this subject is the judgment of Bramwell, B., in *Ryder v. Wombwell*,—the conclusions of which were adopted by the Exchequer Chamber. In such cases the provinces of the Court and of the Jury are as follows:—

L R 3 Ex 90. L R 4 Ex 31.

Nash v Inman, [1908] 2 K B 1

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

Things may obviously be outside the range of possible necessaries. 'Ear-rings for a male, spectacles for a blind person, a wild animal, might be suggested.'

Bramwell, B. in Ryder v. Wombwell.

Things may be of a useful character but the quality or quantity supplied may take them out of the character of necessaries. Elementary text-books might be a necessary to a student of law, but not a rare edition of 'Littleton's

Tenures' or eight or ten copies of 'Stephen's Commentaries.' Necessaries also vary according to the station in life of the infant or his peculiar circumstances at the time. The quality of clothing suitable to an Eton boy would be unnecessary for a telegraph clerk; the medical attendance and diet required by an invalid would be unnecessary to one in ordinary health. It does not follow therefore that because a thing is of a useful class, a judge is bound to allow a jury to say whether or no it is a necessary.

When question left to jury.

But if the judge concludes that the question is an open one, and that the things supplied are such as may reasonably be considered to be necessaries, he leaves it to the jury to say whether, in the circumstances of the case, the things supplied were necessaries in fact. And the jury must then take into consideration the character of the goods supplied, the actual circumstances of the infant and the extent to which the infant was already supplied with them. It is necessary to emphasize the words 'actual circumstances,' because a false impression conveyed to the tradesmen as to the station and circumstances of the infant will not affect the infant's liability; if a tradesman supplies expensive goods to an infant because he thinks that the infant's circumstances are better than they really are, or if he supplies goods of a useful class not knowing that the infant is already sufficiently supplied, he does so at his peril.

What the plaintiff must prove.

Sale of Goods Act, s. 2.

Nash v. Inman, [1908] 2 K. B 1.

'Having shown that the goods were suitable to the condition in life of the infant, he [the tradesman] must then go on to show that they were suitable to his actual requirements at the time of the sale and delivery. Unless he establishes that fact, either by evidence adduced by himself or by cross-examination of the defendant's witnesses, as the case may be, in my opinion he has not discharged the burden which the law imposes on him.'

The proviso in s. 1.

(*b*) Contracts into which an infant may enter 'by any existing or future statute or by rules of Common Law or Equity' and which were not voidable at the date of the enactment, are taken out of the Act by the proviso to Section 1. It was pointed out by Kekewich, J., in *Duncan*

v. Dixon that according to the ordinary rules of construction the effect of this proviso must be to except out of the earlier part of the section some contracts which, but for the proviso, would be within it. The class so excepted is then cut down by excepting from it (and therefore presumably leaving to the operation of the section) any contract which was voidable at the date of the Act. 44 Ch. D. 211

It is not easy to conceive of a contract which would fall within this class when so limited, but perhaps the proviso was inserted *ex majori cautela* to ensure that certain contracts for necessaries other than goods should not be invalidated by the section, though it must be admitted that such contracts would be unaffected by the section even if the proviso did not exist, since they do not belong to any of the three specific contracts which are invalidated by the section. *Ante*, p 130

Contracts then which were not for necessaries in the sense of goods necessary for the infant and yet before the Act were not voidable are to be found where an infant enters into a contract of service so as to provide himself with the means of self-support, or one for the purpose of obtaining instruction or education to fit himself to earn his living at a suitable trade or profession. Such contracts are in fact contracts for 'necessaries' in a wider sense, and are so described in the cases. Walter v Everard, [1891] 2 Q B 369

'It has always been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence. The question has always been whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If so the Court will not allow the infant to repudiate it.' Clements v L & N W R Co, [1894] 2 Q B. 482

In the case cited an infant entered into a contract of service with a Railway Company, promising to accept the terms of an insurance against accidents in lieu of his rights of action under the Employers' Liability Act, 1880. It was held that the contract was, taken as a whole, for his benefit and that he was bound by his promise [1]. And

[1] No *civil* proceedings can, it seems, be taken against an infant on an apprenticeship deed; but if he misbehave he may be corrected by his master,

Leslie v. Fitzpatrick, 3 Q. B. D. 229.

an infant may be held liable for the breach of such a contract under the Employers and Workmen Act, 1875.

On the other hand an agreement by an infant, on entering the service of a Sheffield newspaper, never during the rest of his life to become connected with any other newspaper within twenty miles of Sheffield was held in *Leng v. Andrews* to be more onerous than beneficial and the infant was entitled to repudiate it, apart altogether from the question whether it was void as being in restraint of trade.

[1909] 1 Ch. 763 (C. A.).

Bromley v. Smith, [1909] 2 K. B. 235.

But if an infant's contract of service contain some stipulations which are for his benefit and others, clearly severable from the rest, which are not, he may be bound by the contract in part.

Section two of the Act of 1874.

(3) The second section of the Act of 1874 makes it impossible for a man of full age to make himself liable upon a contract entered into during infancy, even though there be a fresh consideration for his ratification of such liability. This can only affect the class of contracts which at Common Law required an express ratification, which of course includes those now rendered void by Section 1.

But we must note some points which are not quite obvious on reading the section.

Infant can enforce contract.

In the first place, it should be noted that though the contract cannot be enforced *against* the party making the contract during infancy, yet he may sue upon it. The words of the section do not avoid the contract; they only make it unenforceable against one of the parties to it.

Flight v. Bolland, 4. Russ. 298.

But though damages may be recovered, specific performance cannot be obtained for the reason that the contract cannot be mutually enforced, and in these circumstances an equitable remedy which is in the discretion of the Court to grant and cannot be claimed as of right is not permitted to be at the service of the infant.

or brought before a justice of the peace. *De Francesco v. Barnum*, 43 Ch. D. 165. *Gylbert v. Fletcher*, Cro. Car. 179. A covenant in an apprenticeship deed to do or abstain from doing something after the apprenticeship has ceased may, however, be enforced by action: *Gadd v. Thompson*, [1911] 1 K. B. 304.

Secondly, the Courts have been strict in their application of s. 2 when the promise has been to pay a debt contracted during infancy.

King, an infant, became liable to a firm of brokers for £547: after he came of age they sued him, and he compromised the suit by giving two bills of exchange for £50. The firm endorsed one of the bills to Smith, who took the bill with knowledge of all the circumstances, and sued upon it. The Queen's Bench Division held that the bills were a promise, based on a new consideration, to pay a debt contracted during minority, that here was a ratification of the sort contemplated by the Act, and that Smith could not recover.

Smith v. King, [1892] 2 Q. B. 543.

'I think,' said Charles, J., 'that there was here a new consideration for the defendant's promise; but the section expressly says that no action shall be brought on such a promise even where there is a new consideration for it. The case of *ex parte Kibble* seems strongly to support that view. In that case the plaintiff had obtained a judgment by default for a debt incurred by the defendant during infancy, and the judgment had been followed by a judgment debtor summons and a petition for an adjudication in bankruptcy. The Court inquired into the consideration for the judgment, and finding that it was a debt contracted during infancy held that s. 2 applied to the case, and dismissed the petition for adjudication.'

L R 10 Ch. 373

Ratification and new promise.

In dealing with contracts other than those of debt the difficulty of distinguishing between the ratification of an old promise and the making of a new one has led to extreme refinements. Strictly construed the Act would make it impossible for a man to become liable on any agreement made during infancy however advantageous to him.

Where parties to mutual promises of marriage remain on the footing of an engaged couple after the promisor has attained his majority, the maintenance of the engagement has been held to be a ratification and therefore insufficient to sustain an action for breach of the promise. But where the mutual promises made during infancy are conditional on consent of the man's parents, and the promise is renewed by him after majority with their

Coxhead v. Mullis, 3 C P D 439

Northcote v. Doughty, 4 C P D. 385.

consent; or where an engagement is made during infancy with no date fixed for the marriage, and after attaining majority the parties agree to name a day on which it shall take place, the promises so made have been held to be new promises and the breach of them is actionable. The question whether there has been a new promise or only a ratification of a promise made during infancy is however one of fact for the jury.

Ditcham v. Worrall, 5 C. P. D 410

Contracts valid till disaffirmed not affected by Act.

(4) Lastly the old distinction between contracts which were not binding unless ratified and those which were binding even at Common Law unless repudiated before or within a reasonable time after majority still exists since the Act of 1874, which does not in any way affect the latter class. That these are not affected by the Act is well settled. They cannot be affected by Section 1, for that section deals with three specific contracts only, of which these are not one; and they are not affected by Section 2, because the liability under them does not arise from any 'promise' or 'ratification made after full age.'

Carter v Silver, [1892] 2 Ch per Lindley, L J, at p 284

Infant may not be charged upon contract framed as a tort,

Jennings v Rundall, 8 T R 335

Leslie v Sheill, [1914] 3 K B 607

An infant is liable for wrong: but a breach of contract may not be treated as a wrong so as to make the infant liable; the wrong must be more than a misfeasance in the performance of the contract, and must be separate from and independent of it. Thus where an infant hired a mare to ride and injured her by over-riding, it was held that he could not be made liable upon the contract by framing the action in tort for negligence; and an infant who has obtained a loan by falsely representing his age cannot be made to repay the amount of the loan in the form of damages in an action for fraudulent misrepresentation. Nor can an infant be made liable for goods sold and delivered by charging him in trover and conversion; for though by the Infants' Relief Act contracts for goods supplied to an infant are made absolutely void, yet the delivery of the goods to him with intent to pass the property in them vests the title in the infant.

Stocks v. Wilson, [1913] 2 K. B. 235.

but may for actual tort, though originating in contract. Burnard v. Haggis, 14 C B, N S, 45

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

In re Seager, 60 L T 665

A butcher boy appropriated some of the meat which he was employed to carry to his master's customers: he sold it and kept the money. He was detected, an account was made of the money due from him, which he acknowledged to be correct, and when he came of age he gave a promissory note for the amount. He was held liable for the amount. It was argued that the liability arose on an account stated, which was void under s. 1, or on a ratification which was unenforceable under s. 2. But the Court held that he was liable to an action *ex delicto*, and that his promise to pay when he came of age was the compromise of a suit, for which, being of age, he was competent to contract.

Equitable remedy against infant.

Stocks v. Wilson, [1913] 2 K B 235, 242

The aid of equity has been invoked for the purpose of compelling an infant who has obtained property or money by fraud to make restitution. The remedy in such a case, it has been said, is not a remedy on the contract, but an equitable remedy for the fraud, and is therefore not affected by the Infants' Relief Act. It is, however, not of so extensive a nature as was at one time supposed, and has no application where the result would be to derogate from the rule that an infant cannot be made liable for what is in substance a contractual obligation by framing the action in tort. Its true scope and limitation were considered by the Court of Appeal in *Leslie v. Sheill*, where all the earlier decisions are reviewed. 'I think,' said Lord Sumner, 'that the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to show that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains or to release the party

[1914] 3 K B. 606

deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant, even by means of a fraud. . . . Restitution stopped where repayment began.' The equitable remedy is therefore not available in cases where an infant has obtained a loan of money by falsely representing his true age. This was the point at issue in *Leslie v. Sheill*. 'The money was paid over,' as Lord Sumner pointed out, 'in order to be used as the defendant's own, and he has so used it and spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so.'

§ 3. *Corporations.*

1. Necessary limits to its contractual capacity.

A corporation is an artificial person created by law. Hence the limitations to the capacity of a corporation for entering into a contract may be divided into necessary and express. The very nature of a corporation imposes some necessary restrictions upon its contractual power (e.g. it cannot contract to marry), and the terms of its incorporation may impose others.

A corporation has an existence separate and distinct from that of the individuals who compose it; their corporate rights and liabilities are something apart from their individual rights and liabilities; they do not of themselves constitute the corporation, but are only its members for the time being.

Must contract through an agent.

Thus a corporation, having this ideal existence apart from its members, is impersonal, and must contract by

means of an agent. It 'cannot act in its own person, for it has no person.' Ferguson v. Wilson, 2 Ch. 89.

It follows also that a corporation must give some formal evidence of the assent of its members to any legal act which, as a corporation, it may perform. Hence the requirement that a corporation must contract under seal.

The exceptions to this requirement have been dealt with elsewhere. It should however be noticed that where a corporation either expressly, or by the necessary construction of the terms of its incorporation, has power to make negotiable instruments, exception is made by the Bills of Exchange Act, 1882, s. 91 (2), to the general rule that by the law merchant an instrument under seal is not negotiable. Before this Act a trading corporation whose business it might be to make such instruments could render them valid by the signature of an agent duly appointed, but the validity of a bill or note made under the seal of a corporation was doubtful. *Ante*, p 65.

2. Express limitations.

The express limitations upon the capacity of corporate bodies must vary in every case by the terms of their incorporation. Much has been and still may be said as to the effect of these terms in limiting the contractual powers of corporations, but we cannot here discuss the doctrine of 'ultra vires.' The question whether the terms of incorporation are the measure of the contracting powers of the corporation, or whether they are merely prohibitory of contracts which are inconsistent with them, was discussed at length in the much litigated case of the *Ashbury Carriage Company v. Riche*; and the results of this and other cases point to a distinction between two kinds of corporations. L. R. 7 H. L. 653.

A common law corporation, that is, a corporation created by charter in virtue of the royal prerogative, can deal with its property, or bind itself by contract like an ordinary person, and even though the charter may impose limitations on its actions, these do not impair its capacity. If they are exceeded, the effect is not to avoid the contract, but to make the charter liable to forfeiture. See Baroness Wenlock v. River Dee Co., 36 Ch. at p. 685, n.

Osborne v. Amalgamated Soc. of Railway Servants, [1910] A. C. 87.

But a corporation created by or in pursuance of statute is limited to the exercise of such powers as are actually conferred, or may reasonably be deduced from the language of the statute. And thus a company incorporated under the Companies Acts is bound by the terms of its memorandum of association to make no contracts inconsistent with, or foreign to, the objects set forth in the memorandum.

Ashbury Carriage Co v. Riche, L. R 7 H L. 653.

The Companies (Consolidation) Act, 1908, enables such a company to alter its memorandum under certain conditions and for certain objects, e.g. the furtherance of its business, the addition of cognate business, or the abandonment of some of its original objects.

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

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

§ 4. *Lunatic and drunken persons.*

The contract voidable:

The contract of a lunatic or drunken person is binding upon him unless it can be shown that at the time of making the contract he was wholly incapable of understanding what he was doing and that the other party knew of his condition.

Imperial Loan Co v Stone, [1892] 1 Q B 601.

'When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing and proves the allegation, the contract is as binding upon him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.'

whether of lunatic:

A lunatic, even though he has been found insane by inquisition [1], is not on that account incapable of con-

[1] Commissions *de lunatico inquirendo* are no longer issued specially in each case of alleged insanity. A general commission is now, by 53 & 54 Vict. c. 5, issued from time to time, under the Great Seal, to Masters in Lunacy appointed by that Act, who conduct an inquiry in each case in a manner prescribed by the Act.

tracting: the validity of the contract depends on the knowledge which the other party may be shown, or reasonably supposed, to have possessed of the state of mind of the insane person. But it seems that a lunatic so found by inquisition cannot, even during a lucid interval, execute a valid deed which disposes of property.

Hall v. Warren, 9 Ves 605. York Glass Co v Jubb, 42 T.L R 1 *Re* Walker, [1905] 1 Ch 160.

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

or drunken person.

Matthews v Baxter, L R 8 Ex 132

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

By the Sale of Goods Act, 1893, s. 2, a lunatic or a drunkard is liable *quasi ex contractu* for necessaries sold and delivered, if by reason of mental incapacity or drunkenness he is incapable of contracting.

Re J 21 Cox 766.

§ 5. *Married Women.*

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

Before 1883 their contracts void.

Yet there were exceptions to this rule: in some cases a married woman could make a valid contract, but could

Exceptions.

not sue or be sued upon it apart from her husband; in others she could sue but could not be sued alone; in others she could both sue and be sued alone.

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

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

Co. Litt. 133 a.

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

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

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

20 & 21 Vict. c. 85.

(5) A group of exceptions to the general rule was created by the Divorce and Matrimonial Causes Act, 1857, now partly replaced by the Supreme Court of Judicature (Consolidation) Act, 1925.

Divorce,

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

judicial separation,

Judicial separation, while it lasts, causes the wife to be considered as a *feme sole* for the purpose of contracts and wrongs and injuries, and of suing and being sued.

[1] Civil death arises from outlawry: it seems doubtful whether there are any other circumstances to which the phrase is now applicable.

And a wife deserted by her husband, and having obtained a protection order, is in the like position with regard to property and contracts, and suing and being sued, as she would be if she had obtained a judicial separation. Separation orders made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, have a similar effect. desertion.

(6) Akin to the last exception, though not resting upon Statute, is the capacity of a married woman to make a contract with her husband that they should live apart, and to compromise proceedings commenced or threatened in the Divorce Court. For all contracts incident to such a transaction the wife is placed in the position of a *feme sole*. Contract for separation. M'Gregor v. M'Gregor, 21 Q. B. D. 424.

(7) The 'separate estate' of a married woman has in various degrees, in Equity and by Statute, been treated as a property in respect of which and to the extent of which she can make contracts. Separate estate in equity.

The doctrine of the separate estate arose in the Chancery. Property, real and personal, might be settled in trust for the separate use of a married woman independent of her husband, and in default of other trustees of such a settlement equity would compel the husband himself to act as trustee for his wife in respect of property to which at common law he would have been entitled as her husband. Sometimes this property was settled on her with a 'restraint upon anticipation': in such a case she could use the income, but could neither touch the *corpus* of the property, nor create future rights over the income. But where it was not so restrained, then to the extent of the rights and interests created, a married woman was treated by Courts of Equity as having power to alienate and contract. Johnson v. Gallagher, 3 D. F. & J. 494.

But she could not sue or be sued alone in respect of such estate, nor could she bind by contract any but the estate of which she was in actual possession or control at the time the liabilities accrued. Pike v. FitzGibbon, 17 Ch. D. 454.

Separate estate by Statute.

The Married Women's Property Acts of 1870 and 1874 specified various forms of property as the separate estate of married women, enabled them to sue for such property and gave them all remedies, civil and criminal, for its protection that an unmarried woman would have had under the circumstances. Under these Acts a married woman might make a contract for the exercise of her personal skill or labour, and maintain an action upon it in her own name.

Thus was constituted a new *legal* separate estate, not vested in trustees, and in respect of which a married woman could sue apart from her husband. But this estate was limited in character, and the married woman could not defend alone any action brought concerning it: it was necessary that her husband should be joined as a party.

Hancocks v Lablache, 3 C P D 197

The Married Women's Property Act, 1882, repealed the Acts of 1870 and 1874, except as regards all rights acquired or acts done while those statutes were in force. It affects—

(1) Every woman married after January 1st, 1883.

(2) Every woman married before January 1st, 1883, as respects property and *choses in action* acquired after that date.

We may summarize its effect, so far as it relates to our present purpose, as follows —

s 1 (1). All property, real and personal, in possession, reversion or remainder, vested or contingent, held by a woman before, or acquired after marriage, is now her separate property. She can acquire, hold, and dispose of it by will or otherwise, 'as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee.'

s 1 (2) 'In respect of and to the extent of her separate property' a married woman may enter into contracts, and render herself liable thereupon, as though she were a *feme sole*, and on such contracts she may sue and be sued alone.

By the Married Women's Property Act, 1893, every contract now made by a married woman, *otherwise than*

as agent, binds her separate estate, and binds separate estate acquired after the contract was made though she possessed none at the time of making the contract.

The last enactment extends in two ways the operation of the Act of 1882. (1) Under that Act the Court might draw inferences as to the intention of a married woman to bind or not to bind her separate estate. Since 1893 the existence of an intention to bind such estate is presumed and cannot be negatived. (2) The Act of 1882 had been interpreted to mean that the power of a married woman to bind her separate estate depended on the existence of such estate at the date of the contract. The amending Act, as regards all contracts made after December 5, 1893, binds separate estate when acquired, whether or no the married woman possessed any at the date of the contract.

s. 1 (3).

Leak v Driffield, 24 Q. B. D. 98.

Palliser v Gurney, 19 Q. B. D. 519.

The meaning of the words 'otherwise than as agent' was considered in the case of *Paquin v. Beauclerk*. A married woman from time to time ordered articles of dress and paid for them by her own cheque out of funds supplied to her by her husband. The dressmaker did not know, and did not ask, whether she was married or not. The husband having gone bankrupt, some of the dresses supplied were not paid for; and the wife defended an action brought against her for the price on the ground that she had contracted as his agent. The House of Lords being equally divided in opinion, the decision of the Court of Appeal was affirmed; and it was held that as the wife had in fact the authority of her husband, though she did not disclose that fact, she could not be said to have contracted 'otherwise than as agent.' The view of the dissentient members of the House was that unless both parties regarded the lady as an agent, she could not be said to contract 'as agent,' but this did not prevail.

[1906] A. C 148.

The liability imposed by the Acts of 1882 and 1893 does not affect separate estate which a married woman is restrained from anticipating. Where property is settled upon a married woman subject to a restraint on

Restraint on anticipation.

anticipation, she still cannot make it liable in advance for the satisfaction of her contracts, for the latter Act expressly protects from such liability any property which *at the time of making the contract or thereafter* she is restrained from anticipating.

It is true that when once the income of property which is subject to a restraint on anticipation has accrued due to a married woman, such income is her free separate estate to deal with as she chooses; in doing so she clearly cannot be said to 'anticipate' it. And this is so even though such income may not have been actually paid over to her, but may be still in the hands of her trustee. But the freeing of such income from the restraint does not make it available to satisfy a judgment on a contract which she entered into at a time before the income accrued due, and when she was accordingly unable to anticipate it. To hold otherwise would be to hold that at the time of making the contract she was able to anticipate the income. The crucial date therefore in determining what property of a married woman is available to satisfy a judgment on her contract is that of the contract and not that of the judgment.

Hood-Barrs v Heriot, [1896] A C. 174.

Wood v. Lewis, [1914] 3 K. B. 73

The restraint may be imposed on any kind of property and no particular form of words is needed to create it. It may be created before marriage, but it will not operate until marriage, and it will cease to operate if the marriage comes to an end by the death of the husband or by divorce, though it may revive on a second marriage. But the cessation of the restraint will not make the property to which it formerly applied available to satisfy a judgment on a contract made at a time when the restraint was operative.

Brown v. Dimbleby, [1904] 1 K. B. 28.

The restraint may be removed by the Court, but only with her consent and where it appears to be for her benefit, under the Law of Property Act, 1925, § 169; but 'a married woman cannot by hook or by crook—by any device, even by her own fraud, deprive herself of the protection which

Bateman v. Faber, [1898] 1 Ch. 144, per Lindley, M. R.

the restraint on anticipation throws around her. The result is that a married woman, having an estate for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a *feme sole*.'

Nature of liability:

The liability to which a married woman can subject herself on her contracts is not a personal liability. It cannot come into existence unless there is separate estate, and it does not extend beyond the separate estate.

not personal. s. 15.

Thus where a joint judgment is given against husband and wife, it is to be given against the husband personally, and against the wife as to her separate property. And again, a married woman (unless carrying on a trade or business [1]) cannot be made a bankrupt or committed to prison under s. 5 of the Debtors' Act, 1869, for non-payment of a sum for which judgment has been given against her, under s. 1 (2) of the Act of 1882. The Debtors' Act relates to persons from whom a debt is due, and damages or costs recovered against a married woman do not constitute a debt due from her, but 'shall be payable out of her separate estate, and not otherwise.'

Scott v Morley, 20 Q B D 120

s. 1 (2).

Holtby v. Hodgson, 24 Q B D. 109.

Beyond this a judgment against a married woman is precisely the same as a judgment against an unmarried woman. The judgment is against *her*: 'the fact that execution is limited to her separate property does not make it any the less a judgment against her.'

Pelton v. Harrison, [1893] 1 Q B 121

Ante-nuptial debts.

The position of a married woman so far as regards her ante-nuptial debts may be briefly noticed here. At common law, her husband was liable for such debts to the extent of his whole property, whether he knew of their existence or not, and whether or not he obtained any property from his wife. But he could not be sued alone, and his liability ceased on his wife's death. Under

[1] A married woman carrying on a trade or business, whether separately from her husband or not, is now expressly made subject to the bankruptcy laws as if she were a *feme sole*, by s. 125 of the Bankruptcy Act, 1914, which also provides that a judgment or order shall be available for bankruptcy proceedings against her as though she were personally bound to pay the judgment debt or sum ordered to be paid.

s. 14. the Act of 1882, he is only liable to the extent of the property which he has acquired from her on marriage, but he can be sued alone, whether his wife is alive or dead. On the other hand, the creditor may, if he chooses, sue either the wife or both husband and wife; in the latter case the judgments will be separate, that against the wife being as to her separate estate alone. And a judgment previously obtained against the wife is no bar to subsequent proceedings against the husband, for his liability is not a joint liability with her, but a personal liability of his own. But having discharged that liability he is entitled to be indemnified out of her separate estate.

Beck v. Pierce, 23 Q. B. D 316.

An unmarried woman possessed of property and debts, cannot upon marriage evade her debts by settling her property upon herself without power of anticipation. Property owned *before* marriage is liable to debts contracted *before* marriage, however the property may be settled *upon* marriage.

Jay v Robinson, 25 Q. B. D. 467.

To sum up: the Acts of 1882 and 1893 increase in two ways the powers of contracting possessed by a married woman.

Results of the statute. Marriage no longer involves any proprietary disability. All the property which a woman owns when she marries remains hers, and all property which she may subsequently acquire becomes hers, unless it is placed in the hands of trustees with a restraint upon anticipation. The area of separate estate is immensely extended, and therewith the contractual capacity of the woman. Full effect is given to this extension by the provision in the Act that future as well as existing separate estate is rendered liable to satisfy the contract.

And the rights and liabilities thus increased are rendered more easy of enforcement by the provision which enables the married woman to sue and be sued alone.

CHAPTER VI

Reality of Consent

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

This question may have to be answered in the affirmative for any one of the following reasons.

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

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

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

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

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

§ 1. *Mistake.*

Mistake of Intention differs in effect from

The confusion which attends all discussions on Mistake makes it important to strike off at once all topics which,

though superficially connected with the subject, are not relevant to Mistake as invalidating a contract.

mistake of Expression,

First then we must strike off cases where the parties are genuinely agreed, though the terms employed in making their agreement do not convey their true meaning. In such cases they are permitted to explain, or the Courts are willing to correct their error; but this is Mistake of expression, and concerns the Interpretation, not the Formation, of Contract.

want of mutuality,

Next, we must strike off all cases in which there was never the outward semblance of agreement, because offer and acceptance never agreed in terms.

false statement,

Thirdly, we must strike off all cases in which the assent of one party has been influenced by a false statement, innocent or fraudulent, made by the other; by violence, or by oppression on the part of the other.

failure of consideration.

Lastly, we must strike off all cases in which a man is disappointed in his power to perform his contract, or in the performance of it by the other. This last topic relates to the performance of Contract, and would not be mentioned here, but for a practice, common even to learned and acute writers, of confusing Mistake and Failure of Consideration. If a man alleges that a contract to which he was a party has not been performed as he expected, or has altogether failed of performance, the question is not whether he made a contract (for he has clearly done so), but whether the terms of the contract justify his contention. A man who knows with whom he is dealing, and the nature of the contract which he wants to make, has only himself to blame, if the terms of the contract do not bind the other party to carry out the agreement, or pay damages for default. And though the terms may not express what he intended them to express, his failure to find words appropriate to his meaning is not Mistake; if it were so a contract would be no more than a rough draft of the intention of the parties, to be explained by the light of subsequent events, and corrected by the Court and Jury.

Failure of consideration is not Mistake.

We must assume that the terms of the contract correspond to the intention of the parties. If performance does not correspond to the terms of the contract, or if the subject-matter of the contract, or the conditions under which it has to be performed are not such as the parties contemplated, still we cannot say that the rights of the parties are affected by 'mistake.' Every honest man, making a contract, expects that he and the other party will be able to perform and will perform his undertaking. The disappointment of such expectations cannot be called mistake; otherwise Mistake would underlie every breach of a contract which the parties had not deliberately intended to break when they made it.

Cases of operative Mistake.

The kinds of cases with which we have to deal are two, and two only, that is to say, they are cases in which both parties have contracted in the mistaken belief that some fact which lies at the root of the contract is true, and cases where, although to all outward appearance the parties are agreed, the law treats their contract as void on the ground that there is between them no *consensus ad idem*.

(*a*) *Mistake as to the existence of a fact at the root of the contract.*

The clearest instance of this kind of mistake is afforded by mistake as to the existence of the thing contracted for.

Mistake and impossibility.

It has been doubted whether this can be regarded as Mistake, or whether the parties to every contract do not act on an assumption, or implied condition vital to the contract, that the subject-matter of the contract is in existence [1]. The language of the Courts has been, however, in favour of treating these cases as cases of Mistake.

5 H L. C. 673.

In *Couturier v. Hastie*, a contract was made for the sale of a cargo of corn, which the parties supposed to be on its voyage from Salonica to England: it had in fact, before

[1] By s. 6 of the Sale of Goods Act such a condition is implied in every sale of goods

the date of sale, become so heated that it was unloaded at Tunis and sold for what it would fetch. The Court held that the contract was void, inasmuch as 'it plainly imports that there was something to be sold, and something to be purchased, whereas the object of the sale had ceased to exist.'

[1903] 2 Ch 249 In *Scott v. Coulson*, a contract for the assignment of a policy of life insurance was made upon the basis of a belief common to both parties that the assured was alive. He had, in fact, died before the contract was made. It was held that 'there was a common mistake, and therefore the contract was one that cannot be enforced.'

Marine insurance policies usually contain the words 'lost or not lost' in order to protect the assured against the possibility of this form of mistake.

Mistake as to existence of a right. The same rule applies where parties contract under a mutual belief that a *right* exists, which in fact is non-existent. If *A* agrees with *X* to hire or buy an estate from him which both believe to belong to *X*, but which is found to belong to *A*, the contract will not be enforced.

Bingham v Bingham, 1 Ves Senr 126 And this is not, as would at first sight appear, an infringement of the maxim '*ignorantia juris haud excusat.*'

Cooper v Phibbs, L R 2 H L 170. 'In that maxim,' said Lord Westbury, 'the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake, and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.'

(*b*) *Absence of consensus ad idem.*

This class of contract presents considerable difficulties; and it will be convenient to state what are conceived to be the general principles governing this branch of the law, and then to test them by reference to the best known varieties of such contracts.

It follows from the essential nature of a contract that if there is no true agreement between the parties, or, as is commonly said, if the parties are not *ad idem*, there is no contract. This we may call principle No. 1.

This is only another way of saying that offer and acceptance must correspond exactly, or no contract will ensue. Therefore, if the offeree thinks that the offeror is some person other than he really is, or that the thing offered is something different, or that the terms proposed by the offeror are other than those actually proposed, and if he accepts on that mistaken assumption, it is clear that there is no true *consensus ad idem*; for the offer which he has accepted is not the offer made by the other party.

But he may nevertheless be held to have accepted the real offer, and not that which exists merely in his imagination; for it is a principle, which we will call principle No. 2, that, if a person so conducts himself that a reasonable man would suppose that he was assenting to a bargain proposed by another person, and that other person was himself under the impression that he did so assent, in such a case the law will treat him as though he had actually assented to the bargain as proposed. He is said to be estopped by his conduct from denying that he has so assented.

It is evident that in the vast majority of cases the operation of principle No. 1 will be excluded by principle No. 2, so that we should be justified in enunciating the working rule that the cases in which mistake affects contract are the rare exceptions to an almost universal rule that a man is bound by an agreement to which he has expressed a clear assent, uninfluenced by falsehood, violence, or oppression. If he exhibits all the outward signs of agreement the law will hold that he has agreed.

Nevertheless it may occasionally happen that the law regards a contract as void though at first sight it appears perfectly valid. This may be for one of two reasons.

(1) The terms in which the contract is expressed may suffer from such latent ambiguity that it is impossible

to say that the conduct of the parties points to one solution rather than another. In such a case one party may say that he did not attach the same meaning to the terms as the other party, and it will be impossible to say that his conduct would have induced a reasonable man to make one deduction rather than the other.

Raffles v. Wichelhaus, 2 H. & C. 906

Scriven v. Hindley, [1913] 3 K.B. 564.

(ii) Or it may happen that, although the conduct of one party is such that a reasonable man would assume that he was assenting to the offer of the other party, yet that other party knows that he does not really so assent. In such a case he will not be estopped as against that other party from denying the fact of agreement. For an estoppel never operates in favour of a person who is aware of the true facts.

Cundy v. Lindsay, 3 App. Cas. 459.

We shall find instances of both these varieties of operative mistake in the course of the following pages.

The occasions of operative mistake which are most often encountered in practice are the following:—

(i) Mistake as to the identity of the person with whom the contract is made.

(ii) Mistake as to the identity of the subject-matter.

(iii) Mistake by one party as to the intention of the other, known to that other.

(i) *Mistake as to the identity of the person with whom the contract is made.*

Mistake as to party.

Mistake of this sort can only arise where A contracts with X, believing him to be M: that is, where the offeror has in contemplation a definite person with whom he intends to contract. It cannot arise in the case of general offers which any one may accept, such as offers by advertisement, or sales for ready money. In such cases the personality of the acceptor is plainly a matter of indifference to the offeror [1]. And the personality of one party

[1] Where the personality of one party may be important to the other the assumption of a false name is fraudulent and makes the contract voidable. In *Gordon v. Street* the defendant was induced to borrow money from

[1899] 2 Q.B. 641.

may sometimes be immaterial even though the other had in mind a definite person with whom he thought he was contracting. In such a case the mistake of identity will not affect the contract.

Smith v. Wheatcroft 9 Ch. D. 223.

In *Boulton v. Jones*, Boulton had taken over the business of one Brocklehurst, with whom Jones had been used to deal, and against whom he had a set-off. Jones sent an order for goods to Brocklehurst, which Boulton supplied without any notice that the business had changed hands. When Jones learned that the goods had not come from Brocklehurst he refused to pay for them, and it was held that he need not pay. The personality of the supplier of the goods in this case was of importance on account of the set-off which Jones had against Brocklehurst, the person with whom he had been used to deal. Possibly, as was suggested by the Court, Brocklehurst might have adopted Boulton's act in supplying the goods and maintained an action for the price. But, as Sir F. Pollock says, 'with the plaintiff there was no express contract, for the defendants' offer was not addressed to him; nor yet an implied one, for the goods were accepted and used by the defendants on the footing of an express contract with the person to whom their offer was really addressed.'

2 H. & N. 564.

Pollock, Principles of Contract, ed 9, p 508

In *Cundy v. Lindsay*, a person named Blenkarn, by imitating the signature of a respectable firm named Blenkiron, fraudulently obtained from *A* possession of certain goods which he afterwards sold to *X*. It was held that an innocent purchaser could acquire no right to the goods, because as between *A* and Blenkarn there was no contract.

3 App Cas. 459

'Of him,' said Lord Cairns, 'they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there

Gordon, a money-lender, whose usurious practices were notorious, who on this occasion contracted under the name of Addison. On discovery of the fraud Street was held to be entitled to repudiate the contract.

was no consensus of mind, which could lead to any agreement or contract whatever. As between him and them there was merely the one side to a contract, where in order to produce a contract, two sides would be required.'

Baillie's Case, [1898] 1 Ch 110 Hardman v Booth, 1 H. & C 803.

In the above cases and others of a similar kind it will be observed that the party deceived entered (as he supposed) into contractual relations with another whom he never saw and who he was misled into thinking was the person with whom in fact he intended to contract. Clearly there was here no consensus *ad idem*. But in a later case a distinction has been drawn where one party is induced to contract with another, who, present and in his own person, represents himself to be someone else.

[1919] 2 K B 243

In *Phillips v. Brooks*, a man representing himself to be a person of credit and stability, whose name was well known to the plaintiff, called in person at the plaintiff's shop and bought goods by means of a worthless cheque. He sold the goods to the defendant who acted bona fide and without notice of the fraud. The plaintiff sued the defendant for the return of the goods, alleging that in the circumstances he had never parted with the property in them. Judgment was given for the defendant, an American case in which the facts were substantially the same being cited with approval. There Morton, C. J., said:—

Edmunds v Merchants Despatch Co, 135, Mass 283

'The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and term of payment, the person selling and the person buying. . . . He [the plaintiff] could not have supposed that he was selling to any other person; his intention was to sell to the person present and identified by sight and hearing; it does not affect the sale because the buyer assumed a false name or practised any other deceit to induce the vendor to sell.'

The distinction is a fine one; but in *Cundy v. Lindsay* and the other cases cited above, there was never in fact any other contracting party at all, so far as the deceived party was concerned, though he believed erroneously that there was. In *Phillips v. Brooks* the contract was made

and known to be made with a real person. It was voidable because induced by fraud; but it was not void *ab initio* and therefore passed the property in the goods sold [1].

The reports furnish us with no case of genuine Mistake, in which *A* makes an offer to *M* believing him to be *X*, and *M* accepts, believing the offer to be meant for him. Cases of mutual error.

If in *Boulton v. Jones* the plaintiff had succeeded a predecessor in business of the same name, he might reasonably have supposed that the order for goods was meant for him. If the order had been given to Boulton *A*, and accepted by Boulton *B*, it is very doubtful whether Jones could have avoided the contract on the ground that though he obtained the goods he wanted from the man to whom his order was addressed, the Boulton whom he had addressed was not the Boulton whom he intended to address. 2 H & N 564

Circumstances might indicate to the offeree that the offer was intended for a different person. An offer of marriage falling into the hands of a lady for whom it was not intended, where two ladies chanced to have the same name and address, might or might not be turned into a promise by acceptance, according as the terms of acquaintance or age of the parties might justify the recipient in supposing that the offer was meant for her. An offer for the purchase of goods might not call for the same nicety of consideration on the part of the offeree.

(ii) *Mistake as to the identity of the subject-matter.*

A contract may be void on the ground of Mistake, if two things have the same name, and *A* makes an offer to *X* referring to one of them, which offer *X* accepts, thinking that *A* is referring to the other. If there is nothing in the terms of the contract to identify one or Mistake of identity of subject-matter.

[1] This case does not appear to be affected by the decision in *Lake v. Simmons*, for in that case when the jeweller handed the goods to the swindler he did so merely to enable her to show them to a supposed intending purchaser. He intended to make her his bailee, and not to enter into a contract of sale with her. [1927] A C 487

other as its subject-matter, evidence may be given to show that the mind of each party was directed to a different object: that *A* offered one thing, and *X* accepted another.

2 H & C. 906. In *Raffles v. Wichelhaus* the defendant agreed to buy of the plaintiff a cargo of cotton 'to arrive *ex Peerless* from Bombay.' There were two ships called Peerless, and both sailed from Bombay, but Wichelhaus meant a Peerless which arrived in October, and Raffles meant a Peerless which arrived in December. It was held that there was no contract. But if Wichelhaus had meant a ship of a different name, he would have had to take the consequences of his carelessness in not expressing his meaning properly. Nor could he have avoided the contract if its terms had contained such a description of the subject-matter as would practically identify it.

Ionides v. Pacific Insurance Co., L. R. 6 Q. B. 686.

(iii) *Mistake by one party as to the intention of the other, known to that other.*

We come here to the limits of operative Mistake in regard to the subject-matter of a contract, and must be very careful to define them so as to avoid confusion.

2 Exch. 654. A general rule laid down in *Freeman v. Cooke*, and often cited with approval, may be taken to govern all cases in which one of two parties claims to repudiate a contract on the ground that his meaning was misunderstood, or that he misunderstood that of the other party.

Smith v. Hughes, L. R. 6 Q. B. at p. 607.

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

Responsibilities of parties.

In entering into a contract a man must use his own judgment, or if he cannot rely upon his judgment, must take care that the terms of the contract secure to him what he wants. 'Caveat emptor' is a general rule of the law of contracts.

In two classes of cases however the law mitigates the rigour of this rule.

Statutory implied conditions. *Infra*, pp. 363–5

Where goods are bought by description, or in reliance on the judgment of a seller who knows the purpose for which they are required, the Sale of Goods Act, 1893, ss. 14 and 15, introduces into the contract implied conditions that the goods supplied shall be of a merchantable quality, or reasonably fit for the purpose for which they are required. And where the sale is by sample, there are implied conditions that the bulk shall correspond with the sample, that the buyer shall have an opportunity for inspection, and that there shall be no defect not apparent on reasonable examination which would render the goods unmerchantable.

Rule of non-disclosure.

And again, in certain contracts said to be 'uberrimae fidei,' in which one of the two parties is necessarily at a disadvantage as to knowledge of the subject-matter of the contract, the other is bound to disclose every material fact, that is, every fact which might have influenced the mind of a prudent person. *Infra*, p 189

Beyond this, where the terms of a contract are clear, the question is, not what the parties *thought*, but what they *said* and *did*. Subject to the exceptions already mentioned, a contracting party must take care of himself: he cannot expect the other party to correct his judgment as to the matter of his bargain, or ascertain by cross-examination whether he understands its terms.

But the law will not admit that a contract has come into existence when a man makes or accepts an offer, which he *knows* that the other party understands in a materially different sense from that in which he makes or accepts it himself.

Illustrations.

We can best illustrate these propositions by an imaginary sale.

A sells *X* a piece of china.

Mistake as to thing.

(a) *X* thinks it is Dresden china, *A* thinks it is not. Each takes his chance. *X* may get a better thing than

A intended to sell, or a worse thing than he himself intended to buy; in neither case is the validity of the contract affected.

(β) *X* thinks it is Dresden china. *A* knows that *X* thinks so, and knows that it is not.

The contract holds. *A* must do nothing to deceive *X*, but he is not bound to prevent *X* from deceiving himself as to the *quality* of the article sold.

Mistake as to offer.

(γ) *X* thinks that it is Dresden china and thinks that *A* intends to sell it as Dresden china; and *A* knows it is not Dresden china, but does not know that *X* thinks that he intends to sell it as Dresden china. The contract says nothing of Dresden, but is for a sale of china in general terms.

The contract holds. The misapprehension by *X* of the extent of *A*'s offer, *if unknown to A*, has no effect. It is not *A*'s fault that *X* omitted to introduce terms which he wished to form part of the contract.

(δ) *X* thinks it is Dresden china, and thinks that *A* intends to sell it as Dresden china. *A* knows that *X* *thinks he is offering Dresden china*, but does not mean to, and in fact does not, offer more than china in general terms.

Smith v. Hughes, L.R 6 Q B. at p. 610, per Hannen, J.

The contract is void. *X*'s error was not one of judgment as to the quality of the china, as in (β), but was an error as to the nature of *A*'s offer, and *A*, knowing that his offer was misunderstood, allowed the mistake to continue.

London Holeproof Hosiery Co v. Padmore, 44 T. L. R. 499.

Since *A* intends to offer one thing, and *X* to accept an offer of a materially different thing, there is no *consensus ad idem*; and since *A* is aware of this, *X* is not estopped from denying the reality of his apparent consent.

[1913] 3 K.B 564

In *Scriven v. Hindley* the plaintiffs instructed an auctioneer to sell certain bales of hemp and tow, which were described in the catalogue as so many bales in different lots with no indication of the difference in their contents. The defendant examined samples of the hemp before the sale, intending to bid for the hemp alone. The tow was put up

for sale, and the defendant made a bid which was accepted. The bid was a reasonable one if it had been for hemp, but an excessive one for tow. The jury found that the auctioneer intended to sell tow and that the defendant intended to bid for hemp, and that the auctioneer believed that the bid was made under a mistaken idea of the value of tow.

On these findings it is clear that the parties were not *ad idem* in fact, and there could therefore be no contract unless the defendant was estopped by his conduct from asserting that he had intended to bid for hemp. The defendant could not bring the case under the principle of case (δ) above, for the auctioneer did not know that he thought hemp was being offered; he merely thought that the defendant was making an extravagant bid for tow, and to such a mistake the maxim *caveat emptor* would clearly have applied. The defendant therefore would have been estopped but for another circumstance in the case, viz., the misleading form of the catalogue, which had contributed to his mistake. On that ground judgment was entered for the defendant.

Application of rule in equity.

A series of Equity cases illustrates the rule that when one man knows that another understands his offer in a different sense from that in which he makes it the transaction will not be allowed to stand.

30 Beav. 62

In *Webster v. Cecil* specific performance of a contract was refused on the ground of Mistake of this nature. The parties were in treaty for the purchase of some plots of land belonging to Cecil. Webster, through his agent, offered £2,000, which was refused. Afterwards Cecil wrote to Webster a letter containing an offer to sell at £1,200; he had intended to write £2,100, but either cast up the figures wrongly or committed a clerical error. Webster accepted by return of post. Cecil at once tried to correct the error, but Webster, though he must have known from the first that the offer was made in mistaken terms, claimed that the contract should be performed and sued for specific

performance. This was refused: the plaintiff was left to such action at law as he might be advised to bring. The case was described later as one 'where a person snapped at an offer which he must have perfectly well known to be made by Mistake.'

Per James, L. J., Tamplin v James, 15 Ch D 221.

Garrard v Frankel, 30 Beav. 445.

A and *X* signed a memorandum of agreement by which *A* promised to let certain premises to *X* 'at the rent of £230, in all respects on the terms of the within lease': and this memorandum accompanied a draft of the lease referred to. *A*, in filling in the blank in the draft for the amount of rent to be paid, inadvertently entered the figures £130 instead of £230; and the lease was engrossed and executed with this error. The Court was satisfied, upon the evidence, that *X* was aware that *A* believed her to be promising to pay a rent higher than that which she was actually promising, and she was given the option of retaining the lease, amended so as to express the real intention of the parties, or of giving up, and paying at the rate of £230 per annum for such use and occupation of the premises as she had enjoyed.

Infra, p 321.

L. R. 5 Eq 1 28 Ch D 255.

Harris v. Pepperell and *Paget v. Marshall* were cases in which the defendant accepted an offer which he must have known to express something which the offeror did not intend to express. The defendant was offered the alternative of cancellation or rectification. In these cases the promise was sought to be set aside, in *Webster v. Cecil* it was sought to be enforced. Otherwise the circumstances are the same.

Mistake in written contracts

So far it has not been difficult to trace the operation of coherent principles in our law of mistake. The law of written contracts however presents acute points of difficulty. This is mainly due to the existence of the old common law defence of *non est factum*, which permits one who has executed a written document in ignorance of its character to plead that, notwithstanding the execution, 'it is not his deed' in contemplation of law. But the restricted application of this defence makes it necessary

to consider how far written contracts are governed by the principles which have been explained above.

In accordance with those principles a man would normally be bound by a written contract to which he had apparently agreed, but if the other party to the contract knew that he did not really agree, he would not be bound. In that event the effect of a strict application of the principles would be that if the apparent rights of the other party were assigned to a third party who gave value and was unaware of the discrepancy between the man's mind and his act, those rights would be non-existent, in the hands of the assignee no less than in those of the assignor, for, as we saw in discussing the case of *Cundy v. Lindsay*, *Ante*, p 157. a contract where the essential element of *consensus* is lacking is void *ab initio* and can confer no rights even on innocent third parties.

But the law has not accepted this solution, perhaps because writing is more permanent than spoken words and is apt to get into the hands of third parties. In the interests of good faith and of sound business, it has preferred to hold, except in the cases, to be explained presently, in which it admits the plea of *non est factum*, that a person shall be estopped against innocent assignees for value from denying his apparent consent to a contract, even though the party with whom he has immediately contracted was aware that he did not really consent.

Thus in *Howatson v. Webb* one Hooper had fraudulently induced the defendant to execute a mortgage deed which acknowledged that the defendant was indebted to Hooper in the sum of £1,000. The defendant knew that the deed transferred certain property vested in him, but was unaware either that it was a mortgage, or that it contained a promise on his part to pay a sum of money to Hooper. Hooper assigned the mortgage, including the debt, to the plaintiff, who had no knowledge of the fraud and assumed that the deed was valid. It was held that the defendant was estopped from denying the validity of the deed. [1908] 1 Ch. 1, [1907] 1 Ch. 537

In *Howatson v. Webb* the defence of *non est factum* was set up and failed, on the ground that it would not apply where a person was mistaken merely as regards the contents, and not the essential nature of the contract. Where however a party is induced by his mistake to execute a written contract of a character entirely different from that which he intends to sign, the defence of *non est factum* is available; the contract is entirely void, into whosesoever hands it may come, and the operation of the principles which generally apply to mistake is entirely excluded.

Non est factum.

The only cases furnished in the reports are cases in which by the fraud of a third party the promisor has been mistaken as to the nature of the contract into which he was entering, and the promisee has in consequence been led to believe in the intention of the other party to contract when he did not so intend. In *Thoroughgood's Case*, an illiterate man executed a deed, which was described to him as a release of arrears of rent: in fact it was a release of all claims. The deed was not read to him, but when told that it related to arrears of rent, he said, 'If it be no otherwise, I am content,' and executed the deed. It was held that the deed was void.

2 Co Rep 9.

Act of third party

In *Foster v. Mackinnon*, Mackinnon, an old man of feeble sight, was induced to endorse a bill of exchange for £3,000, on the assurance that it was a guarantee. Later the bill was endorsed for value to Foster, who sued Mackinnon; the jury found that there was no negligence on the part of Mackinnon, and though Foster was innocent of the fraud, it was held that he could not recover.

fraudulent,

Foster v Mackinnon, L. R 4 C P. 711.

'It seems plain on principle and on authority that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that *the mind of the signer did not accompany the signature*; in other words, that he never intended to sign, and therefore in

contemplation of law never did sign, the contract to which his name is appended.'

Lewis v. Clay was decided on the same grounds. Lewis was the payee of a promissory note made jointly by Clay and Lord William Nevill. Clay had been induced to sign his name on a piece of paper, concealed from him by blotting-paper with the exception of the space for his signature. He was told by Nevill that the document concerned private affairs, and that his signature was wanted as a witness. The jury found that he had signed in misplaced confidence, but without negligence: and Lord Russell, C. J., setting aside any question which might arise from the character of the instrument, or the construction of the Bills of Exchange Act, 1882, held that he was not liable because 'his mind never went with the transaction,' but was 'fraudulently directed into another channel by the statement that he was merely witnessing a deed or other document.' 77 L. T 653

It will be observed that in none of these three cases had the party deceived contributed to his deception by his own negligence. They therefore left open the question whether the plea of *non est factum* would avail one who is in fact deceived as to the character of the document which he executes, but who was negligent in not informing himself of it.

In *Howatson v. Webb* the Court of Appeal expressed a doubt whether at the present day a person, neither illiterate nor blind, would not be estopped from availing himself of the plea of *non est factum* against one who innocently acts on the faith of a deed being valid. Certainly it might be thought reasonable that if one of two innocent parties in such a case is to suffer for the fraud of a third, the sufferer should be the one whose negligence has contributed to the loss sustained. This however is not the view which the Court of Appeal has subsequently taken in the case of *Carlisle Banking Co. v. Bragg*.[1] [1911] 1 K B. 489

[1] The decision in this case, which cannot be regarded as satisfactory, was discussed by the author of this book in L.Q.R., vol. 28, p. 190.

One Rigg asked Bragg to sign a document, telling him that it referred to some insurance matter about which they had already been doing business together. Bragg signed without reading it, and it turned out to be a guarantee of Rigg's account with the plaintiff Bank. The Bank allowed Rigg to overdraw on the faith of Bragg's supposed guarantee. The jury found that Bragg had been induced to sign the guarantee by the fraud of Rigg, that he did not know it was a guarantee, but that he was negligent in signing it. On these findings the Court of Appeal held that Bragg was not liable on the guarantee, his negligence being immaterial since he owed no duty to the plaintiffs.

The Court distinguished the case of *Foster v. Mackinnon* on the ground that negotiable instruments are exceptions to this rule, for the maker, acceptor, or indorser of a negotiable instrument owes a duty to every subsequent bona fide holder for value, and is liable on the instrument unless he can show not merely that his mind did not go with his signature, but that no negligence on his part contributed to his mistake.

It is not easy to regard the state of the law on mistake in written contracts as satisfactory. It contains two distinctions which are not very easy to justify. In the first place we have the distinction between mistake as to the essential nature or character of the document and mistake as to its contents; in the former the plea of *non est factum* is admitted and the apparent contract is void however negligent the person signing the document may have been, whereas in the latter the plea is not admitted, and the person signing may be estopped from denying his signature. The distinction between character and contents is perhaps intelligible in the abstract, but in practice it leads to different decisions in cases which common sense seems to suggest ought to be governed by the same rule. In *Howatson v. Webb* Webb had no thought of mortgaging property or incurring a debt; in *Carlisle Banking Co. v. Bragg* Bragg had similarly no thought of giving a guaran-

tee; yet because Webb knew that the document related to the property to which it actually did relate (though he thought it dealt with that property in a way totally different from that in which it did deal with it), whereas Bragg thought that his document related to something quite different from a guarantee, Webb was bound and Bragg was not.

Secondly in those cases where the mistake relates to the whole character of the document and the plea of *non est factum* is therefore *prima facie* admitted, we have the distinction between negotiable instruments and other documents, on the ground that a duty is owing to persons into whose hands a negotiable instrument (but not any other document) may come.

But *non est factum* means that in the eye of the law a man has not executed a document to which as a physical fact he has affixed his signature, and it is difficult to see how a man can be under any duty to persons into whose hands a document, which *ex hypothesi* is not his act, may come, or how it can make any difference in this respect whether such a document purports to be a negotiable instrument or something else. It seems unfortunate that the plea of *non est factum* has not been restricted to the case of persons who are blind or illiterate as was suggested by the Court in *Howatson v. Webb*; and that the rule that negligence excludes a plea of *non est factum* in the case of negotiable instruments has not been extended to all written contracts, as indeed was supposed to be the law before the decision in *Carlisle Banking Co. v. Bragg*.

Effect of Mistake.

Effect of Mistake.

Where Mistake, within the limits that we have described, affects the formation of a contract, no true contract comes into existence; it is void *ab initio*. The Common Law therefore offers two remedies to a person who has entered into an agreement void on the ground of Mistake. If it be still executory he may repudiate it

and successfully defend an action brought upon it; or if he have paid money under the contract, he may recover it back upon the general principle that 'where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, an action will lie to recover it back.' And this is so even though the person paying the money did not avail himself of all the means of knowledge open to him. In equity the victim of Mistake may resist specific performance of the contract, or he may apply as plaintiff to the Chancery Division of the High Court to get the contract set aside and to be freed from his liabilities in respect of it, and in some cases, as we have seen, he may be offered the alternative of rectification or cancellation.

Kelly v. Solari, 9 M & W. 58.

Imp. Bank of Canada v. Bank of Hamilton, [1903] A C. 56.

Webster v Cecil, 30 Beav. 62

Paget v Marshall, 28 Ch D 255

§ 2. *Innocent Misrepresentation.*

Distinctions.

In dealing with Misrepresentation as a circumstance invalidating contract we must keep before us two distinctions. We must carefully separate Innocent Misrepresentation of fact from Wilful Misrepresentation of fact, or Fraud: and we must separate with equal care representations which are preliminary to and perhaps induce the making of a contract, from representations which are contained in and therefore are terms of the completed contract itself.

With these distinctions in view, we may hope to encounter successfully the difficulties which meet us in determining the effect of Innocent Misrepresentation in contract.

Misrepresentation and Fraud.

(1) We must, firstly, distinguish Innocent Misrepresentation from Fraud, and must consider whether honesty of motive or ignorance of fact can remove a statement in fact false from the category of Fraud.

Statements which are promises

(2) We must, secondly, bear in mind that a man may, during the preliminary bargaining, make statements of fact which are afterwards embodied in the contract itself,

in the form of an undertaking or warranty that certain things *are*; just as he may promise that certain things *shall be*. In either case the undertaking or promise is a term of the contract. On the other hand he may make, during the preliminary bargaining, statements of fact, intended by neither party to be terms of the subsequent contract, but which, nevertheless, may seriously affect the inclination of one party to enter into it. and statements which are not.

Representation therefore may introduce terms into a contract and affect *performance*: or it may induce a contract and so affect the intention of one of the parties, and the *formation* of the contract. It is with this last that we have to do, and here the terminology of this part of the subject is extraordinarily confused. Representation, condition, warranty, independent agreement, implied warranty, warranty in the nature of a condition, are phrases which it is not always easy to follow through the various shades of meaning in which they are used.

(3) We must, thirdly, take note of the effect of the Judicature Act, combined with subsequent decisions, in modifying the rules of Common Law and expanding those of the Chancery in respect of innocent misrepresentations made prior to the formation of a contract. The Law before and since the Judicature Act.

We shall see that, as a result of this combination and expansion of earlier rules, material misrepresentation is now an invalidating circumstance in all contracts, while even non-disclosure of fact will affect contracts of a special sort known as contracts 'uberrimae fidei,' in which the utmost good faith and accuracy of statement is required.

These difficulties will be dealt with in order.

(1) *Innocent Misrepresentation distinguished from Fraud.*

Fraud differs from Innocent Misrepresentation in that one does, and the other does not, give rise to the Common Law action of deceit. Fraud is thus a wrong or tort in itself, and may be treated as such, besides being a vitiating element in contract. Innocent Misrepresentation may Fraud as a wrong.

vitiate a contract, but never gives rise to an action of deceit.

Arkwright v. Newbold, 17 Ch. D. 320.

'It must be borne in mind,' says Cotton, L. J., 'that in an action for setting aside a contract which has been obtained by misrepresentation, the plaintiff may succeed though the misrepresentation was innocent; but in an action of deceit, the representation to found the action must not be innocent, that is to say it must be made either with a knowledge of its being false or with a reckless disregard as to whether it is or is not true.'

Fraud without dishonest motive.

But a false statement may be made knowingly, yet not with a bad motive: on the other hand, it may be made with no certain knowledge that it is false, but nevertheless with a dishonest motive for wishing it to be believed by the party to whom it is made.

Let us take the first of these cases.

Per Tindal, C. J., Foster v. Charles, 7 Bing. 107.

'It is fraud in law, if a party make representations which he knows to be false and injury ensues, although the motives from which the representations proceeded may not have been bad.'

3 B. & Ad. 114

In *Polhill v. Walter*, Walter accepted a bill of exchange drawn on another person: he represented himself to have authority from that other to accept the bill, honestly believing that the acceptance would be sanctioned, and the bill paid by the person for whom he professed to act. The bill was dishonoured at maturity, and an indorsee, who had given value for the bill on the strength of Walter's representation, brought against him an action of deceit. He was held liable, and Lord Tenterden in giving judgment said:—

'If the defendant, when he wrote the acceptance, and thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.'

It will be observed that in this case the representation was *known to be false*; it is therefore clearly distinguishable from a class of cases in which it has finally been held that a representation in fact false, but *honestly believed to be true* by the party making it, will not give rise to the action of deceit.

Derry v. Peek, 14 App. Ca. 337.

On the other hand it is not necessary, to constitute fraud, that there should be a clear knowledge that the statement made is false. Statements which are intended to be acted upon, if made recklessly and with no reasonable ground of belief, may furnish such evidence of a dishonest mind as to bring their maker within the remedies appropriate to fraud.

Reckless misstatement.

Where directors issue a prospectus setting forth the advantages of an undertaking into the circumstances of which they have not troubled themselves to inquire, and inducing those who read the prospectus to incur liabilities in respect of the undertaking, they commit a fraud if the statements contained in the prospectus are untrue; for they represent themselves to have a belief which they know they do not possess.

Reese River Mining Co v. Smith, L. R. 4 H. L. 64

In the cases which we have just considered there is a statement of fact accompanied either with knowledge of falsehood or else with intention or willingness to deceive. Herein innocent misrepresentation differs from fraud; for innocent misrepresentation is a misstatement of facts not known to be false or a non-disclosure of facts not intended to deceive; whereas fraud is a statement known to be false, or made in ignorance as to its truth or falsehood, but confidently, so as to represent that the maker is certain when he is uncertain. The injured party is then entitled to avail himself of the action of deceit.

(2) *Representations inducing a Contract distinguished from Terms of the completed Contract.*

Representations and terms.

Equally important with the distinction between innocent misrepresentation and fraud is the distinction between the terms of a completed contract and statements which are inducements to enter into a contract.

Much subtlety of reasoning has been wasted because, where a man has in good faith made a promise which he is ultimately unable to perform, it has been said that his promise was misrepresentation, or was made under a

Kennedy v. Panama Steam Co., L. R. 2 Q. B. 580.

mistake of fact, and so questions proper to the performance or breach of contract have been mixed with questions relating to the formation of contract.

We must bear in mind, first that a representation which is subsequently made part of the contract ceases to be a mere representation and becomes something more, viz. a term in the contract, i. e. an undertaking that a certain thing is or shall be; and next, that an untrue representation which does not become a term in the contract, never (in the absence of fraud) gives rise to a claim for damages

Representations at Common Law.

At Common Law, therefore, if a representation did not afterwards become a part of the contract, its untruth (save in certain excepted cases and apart always from fraud) was immaterial. But if it did, it might be one of

Condition.

two things: (1) it might be regarded by the parties as a vital term going to the root of the contract (when it is usually called a Condition); and in this case its untruth entitles the injured party to repudiate the whole contract;

Warranty.

or (2) it might be a term in the nature only of an independent subsidiary promise (when it is usually called a Warranty), which is indeed a part of the contract, but does not go to the root of it; in this case its untruth only gives rise to an action *ex contractu* for damages, and does not entitle the injured party to repudiate the whole contract.

A matter of construction.

Whether a term is to be regarded as a Condition or a Warranty is a matter of construction for the Court to determine.

But two points must be borne in mind. In the first place, the words 'Condition' and 'Warranty' are not invariably kept as distinct as accuracy of definition demands; and in insurance law especially 'warranty' is very commonly used in the sense ascribed to 'condition' above. In the second place, the injured party, if he chooses to waive his right to repudiate the contract on breach of a condition, may still bring an action for such damages as he has sustained.

See Marine Insurance Act, 1906, ss. 33–41, *infra*, pp. 355 *et seq.*

The Common Law rules on the subject of conditions, warranties and representations may be illustrated from the judgments delivered in the three cases of *Behn v. Burness*, *Wallis v. Pratt*, and *Heilbut v. Buckleton*.

3 B & S 751. [1910] 2 K B. 1003 [1913] A C 30

In the first case, action was brought upon a charter party dated the 19th day of Oct. 1860, in which it was agreed that Behn's ship 'now in the port of Amsterdam' should proceed to Newport and there load a cargo of coals which she should carry to Hong Kong. At the date of the contract the ship was not in the port of Amsterdam and did not arrive there until the 23rd. When she reached Newport, Burness refused to load a cargo and repudiated the contract. Thereupon action was brought, and the question for the Court was whether the words 'now in the port of Amsterdam' amounted to a condition the breach of which entitled Burness to repudiate the contract, or whether they only gave him a right, after carrying out the contract, to sue for such damages as he had sustained. The Exchequer Chamber held it to be a condition, and Williams, J., in giving the judgment of the Court, thus distinguishes the various parts or terms of a contract:—

'Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. . . . Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question however may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court and not the jury must determine. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of

Representation, innocent, fraudulent.

Descriptive statement.

Condition precedent. Independent agreement.

his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.'

The distinction referred to in the last words of the passage quoted is amplified in the judgment of Fletcher Moulton, L. J., in *Wallis v. Pratt*:—

[1910] 2 K.B. 1003, 1012. [1911] A. C. 394.

'There are some [obligations] which go so directly to the substance of the contract, or in other words are so essential to its very nature, that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former he has the alternative of treating the contract as completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognizing this distinction between the two classes of obligations under a contract, there has not been a similar consistency in the nomenclature applied to them. I do not however propose to discuss this matter, because later usage has consecrated the term "condition" to describe an obligation of the former class and "warranty" to describe an obligation of the latter class. . . . A condition and a warranty are alike obligations under a contract a breach of which entitles the other party to damages. But in the case of a breach of a condition, he has the option of another and a higher remedy, namely, that of treating the contract as repudiated.'

[1913] A C 30

In *Heilbut v. Buckleton* the action was for fraudulent misrepresentation and for breach of warranty. The jury negatived fraud, but found that a statement made by the defendant's manager in answer to a question before the contract was concluded was a warranty. The House of Lords held that there was no evidence on which the jury could so find, and Lord Moulton (as he then had become) said:—

'The statement made in answer to the plaintiff's question was beyond controversy a mere statement of fact, for it was in reply to a question for information and nothing more. No doubt it was a representation as to fact, and indeed it was the actual representation upon which the main case of the plaintiff rested. . . . The whole case for the existence of a

collateral contract therefore rests on the mere fact that the statement was made as to the character of the Company, and if this is to be treated as evidence sufficient to establish the existence of a collateral contract of the kind alleged the same result must follow with regard to any other statement relating to the subject-matter of a contract made by a contracting party prior to its execution. This would negative entirely the firmly established rule that an innocent representation gives no right to damages. It would amount to saying that the making of any representation prior to a contract relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true and therefore to give a right to damages if such should not be the case.'

A dictum of Holt, C. J., was cited with approval to the effect that 'an affirmation at the time of the sale is a warranty, *provided it appear on evidence to be so intended*,' and the opinion of the Court of Appeal in a later case that in determining whether it was so intended a 'decisive test' is whether the vendor assumes to assert a fact of which the buyer is ignorant was emphatically rejected. Words which on the face of them appear to be simply representations of fact, said Lord Haldane, may import a contract of warranty, *but only if the context so requires*.

Crosse v Gardner, Carth 90

De Lassalle v Guildford, [1901] 2 K B 215, 221

Heilbut v Buckleton, [1913] A C 30, 37

The three judgments cited enable us to get a clear idea of the various elements in a contract.

(α) *Representations*, made at the time of entering into the contract, but not intended by both parties to form a part of it.

Representation.

(β) *Conditions* are terms which are of the essence of the contract. When a term in the contract is construed by the Court as a Condition, then, whether it be a statement of fact or a promise, the untruth, or the breach, of it will entitle the party to whom it is made to be discharged from his liabilities under the contract.

Condition [1].

(γ) *Warranties* are independent subsidiary promises, the breach of which does not give the injured party a right to repudiate the whole contract, but gives him a right of

Warranty *ab initio*.

[1] For a fuller discussion of the terms Condition and Warranty see pp. 355 et seq.

action for such damage as he has sustained by the failure of the other to fulfil his promise.

Warranty *ex post facto.*

(δ) A Condition may be broken and the injured party may not avail himself of his right to be discharged, but continue to take benefit under the contract, or at any rate to act as though it were still in operation. In such a case the condition sinks to the level of a warranty, and the breach of it, being waived as a discharge, can only give a right of action for the damage sustained.

(3) *Effect of Innocent Misrepresentation and Remedies therefor.*

In order to ascertain the effect of innocent misrepresentation or non-disclosure upon the formation of contract, we will first compare the attitude of Common Law and of Equity towards innocent misrepresentation before the Judicature Act, and then consider how far the provisions of the Judicature Act, interpreted by judicial decision, enable us to lay down in general terms a rule which was previously applicable only to a special class of contracts.

Common Law treatment of representation anterior to contract; 10 C B, N.S 844

The case of *Behn v. Burness* shows that in the view of the Common Law Courts a representation was of no effect unless it was either (1) fraudulent, or (2) had become a term in the contract: the case of *Bannerman v. White* shows that the tendency was to bring, if possible, into the terms of the contract, any statement which was material enough to affect consent.

Bannerman offered hops for sale to White. White asked if any sulphur had been used in the treatment of that year's growth. Bannerman said 'no.' White said that he would not even ask the price if any sulphur had been used. They then discussed the price, and White ultimately purchased by sample the growth of that year; the hops were sent to his warehouse, were weighed, and the amount due on their purchase was thus ascertained. He afterwards repudiated the contract on the ground that sulphur had been used in the treatment of the hops.

Bannerman sued for their price. It was proved that he had used sulphur over 5 acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine, had afterwards mixed the whole growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made as to the use of sulphur was not wilfully false, and they further found that 'the affirmation that no sulphur had been used was intended by the parties to be part of the contract of sale, and a warranty by the plaintiff.' The Court had to consider the effect of this finding, and held that Bannerman's representation had been embodied in and thus became a part of the contract, a true Condition, the breach of which discharged White from liability to take the hops.

Erle, C. J., said:—

Bannerman v White, 10 C B, N S. 860

'We avoid the term *warranty* because it is used in two senses, and the term *condition* because the question is whether that term is applicable. Then, the effect is that the defendants required, and that the plaintiff gave his *undertaking*, that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.

'The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty super-added; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used: and upon this ground we agree that the rule should be discharged.'

Note that in this case the representation was made before the parties commenced bargaining; whereas the representation in *Behn v. Burness* was a term in the charter party.

Note, further, that the actual legal transaction between the parties was an agreement to sell by sample a quantity of hops, a contract which became a sale[1], so as to pass the

[1] For the distinction between a sale and an agreement to sell, see p. 85, *supra*, and p. 359, *infra*.

property, when the hops were weighed and their price thus ascertained. The contract of sale contained no terms making the acceptance of the hops conditional on the absence of sulphur in their treatment: and the language of Erle, C. J., shows that he felt it difficult to apply the terms 'condition' or 'warranty' to the representation made by the plaintiff.

'The undertaking,' he says, 'was a preliminary stipulation'; to introduce it into the contract was to include in the contract the discussion preliminary to the bargain. What had happened was that Bannerman made a statement to White, and then the two made a contract which did not expressly include this statement, though but for the statement the parties would never have entered on a discussion of terms. The consent of the buyer was, in fact, obtained by a misrepresentation of a material fact, and was therefore unreal; but the Common Law Courts had precluded themselves from giving any effect to a representation unless it was a term in the contract. Their only remedy was to give damages for breach of a contract, but for representations which were not terms in the contract they could do nothing unless they were fraudulent, and it was to meet this defect that Equity provided the remedy of rescission.

Equitable treatment of misrepresentation inducing contract.

In considering the principles on which Equity has dealt with innocent misrepresentation and non-disclosure of fact we must bear in mind that certain classes of contracts have always been regarded as needing more exact and full statement than others of every material fact which might influence the minds of the parties. Some of these were of a sort with which the Court of Chancery was more particularly concerned—contracts to take shares in companies—contracts for the sale and purchase of land.

We must also remember that judges in the Court of Chancery never had occasion to define fraud with precision

as an actionable wrong. They therefore, not unnaturally, used the term 'fraudulent' as applicable to all cases in which they refused specific performance or set aside an instrument on the ground that one of the parties had not acted in good faith; and somewhat unfortunately they applied the same term to representations which were made in good faith though they afterwards turned out to be untrue.

But we find no general rule as to the effect of innocent misrepresentation until 1873, when, in a case somewhat similar to *Bannerman v. White*, a similar result was reached by the application of a different principle.

Lamare v Dixon, L R 6 H L 414

Lamare, a merchant in French wines, entered into negotiations with Dixon for a lease of cellars. He stated that it was essential to his business that the cellars should be dry, and Dixon assured him, to his satisfaction, that the cellars would be dry. He thereupon made an agreement for a lease, in which there was no term or condition as to the dryness of the cellars. They turned out to be extremely damp. Lamare declined to continue his occupation, and the House of Lords refused to enforce specific performance of the agreement, not because Dixon's statement as to the dryness of the cellars was a term in the contract, but because it was material in obtaining consent and was untrue in fact.

Misrepresentation a ground for refusing specific performance,

'I quite agree,' said Lord Cairns, 'that this representation was not a guarantee[1]. It was not introduced into the agreement on the face of it, and the result of that is that in all probability Lamare could not sue in a Court of Law for a breach of any such guarantee or undertaking: and very probably he could not maintain a suit in a Court of Equity to cancel the agreement on the ground of misrepresentation. At the same time if the representation was made and if that representation has not been and cannot be fulfilled, it appears to me upon all the authorities that that is a perfectly good defence in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled.' at p 428

Thus it appears, that up to the passing of the Judicature Act the Court of Chancery would refuse specific performance

[1] 'Guarantee' must be understood here to mean 'warranty,' and not the contract of guarantee dealt with on p. 70.

of a contract induced by innocent misrepresentation, and that in transactions of certain kinds it was prepared to set contracts aside on the same grounds. The latter remedy had not been expressly limited to transactions of the kind mentioned, but on the other hand it had not been expressly declared to be applicable to all contracts.

Effect of Judicature Act (36 & 37 Vict c. 66), ss 24(1),(2), and 25 (11)

The Judicature Act provided that a plaintiff may assert any equitable claim and a defendant set up any equitable defence in any Court, and that where the rules of equity and law are at variance, the former shall prevail, and in their treatment of this provision there is no doubt that the Courts have extended the application of equitable remedies. Innocent misrepresentation which brings about a contract is now a ground for setting the contract aside, and this rule applies to contracts of every description.

and for rescinding contract.

20 Ch D 1

The case of *Redgrave v. Hurd* was the first in which this rule was applied. It was a suit for specific performance of a contract to buy a house. Redgrave had induced Hurd to take, with the house, his business as a solicitor, and it was for misstatement as to the value of this business that Hurd resisted specific performance, and set up a counterclaim to have the contract rescinded and damages given him on the ground of deceit practised by Redgrave. The Court of Appeal held that there was no such deceit, or statement false to Redgrave's knowledge, as would entitle Hurd to damages; but specific performance was refused and the contract rescinded on the ground that defendant had been induced to enter into it by the misrepresentation of the plaintiff.

Growth of modern rule.

The law was thus stated by Jessel, M. R. :—

at p 12.

'As regards the rescission of a contract there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of Equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract, obtained by material false representation, to prove that the party who obtained it knew at the time that the representation was made that it was false.'

In *Newbigging v. Adam* the rule thus laid down was adopted as of general application. The plaintiff had been induced to enter into a partnership with one Townend by statements made by the defendants who were either the principals or concealed partners of Townend. The Court of Appeal held that 'there was a substantial misstatement though not made fraudulently, which induced the plaintiff to enter into the contract,' and the contract was set aside. 34 Ch. D 582

This principle is clearly stated by Lord Bramwell in *Derry v. Peek*, speaking of the various rights of one who has been injured by the untruth of statements inducing a contract:—'To this may now be added the equitable rule that *a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission.*' 14 App Ca 347 Result.

Thus a general rule is settled; innocent misrepresentation, if it furnishes a material inducement, is ground for resisting an action for breach of contract or for specific performance, and also for asking to have it set aside; this relief is of general application, and is not peculiar to the contracts described as *uberrimae fidei*. It is perhaps well to add that the Judicature Act has not of course affected the Common Law rules regarding an innocent representation which has become a term of the contract, but the further discussion of this matter falls under the subject of breach of contract. The equitable remedy of rescission merely supplements these rules, as it can provide for the case, to which they did not apply, of an innocent misrepresentation which is not a term in the contract. Nature of relief given.

There is however an important limitation of the relief granted by equity. It can only be obtained when the transaction is repudiated at once, and when the parties can be relegated to the position which they occupied before the contract was made. Rescission will not be

Seddon v. North Eastern Salt Co., [1905] 1 Ch. 326

granted after property has changed hands under a contract, and the party who has been misled must take steps to repudiate the transaction at the earliest possible moment.

Hindle v Brown, 98 L. T. 44, at p. 45.

'It is well settled that a contract can only be rescinded on the ground of an innocent misrepresentation, if the parties can be put back again in their original position, and it cannot be rescinded if the contract has been so completed that this cannot be done.'

Angel v Jay, [1911] 1 K. B. 666.

Rescission of a lease duly executed, the lessee having taken possession of the premises, has been refused on these grounds.

Armstrong v Jackson, [1917] 2 K. B. per McCardie, J., at p. 825

'It is too late to regret the limitation which has been placed on the equitable doctrine of rescission on the ground of misrepresentation. It is curious that the doctrine should cease to apply when the formal instrument of transfer has been executed, or the formal delivery of a chattel has taken place. In many cases the misrepresentation cannot, or may not, be discovered until the purchaser has secured his legal title and has therefore entered into possession of his newly acquired property.'

Expression of opinion.

Smith v Chadwick, 9 App. Cas. at p. 196, per Lord Blackburn

The representation must form a real inducement to the party to whom it is addressed, and whether or not a person who has entered into a contract was induced to do so by a particular representation is in each case a question of fact. Further it must be a representation of fact and not a mere expression of an opinion which proves to be unfounded. In effecting a policy of marine insurance the insured communicated to the insurers a letter from the master of his vessel stating that in his opinion the anchorage of the place to which the vessel was bound was safe and good. The vessel was lost there: but the Court held that the insured, in reading the master's letter to the insurers, communicated to them all that he himself knew of the voyage, and that the letter was not a representation of fact, but of opinion, which the insurers could act upon or not as they pleased.

Anderson v. Pacific Insurance Co., L. R. 7 C. P. 65

The distinction between a representation of fact and a statement of opinion, which in one sense always involves a representation of fact, namely that the opinion is held by the person stating it, is discussed in the judgment of

the Judicial Committee of the Privy Council in *Bisset v. Wilkinson*. [1927] A. C. at p. 182.

Nor are commendatory expressions such as men habitually use in order to induce others to enter into a bargain dealt with as serious representations of fact. A certain latitude is allowed to a man who wants to gain a purchaser, though it must be admitted that the border line of permissible assertion is not always discernible. At a sale by auction land was stated to be 'very fertile and improvable': it was in fact partly abandoned as useless. This was held to be 'a mere flourishing description by an auctioneer.' But where in the sale of an hotel the occupier was stated to be 'a most desirable tenant,' whereas his rent was much in arrear and he went into liquidation directly after the sale, such a statement was held to entitle the purchaser to rescind the contract.

Commendatory expressions.

Dimmock v. Hallett, 2 Ch 21.

Smith v Land & House Property Co, 28 Ch D. 7

We have seen that innocent misrepresentation, though a ground upon which a contract may be rescinded, is not one upon which damages can be obtained. But the rescission of a contract means that the contract is set aside, and when a contract is set aside the plaintiff is 'with some exceptions to be restored to his old position,' and this may sometimes include the payment to him of a money indemnity. The exact principle upon which such an indemnity may be given is not altogether clear, and in the leading case where the matter was discussed the members of the Court of Appeal expressed different views. Fry, L. J., agreeing with Cotton, L. J., was inclined to hold 'that the plaintiff is entitled to an indemnity in respect of all obligations entered into under the contract when those obligations are within the necessary or reasonable expectation of both of the contracting parties at the time of the contract. I hesitate to adopt the view of Lord Justice Bowen, that the obligations must be created by the contract.' All the members of the Court were agreed that the right to an indemnity is a right much less extensive than the right to damages.

Newbigging v Adam, 34 Ch D per Cotton, L J, at p 588.

Ibid at p 596.

The distinction between damages and an indemnity as it works out in practice may be illustrated by the case of
82 L. T 49 *Whittington v. Seale-Hayne.* In that case the plaintiffs had been induced to take a lease of premises by the defendant's innocent misrepresentation that they were sanitary. The plaintiffs started a poultry farm on the premises, and incurred expenses for outbuildings, &c. In consequence of the insanitary condition of the premises their manager fell ill and the poultry died. They claimed rescission of the lease, and an indemnity to cover the value of the stock, loss of profit on sales, medical expenses of the
Angel v Jay, ante, p 184 manager, and other expenses incurred. As the lease had been executed, it would appear that it was too late for it to be rescinded, but this point does not appear to have been decided by Farwell, J., who said that, on the assumption that the plaintiffs were entitled to rescind, they would be entitled to be indemnified for what they had spent on rent, rates, and repairs, these being expenses incurred under covenants in the lease, but not for the other items of loss claimed, which were damages pure and simple.

Exceptions. To the rule that no damages can be obtained for innocent misrepresentation there are however three exceptions.

Warranty of authority. (*a*) The first is where an agent in good faith assumes an authority which he does not possess and induces another to deal with him in the belief that he has the
Collen v Wright, 8 E. & B 647 authority which he assumes. This subject is further
Infra, p 426 discussed in the chapter on Agency, where it is pointed out that the action is really for the breach of an implied contract in which the agent warrants or promises that he has the authority assumed.

Companies Act. (*b*) The Companies (Consolidation) Act, 1908, s. 81, requires that a prospectus of a Company should contain a number of particulars which must be assumed to be material to the formation of the judgment of an intending applicant for an allotment of shares. The duty cast by

the Statute upon those interested in the formation of the Company would seem to create a corresponding liability to an action for damages.

(*c*) The same Act, s. 83 (re-enacting the provisions of the Directors' Liability Act, 1890), also gives a right to any person who has been induced to subscribe for shares in a company by untrue statements in a prospectus, to obtain compensation from the directors for loss sustained, unless they can show that they had reasonable ground to believe the statement and continued to believe it till the shares were allotted, or that the statement was a fair account of the report of an expert or a correct representation of an official document. Directors' liability.

From these cases we must carefully distinguish the sort of liability which is supported rather than created by *estoppel* by conduct, sometimes called, in distinction from estoppel by record or by deed, *estoppel in pais*. Estoppel.

Estoppel is a rule of evidence, and the rule may be stated in the words of Lord Denman:—

'Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' Pickard v. Sears, 6 A. & E. 469.

Where a defendant is by a rule of evidence not permitted to disprove certain facts, and where on the assumption that such facts exist the plaintiff would have a right, then estoppel comes in aid of the establishment of the right by preventing the denial or disproof of these facts.

But an estoppel can only arise from words or conduct which are clear and unambiguous. This rule, and the effect of estoppel, may be illustrated by the case of *Low v. Bouverie*. [1891] 3 Ch. 82.

Low was about to lend money to *X* on the security of *X*'s share of a trust fund, of which Bouverie was trustee. He asked Bouverie whether this share was mortgaged or otherwise encumbered, and if so to what extent. Bouverie

named such charges as occurred to him but did not name all, and the loan was made. In fact the interest of *X* was heavily encumbered, and when Low sued Bouverie, *X* was an undischarged bankrupt. Low claimed that Bouverie, the trustee, was liable to make good the loss. The Court of Appeal held (1) that Bouverie's statement could not be construed as a warranty, so as to bind him by contract to Low; (2) that the statement was not false to his knowledge; (3) that the misrepresentation, being innocent, could not give rise to an action for damages, unless a duty was cast upon Bouverie to use care in statement; (4) that no such duty rested upon a trustee, requiring him to answer questions concerning the trust fund to strangers about to deal with the *cestui que trust*; (5) that therefore Bouverie could only be held liable if he was *estopped* from contending that there were other incumbrances upon the trust fund than those which he had mentioned to Low.

Per Lindley, L. J., p. 103. If he had been so estopped he might have been ordered to pay to Low the trust fund, subject only to the incumbrances disclosed in his letters; and, as there were other charges in abundance, he would have had to make good the deficiency out of his own pocket. But the Court held that the letters upon which Low sought to make Bouverie liable could not be construed as explicitly limiting the charges on the trust fund to those specified in the letter.

at p. 106. 'An estoppel,' said Bowen, L. J., 'that is to say, the language on which the estoppel is founded, must be precise and unambiguous.'

Instances of such precise and unambiguous statement may be found in the cases of Companies which issue certificates stating that the holders are entitled to shares, or to 'fully paid up' shares. If the certificate is obtained by means of a deposit with the Company of a forged transfer of shares, the Company are nevertheless estopped from disputing the title to shares which their certificates confer.

Bloomenthal v. Ford, [1897] A. C. 156.

Balkis Co. v. Tomkinson, [1893] A. C. 396.

(4) *Non-disclosure of material facts. Contracts uberrimae fidei.*

There are some contracts in which more is required than the absence of innocent misrepresentation or fraud. These are contracts in which one of the parties is presumed to have means of knowledge which are not accessible to the other, and is therefore bound to tell him everything which may be supposed likely to affect his judgment.

Contracts of marine, fire and life insurance, and indeed contracts of insurance of every kind, are of this special class. They are known as contracts *uberrimae fidei*, and may be avoided on the ground of non-disclosure of material facts, even though *restitutio in integrum* is no longer possible.

There are also other contracts, for the sale of land, for family settlements, and for the allotment of shares in companies, which, though not contracts *uberrimae fidei* in the same sense, yet present certain points of resemblance to them, and may properly be mentioned here. Among them are sometimes included contracts of suretyship and partnership, but, as it would seem, erroneously.

(*a*) Contracts of insurance.

Insurance contracts.

The general principles of law applicable to contracts *uberrimae fidei* do not differ in essence from those applicable to other kinds of contracts, and the rule with regard to the disclosure of material facts and the penalty for non-disclosure is rather a rule of construction for a particular group of contracts. 'The rule imposing an obligation to disclose upon the intending assured does not rest upon a general principle of common law, but arises out of an implied condition, contained in the contract itself, precedent to the liability of the underwriter to pay.' The insurer contracts on the basis that all material facts have been communicated to him; and it is an implied condition of the contract that the disclosure

Pickersgill v London and Provincial, &c., Co., [1912] 3 K. B. 614, 621.

Blackburn v Vigors, 12 App Cas. 531, 537, 541.

shall be made, and that if there has been non-disclosure he shall be entitled to avoid.

Marine insurance.

So far as regards marine insurance, the Common Law rules are now codified in the Marine Insurance Act, 1906. S. 18 of the Act provides that:—

(1) The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.

L. R. 9 Q B 531

In *Ionides v. Pender* goods were insured upon a voyage for an amount largely in excess of their value; it was held that although the fact of over-valuation would not affect the risks of the voyage, yet, being a fact which underwriters were in the habit of taking into consideration, its concealment vitiated the policy.

Per Blackburn, J., at p 527

'It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy.'

It will be observed that under the Act the assured is, for purposes of communication, 'deemed to know' all circumstances which in the ordinary course of business he ought to know; and the same rule applies to an agent effecting an insurance for a principal. The agent must disclose everything material that he himself knows or is 'deemed to know,' as well as everything that his principal is bound to disclose, unless it comes to the knowledge of the principal too late for him to inform the agent.

Fire insurance.

A policy of fire insurance will similarly be vitiated by the non-disclosure, however innocent, of any material facts. In an American case, referred to by Blackburn, J., in the judgment above cited, 'the plaintiff had insured certain property against fire, and the president of the company heard that the person insuring with them,

New York Bowery Fire Insurance Co. v. New York Fire Insurance Co., 17 Wend. 359.

or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured. The plaintiffs reinsured with the defendants, but did not inform them of this. A fire did take place, the insured came upon the plaintiffs, who came upon the defendants. The judge directed the jury, that if this information given to the president of the plaintiff company was intentionally kept back, it would vitiate the policy of reinsurance. The jury found for the plaintiffs, but the Court, on appeal, directed a new trial on the ground that the concealment was of a material fact, and whether intentional or not, it vitiated the insurance.' L R 9 Q B. at p 539

In *The London Assurance v. Mansel* an action was brought to set aside a policy of life insurance on the ground that material facts had been concealed by the party effecting the insurance. He had been asked and had answered questions as follows:— 11 Ch D 363 Life insurance.

Has a proposal ever been made on your life at other offices? If so, where? Was it accepted at the ordinary premium or at an increased premium or declined?	Insured now in two offices for £16,000 at ordinary rates. Policies effected last year.

The answer was true so far as it went, but the defendant had endeavoured to increase his insurance at one of the offices at which he was already insured, and to effect further insurances at other offices, and in all these cases he had been refused.

The contract was set aside, and Jessel, M. R., thus laid down the general principle on which his decision was founded:—

'I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and though there may be certain circumstances, from the peculiar nature of marine insurance, which require to be disclosed and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle.' at p 367

But where *A* is effecting an insurance on the life of *X*, and *X* makes false statements as to his life and habits which *A* in good faith passes on to the insurance office, such statements have been held not to vitiate a policy. The ground of the decision was (1) that the statements were not *conditions* on the truth of which the validity of the contract depended, and (2) that *X* was not the agent of *A* for the purpose of effecting the policy, so that the fraud of *X* was not imputable to *A* under the rule that the principal is liable for the fraud of his agent.

Wheelton v. Hardisty, 8 E & B. 298.

It is possible that if such a case were to occur since equitable remedies for misrepresentation have become general it might be decided otherwise. It precisely corresponds to the case described in *Redgrave v. Hurd*, 'where a man having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract.' But in a later case Vaughan Williams, L. J., expressed his approval of the view taken by Lord Campbell in *Wheelton v. Hardisty*, that where the assured 'does his best to put the insurer in a situation to obtain the information and to form his own opinion that the information is sincere,' the policy cannot be avoided by the insurer, if no blame is imputable to the assured himself with regard to the information given. And it may also be said that where *A* is effecting an insurance for his own purposes on the life of *X*, the circumstances of the case negative the possibility of an implied term that the insurer shall be entitled to avoid his contract with *A* on the ground of misrepresentations made by *X*, not to the insurer at all, but to *A*.

20 Ch. D. 1

Joel v Law Union, [1908] 2 K. B 879.

(*b*) Contracts for the sale of land.

Sale of land.

Contracts of this kind are not *uberrimae fidei* in the sense that a vendor has a duty to disclose to the purchaser every material fact relating to the land which is within his knowledge. In the absence of misrepresentation, innocent or otherwise, *caveat emptor* is the rule; but this is subject to certain qualifications. A vendor must

disclose every material defect in his title, for if he does not make it a condition of the contract that the purchaser should accept a defective title, and the title is in fact defective, he will be unable to perform his contract. In *Flight v. Booth*, leasehold property was agreed to be purchased by the defendant. The lease contained restrictions against the carrying on of several trades, of which the particulars of sale mentioned only a few; Tindal, C. J., held that the plaintiff could rescind the contract and recover back money paid by way of deposit on the purchase of the property.

Nottingham Patent Brick Co v. Butler, 16 Q. B. D. 778, 786. Beyfus v. Lodge, [1925] Ch 350 1 Bing N C 370

'We think it is a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such cases the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale.'

Molyneux v. Hawtrey is also a case of non-disclosure. A lease was sold by plaintiff to defendant containing onerous and unusual covenants. The vendor had not disclosed these covenants nor given to the purchaser a reasonable opportunity for informing himself of them; and the contract could not be enforced.

[1903] 2 K. B. 487.

Equitable remedies however can be adapted to the extent and character of the misdescription; and if this is merely a matter of detail the purchaser may be compelled to conclude the sale subject to compensation to be made by the vendor.

Shepherd v Croft, [1911] 1 Ch 521.

The parties may also provide in the contract of sale for compensation in case of misdescription, and this right, if so expressed, will not merge in the deed of conveyance but may be exercised after the property has passed.

Palmer v Johnson, 13 Q. B. D 351

(*c*) Contracts preliminary to family settlements and arrangements need no special illustration.

(*d*) Contracts for the allotment of shares in Companies.

Purchase of shares.

The rule as to the fullness of statement required of projectors of an undertaking in which they invite the public to join is clearly stated by Kindersley, V. C., in the case of the *New Brunswick Railway Company v. Muggeridge*, in words which were approved by Lord Chelmsford in a later case in the House of Lords:—

1 Dr. & Sm at p. 381.

Venezuela Ry Co v. Kisch, L. R. 2 H. L. 113

> 'Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.'

Aaron's Reefs v Twiss, [1896] A. C. 273, 287.

But 'the duty of disclosure is not the same in a prospectus inviting share subscriptions as in the case of a proposal for marine insurance.' Mere non-disclosure in a prospectus, even of facts which in the opinion of an intending shareholder might have materially influenced his judgment, will be no ground for rescission, unless the omission makes what is stated actually misleading.

We should distinguish this right of avoidance for non-disclosure, (1) from the remedy in deceit for actual fraud; (2) from the remedy in tort apparently given by s. 81 of the Companies (Consolidation) Act, 1908 (re-enacting a section in an earlier Act to the same effect) against persons responsible for the issue of a prospectus from which material facts are omitted, to those who suffer pecuniary loss by such omissions; and (3) from the right to compensation given by s. 83 of the same Act (re-enacting the provisions of the Directors' Liability Act, 1890), to persons who have sustained loss by purchasing shares on the faith of an untrue statement in the prospectus of a company.

Suretyship is not in general *uberrimae fidei*,

(*e*) Suretyship and Partnership are sometimes described as contracts which need a full disclosure of all facts likely to affect the judgment of the intending surety or partner.

This statement goes too far; either contract would be invalidated by material though innocent misrepresentation, or by such non-disclosure of a fact as would amount to an implied representation that the fact did not exist; but neither as a rule requires the same fullness of disclosure as is necessary in a contract *uberrimae fidei*. On the other hand it is not always easy in practice to draw the line between contracts of suretyship or guarantee in the strict sense of contracts to answer for the debt, default, or miscarriage of another and contracts of insurance taking the form of contracts to indemnify against some risk stated in the contract. It was pointed out by Romer, L. J., in *Seaton v. Heath* that many contracts may with equal propriety be called contracts of insurance or contracts of guarantee, and that whether a contract requires *uberrima fides* or not depends not upon what it is called, but upon its substantial character and how it came to be effected. Generally in a contract of insurance the person desiring to be insured has means of knowledge of the risk which the insurer does not possess, and he puts the risk before the insurer as a business transaction. In a contract of guarantee, on the other hand, the creditor does not as a rule go to the surety, explain the risk, and ask him to undertake it. The surety is often a friend of the debtor and knows the risk to be undertaken, or the circumstances indicate that as between the creditor and the surety it is contemplated that the surety will take upon himself to ascertain what the risk is. Only in the exceptional cases when a contract which is described as one of guarantee or suretyship has the characteristics which occur normally in a contract of insurance is the former a contract *uberrimae fidei*.

Lee v Jones 17 C. B., N. S. 482.

[1899] 1 Q B at p 792

Accordingly it is settled that there is no duty of full disclosure where a surety guarantees to a bank the account of one of the bank's customers. On the other hand when an employer, in taking a bond from a surety for the fidelity of a servant, did not disclose the fact, known to

L G O. Co, v Holloway, [1912] 2 K B 72. National Provincial Bank v Glanusk, [1913] 3 K. B. 335.

him but not to the surety, that the servant had previously been guilty of misappropriating money while in his service, he was unable to enforce the bond on the servant subsequently committing a further misappropriation.

Further in the exceptional class of cases in which a contract of suretyship is a contract *uberrimae fidei*, the surety is entitled to be informed of any subsequent agreement which alters the relation between creditor and debtor or any circumstance which would give him a right to withdraw his guarantee. So in *Phillips v. Foxall*, the defendant had guaranteed the honesty of a servant in the employ of the plaintiff; the servant was guilty of dishonesty in the course of his service, but the plaintiff continued to employ him and did not inform the defendant of what had occurred. Subsequently the servant committed further acts of dishonesty. The plaintiff required the defendant to make good the loss. It was held that the defendant was not liable. The concealment released the surety from liability for the subsequent loss. It would seem that if the surety knew that the servant had committed acts of dishonesty which would justify his dismissal, he would be entitled to withdraw his guarantee.

L. R. 7 Q. B. 666.

Burgess v. Eve, 13 Eq. 450.

nor partnership.

There seems to be no rule requiring full disclosure in the formation of a contract of partnership, but since, when the partnership has been formed, the parties stand to one another in the confidential relationship of principal and agent, each partner is bound to disclose to the others all material facts, and to exercise the utmost good faith in all that relates to their common business. The duties of partners are however now for the most part regulated by the Partnership Act, 1890.

§ 3. *Wilful Misrepresentation, or Fraud.*

(1) *Definition of Fraud.*

Fraud.

Fraud is an actionable wrong. As such it is susceptible of fairly precise definition; and as such we may treat of it here. Fraud which gives rise to the action of deceit is

a very different thing from the sharp practice or unhandsome dealing which would incline a Court of Equity to refuse the discretionary remedy of specific performance, or to grant relief by the cancellation of a contract. It represents the reasoned, logical conclusions of the Common Law Courts as to the nature of the deceit which makes a man liable in damages to the injured party.

Its essential features.

Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.

Let us consider these characteristics in detail.

(*a*) Fraud is a false *representation*.

There must be a representation.

It differs here from non-disclosure such as may vitiate a contract *uberrimae fidei*; there must be an active attempt to deceive either by a statement which is false, or by a statement not untrue in itself but accompanied with such a suppression of facts as to convey a misleading impression. Concealment of this kind is sometimes called 'active,' 'aggressive,' or 'industrious'; but perhaps the word itself, as opposed to non-disclosure, suggests the active element of deceit which constitutes fraudulent misrepresentation. The distinction between misrepresentation by non-disclosure, which can only affect contracts *uberrimae fidei*, and misrepresentation which gives rise to an action of deceit, is clearly pointed out by Lord Cairns in the case of *Peek v. Gurney*:—

L R 6 H L. p 403

'Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as *that the withholding of that which is not stated makes that which is stated absolutely false*.'

Caveat emptor is the ordinary rule in contract. A vendor

Non-disclosure is not fraud.

is under no liability to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist.

Ward v. Hobbs, 3 Q. B. D. 150.

Hobbs sent to a public market pigs which were to his knowledge suffering from typhoid fever; to send them to market in this state was a breach of a penal statute. Ward bought the pigs, 'with all faults,' no representation being made as to their condition. The greater number died: other pigs belonging to Ward were also infected, and so were the stubble-fields in which they were turned out to run. It was contended that the exposure of the pigs in the market amounted to a representation, under the circumstances, that they were free of any contagious disease. The case went up to the House of Lords, where Lord Selborne thus states the law on this point:—

4 App Ca 13.

'Upon the question of implied representation I have never felt any doubt. Such an implication should never be made without facts to warrant it, and here I find none except that in sending for sale (though not in selling) these animals a penal statute was violated. To say that every man is always to be taken to represent in his dealings with other men, that he is not, to his knowledge, violating any statute, is a refinement which (except for the purpose of producing some particular consequence) would not, I think, appear reasonable to any man.'

10 C. B. 591.

In *Keates v. Lord Cadogan*, the plaintiff sued for damages arising from the defendant's fraud in letting to the plaintiff a house [1] which he knew to be required for immediate occupation without disclosing that it was in a ruinous condition. It was held that no such action would lie.

'It is not pretended,' said Jervis, C. J., 'that here was any warranty, expressed or implied, that the house was fit for immediate occupation: but, it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and

[1] The house was leased for a term of years. The law is otherwise where a furnished house is hired for a short period, as for instance the London season. In such a case immediate occupation is of the essence of the contract, and if the house is uninhabitable the lessee is discharged, not on the ground of fraud, but because 'he is offered something substantially different from that which was contracted for.' An undertaking as to sanitary condition is now implied by the Housing Acts, 1890–1919, in the case of all tenements below a certain value.

Wilson v. Finch-Hatton, 2 Ex. D. 336.

dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do, what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit.'

(*b*) The representation must be a representation *of fact*.

A repre-sentation of fact not of opinion; Harvey v Young, 1 Yelv 20. Lindsay Petroleum Co. v Hurd, L R 5 P C at p 243

A mere expression of opinion, which turns out to be unfounded, will not invalidate a contract. There is a wide difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it. The first is an opinion which the buyer may adopt if he will: the second is an assertion of fact which, if false to the knowledge of the seller, is also fraudulent.

nor expression of intention. Burrell's case, 1 Ch D 552

Again, we must distinguish a representation that a thing is from a promise that a thing shall be: neither a statement of intention nor a promise can be regarded as a statement of fact except in so far as a man may knowingly misrepresent the state of his own mind. Thus there is a distinction between a promise which the promisor intends to perform, and one which the promisor intends to break. In the first case he represents truly enough his intention that something shall take place in the future: in the second case he misrepresents his existing intention; he not only makes a promise which is ultimately broken, but when he makes it he represents his state of mind to be something other than it really is. Thus it has been laid down that if a man buy goods, having at the time formed an intention not to pay for them, he makes a fraudulent misrepresentation.

Ex parte Whittaker, 10 Ch 446

Again, it is said that wilful misrepresentation of law does not give rise to the action of deceit, nor even make a contract voidable as against the person making the statement, but it is not easy to see why this should be so, for any misrepresentation of a man's opinion is a misrepresentation of a fact. At any rate it seems clear that the distinction drawn in *Cooper v. Phibbs* between ignorance

Eaglesfield v Marquis of Londonderry, 4 Ch D at p 702 L R. 2 H.L. 170.

of general rules of law and ignorance of the existence of a right would apply to the case of a fraudulent misrepresentation of law, and that if a man's rights were concealed or misstated knowingly, he might sue the person who made the statement for deceit. A decided opinion has been expressed in the King's Bench Division, that a fraudulent representation of the effect of a deed can be relied upon as a defence in an action upon the deed.

Hirschfield v London, Brighton, and South Coast Railway Co., 2 Q. B. D. 1.

There must be knowledge of falsehood;

(c) The representation must be made *with knowledge of its falsehood or without belief in its truth.*

Unless this is so, a representation which is false gives no right of action to the party injured by it. A Telegraph Company, by a mistake in the transmission of a message caused the plaintiff to ship to England large quantities of barley which were not required, and which, owing to a fall in the market, resulted in a heavy loss. It was held that the representation, not being false to the knowledge of the Company, gave no right of action to the plaintiff.

Dickson v. Reuter's Telegraph Co., 3 C. P. D. 1.

at. p. 5.

'The general rule of law,' said Bramwell, L. J., 'is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it.'

This rule is to be supplemented by the words of Lord Herschell in *Derry v. Peek*:—

14 App. Ca 337.

at p. 374.

or disregard of truth.

'First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, 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, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is 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.'

Therefore if a man makes a false statement, honestly believing it to be true, he cannot be rendered liable in an action of deceit.

It is fraudulent to represent yourself as possessing a belief which you do not possess. This is the ground of

liability in the case of reckless misstatement of fact. The maker of the statement represents his mind as certain in the matter, whereas in truth it is not certain. He says that he believes, when he really only hopes or wishes.

It is just as fraudulent for a man to misrepresent wilfully his state of mind as to misrepresent wilfully any other matter of fact. 'The state of a man's mind,' said Bowen, L. J., 'is just as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.' The rule as to reckless misstatement laid down by Lord Herschell does not in any way widen the definition of Fraud.

Edgington v Fitzmaurice, 29 Ch D 483.

But from time to time attempts have been made to extend the results of Fraud, and to make men liable not merely for wilful misstatements of fact or of belief, but for misstatement of fact made in the honest belief of their truth, but not based upon reasonable grounds.

Want of reasonable ground for belief;

The rule was settled in the Common Law Courts, as long ago as 1844, that a misstatement of fact made with an honest belief in its truth was not a ground for an action of deceit, and that 'fraud in law' or 'legal fraud' is a term which has no meaning as indicating any ground of liability.

Collins v Evans, 5 Q B 820

But shortly after the Judicature Act came into effect judges whose experience had lain chiefly in Courts of Equity came to deal with the Common Law action of deceit, and applied to it from time to time the somewhat ill-defined notions of Fraud, which had prevailed in the Equity Courts. In *Weir v. Bell* the dissenting judgment of Cotton, L. J., contains a *dictum* that a man is liable for deceit, 'if he has made statements which are in fact untrue, recklessly, that is, *without any reasonable grounds for believing* them to be true.'

2 Ex D 242.

its effect doubtful

This view of liability for deceit was not accepted by the majority of the Court, and the case is remarkable for an

emphatic condemnation by Bramwell, L. J., of the use of the term 'legal fraud':—

at p 243 'To make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud; to my mind it has no more meaning than legal heat or legal cold, legal light or legal shade.'

20 Ch D 44 Nevertheless in *Smith v. Chadwick* the view of Fraud expressed by Cotton, L. J., was adopted and extended by Sir G. Jessel. He there says that a misstatement made carelessly, but with a belief in its truth and with no intention to deceive, renders the maker liable to an action for deceit.

Evidently a confusion was growing up between misrepresentation which is a ground for rescinding a contract, and misrepresentation which is a ground for an action of deceit. The matter came to an issue in *Derry v. Peek*.

14 App Ca 337 till settled in *Derry v. Peek*. The defendants were directors of a tramway company, which had power by a special Act to make tramways, and with the consent of the Board of Trade to use steam power to move the carriages. In order to obtain the special Act the plans of the Company required the approval of the Board of Trade, and the directors assumed that, as their plans had been approved by the Board before their Act was passed, the consent of the Board to the use of steam power, which they had to obtain after the Act was passed, would be given as of course. They issued a prospectus in which they called attention to their right to use steam power as one of the important features of their undertaking. The consent of the Board of Trade was refused: the Company was wound up, and a shareholder brought an action of deceit against the directors.

Derry v Peek, 37 Ch. D 541, 565. Stirling, J., found as a fact that the defendants 'had reasonable grounds for the belief' expressed in the prospectus, and that they were innocent of fraud. The Court of Appeal held that although the prospectus expressed the honest belief of the directors, it was a belief for which no reasonable grounds existed, and that the directors were therefore liable. The House of Lords reversed the decision

of the Court of Appeal. The cases are exhaustively discussed in the judgment of Lord Herschell, and the conclusion to which he comes is thus expressed:—

Absence of reasonable ground for belief not a cause of action,

'In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. . . . At the same time, I desire to say distinctly that when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one.'

The rule may therefore be regarded as settled that a statement made with an honest belief in its truth cannot render the maker liable to an action for damages for deceit[1], though the absence of reasonable grounds for belief may go to show that the belief expressed was not really entertained; in other words, that the man who made the statement represented himself to possess a belief which he did not possess.

but may suggest dishonest motive.

It may well happen in the course of business that a man is tempted to assert for his own ends that which he wishes to be true, which he does not know to be false but which he strongly suspects to have no foundation in fact. If he asserts such a thing with a confident assurance of belief, or if he neglects accessible means of information, his statement is not made in an honest belief of its truth; he may have taken care not to acquaint himself with inconvenient facts.

Angus v Clifford, [1891] 2 Ch (C A) 463

'But *Peek v. Derry* has settled once for all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained.'

[1] It is stated on high authority that a representation, believed to be true when made, but afterwards discovered to be false, amounts to fraud if the transaction is allowed to continue on the faith of it. If this means that an action of deceit would lie, there must be something said or done confirmatory of the statement after it is known to be false.

Lord Blackburn in Brownlie v Campbell, 5 App Ca. p. 950.

Dishonest motive need not be present,

Ante, p. 172. L. R. 6 H. L. 409

There is another aspect of fraud in which the fraudulent intent is absent but the statement made is known to be untrue. Such is the case of *Polhill v. Walter*, cited above. That decision is confirmed by the judgment of Lord Cairns in *Peek v. Gurney*. The plaintiff in that case had purchased shares from an original allottee on the faith of a prospectus issued by the directors of a Company, and he brought an action of deceit against the directors. Lord Cairns compared the statements in the prospectus with the circumstances of the Company at the time they were made, and came to the conclusion that the statements were not justified by facts. He then proceeded to point out that though these statements were false, yet the directors might well have thought, and probably did think, that the undertaking would be a profitable one:—

if statement known to be false.

> 'But in a civil proceeding of this kind all that your Lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? And if there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which would properly result from what was done.'

The rule is a sound one. If a man chooses to assert what he knows or even suspects to be false, hoping, perhaps believing, that all will turn out well, he cannot rely upon the excellence of his motives to defend him from the natural inferences and results which follow upon his conduct.

The statement need not be made to the injured party,

(*d*) The representation must be made *with the intention that it should be acted upon by the injured party.*

We may divide this proposition into two parts. (1) The representation need not be made to the injured party; but (2) it must be made with the intention that he should act upon it.

Langridge v. Levy, 2 M. & W. 519.

(1) Levy sold a gun to the father of Langridge for the use of himself and his sons, representing that the gun had been made by Nock and was 'a good, safe, and secure gun': Langridge used the gun; it exploded, and so injured

his hand that amputation became necessary. He sued Levy for the false representation, and the jury found that the gun was unsafe, was not made by Nock, and found generally for the plaintiff. It was urged, in arrest of judgment, that Levy could not be liable to Langridge for a representation not made to him; but the Court of Exchequer held that, since the gun was sold to the father to be used by his sons, and the false representation made in order to effect the sale, and as 'there was fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.'

at p 532.

(2) In *Peek v. Gurney* directors were sued by persons who had purchased shares in a Company on the faith of false statements contained in a prospectus issued by the directors. The plaintiffs were not those to whom shares had been allotted on the first formation of the Company; they had purchased their shares from such allottees. It was held that the prospectus was only addressed to the first applicants for shares; that the intention to deceive could not be supposed to extend to others than these: and that on the allotment 'the prospectus had done its work; it was exhausted.'

L R 6 H L 377

but must be made with the intention that he should act upon it.

at p 410

The law had been so stated in an earlier case:—

'Every man must be held responsible for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, *provided it appear that such false representation was made with the intent that it should be acted upon* by such third person in the manner that occasions the injury or loss. . . . But to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the representation thus made.'

Barry v Croskey, 2 J & H 1 at p 22

But if a prospectus is only part of a scheme of fraud maintained by false statements deliberately inserted from time to time in the press, its effect is not held to be exhausted by the allotment of shares, and its falsehoods will afford ground for an action of deceit to others than the

Andrews v Mockford, [1896] 1 Q B 372.

allottees; for the whole mass of false statement is intended to induce the public at large to continue to purchase shares and thus keep their value inflated.

Deceit which does not deceive is not fraud.

(*e*) The representation *must actually deceive.*

'In an action of deceit the plaintiff cannot establish a title to relief simply by showing that the defendants have made a fraudulent statement: he must also show that he was deceived by the statement and acted upon it to his prejudice.'

Arkwright v. Newbold, 17 Ch. D. 324.

Horsfall v Thomas, 1 H. & C 90

Thomas bought a cannon which had been manufactured for him by Horsfall. The cannon had a defect which made it worthless, and Horsfall had endeavoured to conceal this defect by the insertion of a metal plug into the weak spot in the gun. Thomas never inspected the gun; he accepted it, and upon using it for the purpose for which he bought it the gun burst. It was held that, as he was not in fact deceived, the attempted fraud having had no operation upon his mind, he could not successfully set up a plea of fraud. 'If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him.'

Per Bramwell, B, at p 99

See *dicta* of Cockburn, Smith v Hughes, L. R 6 Q B at p 605.

This judgment has been severely criticized by high authority, but it should be remembered that the only question before the Court was whether the facts would sustain a plea of fraud, and not whether Thomas might have succeeded in an action differently framed. Moreover it must not be understood as laying down that the mere fact that a party has the opportunity of investigating and ascertaining whether a representation is true or false will deprive him of his right to say he was deceived by it. On the point of fraud however the principle laid down seems to be sound, and it has been followed in a later case. An action of deceit was brought by an omnibus company to restrain an omnibus proprietor from so painting and lettering his omnibuses as to induce the public to believe that

Redgrave v. Hurd, 20 Ch D 1

they were the plaintiffs'. The learned judge who tried the case viewed the respective omnibuses, and decided against the defendant on the ground that the painting of his omnibus was calculated to deceive the public. But on appeal the action was dismissed on the ground that there was no evidence that any member of the public had actually been deceived.

London General Omnibus Co v Lavell, [1901] 1 Ch 135

We may lay down the general rule that deceit which does not affect conduct cannot create liabilities.

(2) *Effect of Fraud, and Remedies therefor.*

We may now consider the effect of fraud, such as we have described it to be, upon rights *ex contractu*.

Effect of Fraud.

Apart from contract, the person injured by fraud, such as we have described, has an action of tort, viz. the Common Law action for deceit, and may recover by that means such damage as he has sustained.

Remedies *ex delicto*.

But we have to consider fraud and its effects in relation to contract. We must therefore ask what are the remedies *ex contractu* open to one who finds that he has been induced to enter into a contract by fraud.

(*a*) He may affirm the contract and ask for a fulfilment of its terms so far as that may be possible or damages for such loss as he has sustained by their non-fulfilment. 'If the property be subject to encumbrances [fraudulently] concealed from the purchaser, the seller must make good his statement and redeem these charges.' In like manner one who has been induced to purchase a chattel by fraud may retain the chattel and sue for loss sustained by fraud.

Remedies *ex contractu*.

Pulsford v Richards, 22 L J Ch *per* Romilly, M R at p 563

But the exercise of this right must depend on the nature of the contract. A man cannot remain a shareholder and sue the company of which he is a member, though he was induced to purchase shares by the fraud of the directors. Nor can he divest himself of the character of a shareholder, and so put himself in a position to sue, after the company has gone into liquidation.

Houldsworth v City of Glasgow Bank, 5 App Ca. 317.

Right of rescission.

(*b*) He may avoid or repudiate the contract by taking steps to get it cancelled in the Chancery Division on the ground of fraud; or by resisting a suit for specific performance, or an action at common law in respect of the contract.

Aaron's Reefs v. Twiss, [1896] A. C. 273.

Thus if a shareholder, suspecting fraud, declines to pay calls and thereby incurs the forfeiture of his shares, he ceases to be a shareholder and becomes merely a debtor to the company and can resist payment of his debt on the plea of fraud.

Limits of right to rescind.

(*c*) He may lose his option to affirm or avoid, and may be left to his action for deceit, in three cases.

Clough v L N W Ry Co, L R 7 Ex. 26

Firstly, if after becoming aware of the fraud he affirms the contract either by express words or by an act which shows an intention to affirm it.

Rights of third parties.

Babcock v. Lawson, 4 Q. B D 394.

Secondly, since the contract is voidable and not void—is valid until rescinded—if third parties bona fide and for value acquire property or possessory rights in goods obtained by fraud, these rights are valid against the defrauded party, whether acquired before or after he became aware of his right to rescind.

Clarke v. Dickson, E B & E. 148, *per* Crompton, J.

Thirdly, it has been said that when a party 'exercises his option to rescind a contract, he must be in a state to rescind; that is he must be in such a situation to be able to put the parties into their original state before the contract.' Thus a shareholder who has been induced to take shares by false statements in a prospectus cannot disaffirm his contract if he waits until a petition has been filed for the winding up of the company, or *a fortiori* if a winding-up order has been made and the company has gone into liquidation.

Whiteley's Case, [1899] 1 Ch 770

Oakes v. Turquand, L. R 2 H L 325

Hulton v. Hulton, [1917] 1 K B. *per* Swinfen Eady, L J, at p. 821

3 App. Cas at p. 1278.

The exact scope of this limitation on the right to rescind is not easy to define. 'The general rule is that as a condition of rescission there must be *restitutio in integrum*, but at the same time the Court has full power to make all just allowances. It was said by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* that the practice

had always been for a Court of Equity to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties to the state they were in before the contract.' It appears that the mere fact that the subject-matter of a contract may have deteriorated before the fraud is discovered is not sufficient to prevent a *restitutio in integrum* and so to destroy the right to rescind the contract.

Armstrong v. Jackson, [1917] 2 K B *per* McCardie, J, at p 829.

Lapse of time, though of itself it has no effect on the rights of the defrauded party, may, if coupled with knowledge of the fraud, furnish evidence of an intention to affirm; and, in any event, delay increases the chance that the position of the parties may change, or that third parties may acquire rights and that the right to rescind may thus be lost.

Charter v. Trevelyan, 4 Cl & F. 714.

Clough v L & N W. R Co, L R. 7 Ex 35

From the results of fraud such as we have described—fraud which makes a contract voidable—we must distinguish fraud which, whether by personation or other device, induces a man to go through the form of agreement while he is mistaken as to the nature of the agreement, or as to the individual with whom he is dealing.

We have dealt with these cases under the head of Mistake. They are cases in which no true consent has been expressed, in which the contract is void, and in which an innocent third party who may have acquired goods for value from the fraudulent person has no title to the goods against the victim of the fraud.

(3) *Fraud in Equity.*

In a later case in the House of Lords the true scope and application of the judgments in *Derry v. Peek* have been considered, and attention drawn to the fact that the principles there laid down do not in any way narrow the remedies previously given by the Court of Chancery in cases over which it exercised at one time an exclusive jurisdiction and which 'although classified in that Court as

Nocton v. Ashburton, [1914] A. C. 932.

cases of fraud, yet did not necessarily import the element of dolus malus.' Such cases are to be found where there has been a breach of special duty recognized and enforced by the Court of Chancery, whether arising from the fiduciary relationship of the parties or the special circumstances of the case.

'It must now be taken to be settled,' said Lord Haldane, L.C., 'that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit. This is so whether a Court of Law or a Court of Equity, in the exercise of concurrent jurisdiction, is dealing with the claim, and in this strict sense it was quite natural that Lord Bramwell and Lord Herschell should say that there was no such thing as legal as distinguished from moral fraud. But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience.'

'If among the great common lawyers who decided *Derry v. Peek*,' he adds, 'there had been present some versed in the practice in the Court of Chancery, it may well be that the decision would not have been different, but that more and explicit attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, Courts of Equity gave a remedy.'

[1914] A C. 932.

In *Nocton v. Ashburton*, the case from which the above quotations are taken, a mortgagee sued his solicitor, alleging that the solicitor had by improper advice induced him to release a part of his security, whereby the security had become insufficient, that the advice was not given in good faith but in the solicitor's own interest, and that when it was given the solicitor well knew that the security would thereby be rendered insufficient. The House of Lords held

that fraudulent misrepresentation in the sense of *Derry v. Peek* had not been proved, and that damages for deceit could not therefore be recovered; but they held also that there had been a breach of the duty imposed on the solicitor by the confidential relationship in which he stood to his client, which entitled the latter to the relief which the Court of Chancery has been accustomed to give in such cases, viz. an indemnity for the loss which the breach of duty had caused him.

This case illustrates principles which we shall have to consider later under the heading of Undue Influence; but the distinction drawn in it between the fraud which gives rise for an action for deceit (as defined in *Derry v. Peek*) and the fraud of which Courts of Equity take cognisance makes it convenient and desirable to refer to it in this place. The decision confirms and emphasizes *Derry v. Peek*, but makes it clear that the absence of proof of an intention to deceive does not in all cases deprive of a remedy the person who has in fact suffered from deception.

§ 4. *Duress.*

A contract is voidable at the option of one of the parties if he have entered into it under Duress.

In what it consists.

Duress consists in actual or threatened violence or imprisonment; the subject of it must be the contracting party himself, or his wife, parent, or child; and it must be inflicted or threatened by the other party to the contract, or else by one acting with his knowledge and for his advantage.

1 Rolle, Abr 688

Must affect promisor

A contract entered into in order to relieve a third person from duress is not voidable on that ground; though a simple contract, the consideration for which was the discharge of a third party by the promisee from an illegal imprisonment, would be void for unreality of consideration.

Huscombe v Standing, Cro Jac 187.

Atlee v Backhouse, 3 M. & W. 633.

Nor is a promise voidable for duress which is made in consideration of the release of goods from detention. If the detention is obviously wrongful the promise would

and must be personal.

be void for want of consideration; if the legality of the detention was doubtful the promise might be supported by a compromise. But money paid for the release of goods from wrongful detention may be recovered back in virtue of the quasi-contractual relation created by the receipt of money by one person which rightfully belongs to another.

See *infra*, Quasi-Contract.

Kaufman v. Gerson, [1904] 1 K. B. 591.

The Court of Appeal has held that an agreement induced by moral pressure, such as a threat to prosecute a near relation, is not one which the Courts of this country will enforce; not so much (it seems) for the reason that moral pressure of this kind is to be regarded as negativing the existence of a genuine consent between the parties to the contract, as because it is against the general policy of the law to allow a plaintiff to maintain an action on an agreement so unfairly obtained. It is, however, not always easy since the Judicature Act to distinguish between duress properly so called and the unconscientious dealing known to Courts of Equity as 'undue influence,' which is discussed below; and *Kaufman v. Gerson*, the case in question, is in truth an illustration of the narrowness of the borderline which now separates the two.

William v. Bayley, L. R. 1 H. L. 200.

Dynamit Atk. v. Rio Tinto, [1918] A. C. 292, 297–8

§ 5. *Undue Influence.*

It has been shown that the use of the term 'fraud' has been wider and less precise in the Chancery than in the Common Law Courts. This followed necessarily from the remedies which they respectively administered. Common Law gave damages for a wrong, and was compelled to define with care the wrong which furnished a cause of action. Equity refused specific performance of a contract or set aside a transaction, or gave compensation, where one party had acted unfairly by the other. Thus 'fraud' at Common Law is a false statement such as is described in the preceding section: 'fraud' in Equity has often been used as meaning unconscientious dealing,—'although, I think, unfortunately,' to use the words of a great equity lawyer.

Fraud at Common Law and in Equity.

Lord Haldane in Nocton v. Ashburton, [1914] A C 932, 953.

Equitable doctrine of Undue Influence.

One form of such dealing is commonly described as the exercise of 'Undue Influence.' The subject can only be dealt with here in outline. Whether or no relief is granted in any given case must often depend on the view taken by the Court of the character or tendency of a number of transactions extending over a considerable time.

Definition of Undue Influence.

But we must find a definition of Undue Influence; and then proceed to consider and classify the circumstances which create it; and we may be aided in the process of classification by certain principles which equity judges have laid down as to the enforcement of promises or gifts made for no consideration or for a consideration wholly disproportionate to the value of the thing promised or given.

8 Ch. 490.

Lord Selborne supplies a definition in *The Earl of Aylesford v. Morris*. Speaking of the cases 'which, in the language of Lord Hardwicke, raise, from the circumstances and conditions of the parties contracting, a presumption of fraud,' he says:—

> 'Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable.'

The principles above alluded to are these:—

Kekewich v. Manning, 1 D M G 188.

(*a*) that equity will not decree specific performance of a gratuitous promise even though it be under seal;

Hoghton v Hoghton, 15 Beav 299

(*b*) that the acceptance of a voluntary donation throws upon the person who accepts it the necessity of proving 'that the transaction is righteous';

Wood v. Abrey, 3 Mad 423

(*c*) that inadequacy of consideration is regarded as an element in raising the presumption of undue influence or fraud;

Coles v Trecothick, 9 Ves 246

(*d*) but that mere inadequacy of consideration will not (according to the strong tendency of judicial opinion) amount to proof of either.

So the question which we have to discuss may be put

thus:—When a man demands equitable remedies, either as plaintiff or defendant, seeking to escape or avoid a grant or promise made gratuitously or for a very inadequate consideration, what must he show in addition to this in order to establish Undue Influence?

The cases fall into three distinct groups:—

Presumption from obvious unfairness or inequality of parties;

(1) There are cases in which the Court, from the circumstances or condition of the parties contracting, will regard the transaction as *prima facie* unfair, and require the person who has benefited to show that it is in fact fair and reasonable.

Formerly the Usury laws were supposed to protect the borrower; while an 'expectant heir' dealing with his reversionary interest was protected by a rule of equity which required the purchaser, at any time, to show that he had not given undervalue for his bargain.

The Usury laws are repealed and the rule of equity as to reversions is set aside by the Sale of Reversions Act, 1867[1], but the Moneylenders Acts, 1900 to 1927, enable any Court, in any proceedings taken by a moneylender for the recovery of money lent, to reopen the transaction if satisfied—

'that the interest charged in respect of the sums actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that in either case the transaction is harsh and unconscionable *or* is otherwise such that a Court of Equity would give relief.'

Litchfield v Dreyfus, [1906] 1 K. B. 584.

A moneylender, according to the definition in the Act, is a person who carries on the business of moneylending as a business in itself and not as incidental to another business (such as banking); and it is sufficient to say that the Court may treat a transaction as harsh and unconscionable not necessarily because there was oppression or advantage taken of one party by the other, but because the rate of interest was excessive, having regard to all the circumstances of the case, among others to the character and value of the security given for the debt.

Saunders v Newbold, [1906] A. C 461.

[1] Now re-enacted in the Law of Property Act, 1925, s. 174.

Apart from the Moneylenders Acts, we are left to the action of the Courts, which will protect that one of two parties who has dealt with the other on unequal terms as to age, knowledge, or position.

James v Kerr, 40 Ch. at p 460

A presumption of undue influence arises where one of the parties was uneducated or inexperienced, and the other a person of knowledge and experience; or where he was in urgent need, and thereby induced to sacrifice future advantage.

'In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of "the expectant heir," or of persons under pressure without adequate protection, and in the case of dealings with uneducated ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract.'

O'Rorke *v* Bolingbroke, 2 App Cas. at p. 823

And it has been pointed out that neither the abolition of the Usury laws nor the Sale of Reversions Act has altered the *onus probandi* in these cases, which, according to the language of Lord Hardwicke, raise 'from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness'—a presumption of fraud.

Earl of Aylesford v Morris, 8 Ch *per* Selborne, L C, at p 49.

Earl of Chesterfield v Janssen, 2 Ves Sen, 157

(2) In the next group of cases the transaction is not, on the face of it, unfair. The party who seeks redress is of full capacity, and is in no such immediate want as would put him at the mercy of an unscrupulous speculator. Here the exercise of undue influence will not be presumed unless certain relations, parental or fiduciary, are shown to exist between the parties, and it is not every fiduciary relationship which gives rise to such a presumption; it must be a relationship of such a kind as to suggest undue influence. But where such a relationship exists, then a presumption of influence arises, which can only be rebutted by proof that the donor or promisor has been 'placed in such a position as will enable him to form an entirely free and unfettered judgment independent altogether of any sort of control.'

Presumption from special relation. Hoghton v Hoghton, 15 Beav 299

Re Coomber [1910] 1 Ch 723

Archer v. Hudson, 7 Beav 560.

parental; The Court will not necessarily set aside a gift or promise made by a child to its parents, by a client to his solicitor, by a patient to his medical man, by a *cestui que trust* to his trustee, by a ward to his guardian, or by any person spiritual. to his spiritual adviser; but such relations call for proof that the party benefited did not take advantage of his 14 Ves 273. position [1]. As was said by Lord Eldon in *Huguenin v. Baseley*, where a lady made over her property to a clergyman in whom she reposed confidence,—

at p. 300. 'The question is not whether she knew what she was doing, had done, or proposed to do, but how that intention was produced: whether all that care and providence was placed around her, as against those who advised her, which from their situation, and relation in respect to her, they were bound to exert on her behalf.'

It will be sufficient to mention two later cases.

[1900] 1 Ch. 243. In *Powell v. Powell* a settlement executed by a young woman, under the influence of her stepmother, by which she shared her property with the children of the second marriage, was set aside though a solicitor had advised the plaintiff. The solicitor was acting for the other parties to the settlement as well as for the plaintiff, and it appeared that although he expressed disapproval of the transaction he had not carried his disapproval to the point of withdrawing his services.

[1903] 1 Ch. 27. The rules laid down in *Wright v. Carter* show how difficult it is to maintain the validity of a gift or sale made by a client to his solicitor. In the case of a gift the relation of solicitor and client must have ceased; the client must, from the outset of the transaction, be in receipt of independent advice; and this advice must be given with the fullest knowledge of every material consideration.

In the case of a sale the client must be fully informed as to what he is doing: he must have competent independent advice: and the price must be such as the Court would consider to be fair.

[1] The relationship of husband and wife is not one of those to which the rule applies. *Howes v. Bishop*, [1909] 2 K. B. 390, C.A.

(3) Where there are no such relations between the parties as create a presumption of influence, the burden of proof rests on the donor or promisor to show that undue influence was, in fact, exercised. If this can be shown the Courts will give relief. Where no presumption, influence may be proved.

'The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Court of Equity most ordinarily deals are those of trustee and *cestui que trust*, and such like. It applies especially to those cases, for this reason and for this reason only, that from those relations the Court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense and the technical rules of a Court of Equity are just as applicable in the one case as the other.' Smith v. Kay, 7 H.L.C. 77.

The words quoted are those of Lord Kingsdown: the case was one in which a young man, only just of age, had incurred liabilities to the plaintiff by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation. It was held that influence of this nature, though it certainly could not be called parental, spiritual, or fiduciary, entitled the plaintiff to the protection of the Court.

Similar in character was the later case of *Morley v. Loughnan*, an action brought by executors to recover money paid by the deceased to a man in whose house he had lived for some years. Wright, J., in giving judgment for the plaintiffs, said that it was unnecessary to decide whether a fiduciary relation existed between the deceased and Loughnan, for 'the defendant took possession, so to speak, of the whole life of the deceased, and the gifts were not the result of the deceased's own free will, but the effect of that influence and domination.' [1893] 1 Ch. 736.

The right to rescind contracts and to revoke gifts made under undue influence is similar to the right of rescinding contracts induced by fraud. Such transactions are voidable, not void. So soon as the undue influence is withdrawn, the action or inaction of the party influenced Rescission.

Presumed affirmation

becomes liable to the construction that he intended to affirm the transaction.

8 Q. B D. 587.

Thus in *Mitchell v. Homfray* a jury found as a fact that a patient who had made a gift to her physician determined to abide by her gift after the confidential relation of physician and patient had ceased, and the Court of Appeal held that the gift could not be impeached.

36 Ch. D 145

In *Allcard v. Skinner* the plaintiff allowed five years to elapse before she attempted to recall gifts made to a sisterhood from which she had retired at the commencement of that time; during the whole of the five years she was in communication with her solicitor and in a position to know and exercise her rights. In this case also the Court of Appeal held that the conduct of the donor amounted to an affirmation of the gift.

depends on cessation of influence.

But the affirmation is not valid unless there be an entire cessation of the Undue Influence which has brought about the contract or gift. The necessity for such a complete relief of the will of the injured party from the dominant influence under which it has acted is thus set forth in

8 Ch. 881

Moxon v. Payne:—

> 'Fraud or imposition cannot be condoned; the right to property acquired by such means cannot be confirmed in this Court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and *an absolute release from the undue influence by means of which the frauds were practised*.'

The same principle is applied where a man parts with a valuable interest under pressure of poverty and without proper advice. Acquiescence is not presumed from delay

In re Fry, 40 Ch D. at p. 324

alone: on the contrary, 'it is presumed that the same distress which pressed him to enter into the contract prevented him from coming to set it aside.'

CHAPTER VII

Legality of Object

THERE is one more element in the formation of contract which remains to be considered—the object of the parties. Certain limitations are imposed by law upon the freedom of contract. Certain objects of contract are forbidden or discouraged by law; and though all other requisites for the formation of a contract be complied with, yet if these objects are in contemplation of the parties when they enter into their agreement the law will not enforce it.

Two matters of inquiry present themselves in respect of this subject. The first is the nature and classification of the objects regarded by law as illegal. The second is the effect of the presence of such objects upon the contracts in which they appear.

Two subjects of inquiry: (1) the nature, (2) the effects of illegality.

§ 1. *Nature of Illegality in Contract.*

The objects of contract may be rendered illegal by express statutory enactments or by rules of Common Law. And the rules of Common Law may be more or less precisely defined.

What is illegality?

We may arrange the subject in the following manner:

A contract may be illegal because—

(1) its objects are forbidden by Statute;

(2) its objects are defined by the Common Law as constituting an indictable offence or civil wrong;

(3) its objects are discouraged by the Common Law as contrary to public policy.

But the two latter heads of illegality are in fact two forms, one more and one less precise, of Common Law prohibition. The broad distinction is between contracts illegal by Statute and contracts illegal at Common Law, and it is thus that it is proposed to treat the subject.

(1) *Contracts which are made in breach of Statute.*

Effects of statutory prohibition.

A statute may declare that a contract is illegal or void. There is then no doubt of the intention of the Legislature that such a contract should not be enforced. The difference between an *illegal* and a *void* contract is important as regards collateral transactions, but as between the parties the contract is in neither case enforceable.

But a statute may impose a penalty on the parties to a contract, without declaring it to be either illegal or void.

In such a case we have to ascertain whether the Legislature intended merely to discourage the contract by making it expensive to both parties; or to avoid it, so that parties would acquire no legal rights under it; or to prohibit it, so that any transactions entered into for its furtherance would be tainted with an illegal purpose.

Brown v. Duncan, 10 B. & C. 93.

If the penalty was imposed for the protection of the revenue, it is possible that the contract is not prohibited, that the Legislature only desired to make it expensive to the parties in proportion as it is unprofitable to the revenue.

Cope v. Rowlands, 2 M. & W. 158.

Smith v. Mawhood, 14 M. & W. 464.

The soundness of this distinction has, however, been called in question. A better test is to be found in the continuity of the penalty. If the penalty is imposed once for all, and is not recurrent on the making of successive contracts of the kind which are thus penalized, or if other circumstances would make the avoidance of the contract a punishment disproportionate to the offence, it may be argued that such contracts are not to be held void. But

Bonnard v. Dott, [1906] 1 Ch. 740.

where the penalty recurs upon the making of every contract of a certain sort, we may assume (apart from revenue cases, as to which there may yet be a doubt) that the contract thus penalized is avoided as between the parties.

Brightman v. Tate, [1919] 1 K. B. 463.

Whether it is rendered illegal, so as to taint collateral transactions, must be a question of the construction of the statute.

We need not discuss here in any detail the various

statutes by which certain contracts are prohibited or penalized. They relate for the most part (1) to the security of the revenue; (2) to the protection of the public in dealing with certain articles of commerce, (3) or in dealing with certain classes of traders; (4) to the regulation of the conduct of certain kinds of business.

Objects of statutory prohibition.

There is, however, a kind of contract which has been the frequent subject of legislation, and which from its peculiar character calls for analysis as well as for historical treatment. This is the wager.

Wagering contracts.

A wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event; the consideration for such a promise is either something given by the other party to abide the event, or a promise to give upon the event determining in a particular way.

What is a wager?

'The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if an event turns out one way, *A* will lose, but if it turns out the other way he will win.'

Thacker v. Hardy, 4 Q. B. D. 685, 695 Richards Starck, [1911] 1 K. B. 296.

There must therefore be mutual chances of gain and loss [1]. But it is to be observed that the event may be uncertain, not only because it is a future event, but because it is not yet ascertained, at any rate to the knowledge of the parties. Thus a wager may be made upon the length of St. Paul's, or upon the result of an election which is over, though the parties do not know in whose favour it has gone. The uncertainty then resides in the minds of the parties, and the subject of the wager may be said to be the accuracy of each man's judgment rather then the determination of a particular event.

But the parties must contemplete the determination of

[1] A so-called bet of £*x* to nothing might be an offer of reward for the exercise of skill, as if *A* should bet a jockey £100 to nothing that he did not win a race which *X* desired him to win; or it might be a gratuitous promise to pay money on a condition, as if *A* should bet £5 to nothing that it rained in 24 hours.

the uncertain event as the sole condition of their contract. One may thus distinguish a genuine wager from a conditional promise or a guarantee.

But the definition of a wager given above needs limitation, for as it stands it would include many contracts which are in no sense wagering contracts. For example, if A contracts to sell goods to X, delivery to be made three months hence, and the price to be the market price at the date of delivery, it may be said that A stands to lose or gain upon a future event which is uncertain, that is to say, according as the market falls or rises. But this element of chance is merely an incident in the larger transaction of a contract for the sale of goods on certain terms; it does not convert that transaction into a wagering contract. The object of a wager is to make a gain without effort and purely as the result of the decision of an uncertain event. One party backs his knowledge, skill, or luck against that of the other, and in a true wager this is the whole transaction.

Ironmonger v. Dyne, 44 T. L. R. 497.

We must therefore distinguish a wager from certain other transactions in which there may be chances of gain and loss to the parties depending on the determination of an uncertain event, but in which these chances are merely incidental to some other object which the parties have in view.

it differs from conditional promise:

If A promises to paint a portrait of X, and X promises to pay £100 if M approves the likeness—this is a contract for the sale of a chattel, the payment to depend upon a condition. A agrees to do a piece of work, for which he is to be paid in the uncertain event of M's approval.

If A, wishing at the same time to be sure that he gets something, promises D to pay him £20 if M approves, in consideration that D promises to pay A £10 if M does not approve—this is a wager on the uncertain event of M's decision. A bets D 2 to 1 that M does not approve.

and guarantee.

Again, if A desires X to advance £500 to M, and promises that if at the end of three months M does not pay

he will—this is a promise to answer for the debt or default of another.

If *A*, wishing to secure himself against the possible default of *M*, were to promise *D* to pay him £100 if *M* satisfied his debt at the end of the three months, in consideration that *D* promised him £250 if *M* did not satisfy his debt—this would be a wager upon the solvency of *M*.

and insurance.

Contracts of insurance bear a certain superficial resemblance to wagering contracts, but actually they are transactions of a different character. If *A* insures his cargo with *X*, an underwriter, that is to say, if he agrees with *X* that in consideration of his paying a premium of £50, *X* will pay him £5000 if the cargo is lost by certain specified perils, *A* cannot, except by straining the use of words, be said to bet against the safety of his own cargo. His object is to preserve himself from a financial loss if his property perishes, and not that he should gain and *X* lose if an uncertain event turns out in a particular way. Such a transaction is quite different from the transaction of backing a horse, even one's own horse, to win the Derby, or even from the transaction of betting against one's own horse winning, for the proprietary interest of the owner in his horse does not enter into the transaction in either of these cases. If we would seek for an analogy to a contract of marine insurance in the sphere of sport, we should find it rather in a contract insuring the safety of a valuable horse in a point to point race, but this would not be a wager.

Wilson v Jones, L R 2 Ex. at pp 141, 150

Similarly, if *A* insures his life, he cannot, without absurdity, be said to back himself for a short life; what he does is to buy a certain future provision for his dependants at a price which will be fixed according to the number of years he lives. No doubt, if he has a long life, the transaction will prove financially unprofitable, but almost any commercial transaction may involve chances of profit and loss.

A genuine insurance transaction therefore is not a wagering contract, though a transaction purporting to be one of insurance may sometimes turn out to be nothing but a wager. This abuse has, as we shall see, been dealt with by the Legislature, which makes the existence or non-existence of an 'insurable interest' the distinction between a genuine insurance transaction and a wager.

Infra, p. 228

History of the common law as to wagers; Jackson v. Colegrave, (1694) Carthew, 338 March v. Pigot, 5 Burr. 2802.

We may leave here the analysis of a wager, and look at the history of the law respecting wagering contracts. At common law all wagers were enforceable, and, until the latter part of the eighteenth century, were only discouraged by some trifling difficulties of pleading. Thus in 1771 Lord Mansfield heard without protest an action on a wager made at Newmarket by which two young men agreed 'to run their fathers (to use the phrase of that place) each against the other'; that is, to bet on the duration of their fathers' lives. It so happened that the father of one of them was (unknown to either) already dead, and the arguments in the case were solely concerned with the question whether a term was to be implied in the contract analogous to the 'lost or not lost' of a marine insurance policy.

But as the Courts found that frivolous or indecent matters were brought before them for decision, rules came to be established that a wager was not enforceable if it could only be proved by evidence which was indecent or was calculated to injure or pain a third person, or, as a matter of public policy, that any wager which tempted a man to offend against the law was illegal.

Strange and even ludicrous results followed from these efforts of the Courts to discourage the litigation of wagers. A bet upon the duration of the life of Napoleon was held to be a contract which the Courts would not enforce, as tending, on the one side, to weaken the patriotism of an Englishman, on the other, to encourage the idea of the assassination of a foreign ruler, and so to provoke retaliation upon the person of our own sovereign. But it

Gilbert v. Sykes, (1812) 16 East, 150.

is evident that the substantial motive which pressed upon the judges was 'the inconveniences of countenancing idle wagers in courts of justice,' the feeling that 'it would be a good rule to postpone the trial of every action upon idle wagers till the Court had nothing else to attend to.'

Bayley, J., in Gilbert v. Sykes, p. 162

The Legislature had however dealt with certain aspects of wagering contracts. It was enacted by 16 Car. II. c. 7, that any sum exceeding £100 lost in playing at games or pastimes, or in betting on the players, should be irrecoverable, and that all forms of security given for money so lost should be void. The law was carried a stage further by 9 Anne, c. 14, whereby securities of every kind, whether given for money lost in playing at games, or betting on the players, or knowingly advanced for such purposes, were rendered wholly void; and the loser of £10 or more was enabled to recover back money so lost and paid, by action of debt brought within three months of payment.

Statute as to wagers.

It will be observed that these two Acts only dealt with wagers on 'games and pastimes' (which include horse-racing), and did not affect wagers of other kinds, such as a wager on the result of a contested election. It will be seen hereafter that the distinction is still of importance.

'Games and pastimes.' Woolf v. Hamilton, [1898] 2 Q. B. 338

Cases of hardship resulted from the working of this Act. Securities might well be purchased from the holders of them by persons ignorant of their origin. These persons, when they sought to enforce them against the giver of the security, discovered, too late, that they had paid value for an instrument which was by statute wholly void as against the party losing at play. The Gaming Act, 1835, s. 1, therefore enacted that securities which would have been void under the Act of Anne should henceforth be deemed to have been made, drawn, or accepted for an illegal consideration. The holder of such an instrument may therefore enforce it, even after proof of its illegal inception, if he is able to show that he gave value for it

5 & 6 Will. 4 c. 41

Infra, p. 300

and was ignorant of its origin: in other words—that he is a '*bona fide* holder for value.' [1]

8 & 9 Vict. c. 109.

The next step was to make wagers of all kinds void: this was done by the Gaming Act, 1845, s. 18, which enacts:—

Gaming Act, 1845.

'That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful Game, Sport, Pastime, or Exercise.'

But it will be noticed that this Act does not affect the distinction between wagers on games and pastimes and other wagers, *so far as concerns securities given in respect of each class of wager*. Securities given in respect of wagers on games and pastimes, or in respect of money lent for betting on such games or pastimes, are still (by reason of the Act of 1835) deemed to be given on an illegal consideration; but since the Gaming Act, 1845, securities given in respect of other wagers are given in respect of contracts which the Act makes *void*; that is to say, they are given for no consideration at all.

[1] S. 1 of the Act of 1835 is directed to the relief of innocent holders of securities given in respect of gaming transactions; but it was not intended to place the winner in a gaming transaction in a better position than he was in before the Act, by enabling him to transfer his security to an innocent third party, or to deprive the loser of the right which he would otherwise have had, as between himself and the winner, to plead when the time came for payment that the security was unenforceable. S. 2 accordingly provided that if the loser should have actually paid an indorsee, holder, or assignee of the security, he might recover the sum so paid from the person to whom the security was originally given. It was not apparently realized until some eighty years later that this section in effect enabled all who had paid betting losses by cheque to recover the sums so paid, since the cheque would in practically every case be paid to an indorsee or holder, i.e. the bank through which it was cleared: *Sutters v. Briggs*, [1922], 1 A. C. 1. The legislature thereupon intervened and, whether to rescue a national industry from disaster or to remove temptation from impecunious backers of horses, repealed the section by the Gaming Act, 1922.

Agreements in respect of wagers.

It remained to deal with agreements arising out of wagers or made in contemplation of them. Wagers being only *void*, no taint of illegality attached to collateral transactions, except in the case of securities given for payment of money due in respect of wagers on games and pastimes. Money lent to make or to pay bets could be recovered, although a security for money lent to make bets on games or pastimes was deemed to be given on an illegal consideration. So, too, if one man employed another to make bets for him the ordinary rules prevailed which govern the relation of employer and employed.

Wettenhall v Wood, 1 Esp 17
Pyke's case, 8 Ch D 756.

Gaming Act, 1892.

The Gaming Act, 1892, alters the law in this last respect:—

'Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

A man cannot now recover commission or reward promised to him for making or for paying bets: nor can he recover money paid in discharge of the bets of another. Whether he is a betting commissioner who pays the bets which he has been employed to make and, if lost, to pay: or whether, on request, he settles the accounts of a friend who has lost money at a race-meeting, he cannot successfully sue for money so paid.

Saffery v Mayer, [1901] 1 K B. 11

Loans for Gaming.

The Court of Appeal has held that money knowingly lent to *pay* bets is not money paid 'in respect of' a contract rendered null and void by the Gaming Act, 1845; but whether money lent for the purpose of *making* bets is to be similarly regarded is as yet undecided. The distinction, which Cozen Hardy, M. R., in the case cited described as 'vital,' is clearly of importance under the Act of 1835, but the language of the Act of 1892 would not seem to cover loans for either of these purposes. The

Re O'Shea, [1911]2K B. 981

[1909] 2 K. B. at p. 232

language of the Court in *Saxby v. Fulton* supports this view, though the decision itself turned on the liability to repay money lent for gaming in a country where gaming is lawful [1].

De Mattos v. Benjamin, 63 L. J. (Q. B.) 248

It is clear, however, that one who is employed to make bets on behalf of another and who receives the winnings cannot keep them. This is money received on behalf of another, and is not within the Act.

Burge v. Ashley & Smith, Ltd., [1900] 1 Q. B. 744

And money deposited with a stakeholder to abide the event of a wager is not money 'paid.' For the word 'paid' is interpreted to mean 'paid out and out,' and the deposit can be recovered by the depositor at any time before it has been paid away on the determination of the bet.

General effect of the Gaming Acts.

5 & 6 Will. 4, c. 41
8 & 9 Vict. c. 109
55 Vict. c. 9

The Act of 1845 repealed the Act of Charles II and substantially that of Anne, so that, apart from Acts forbidding lotteries and certain games, and Acts regulating insurance, we now have three statutes relating to wagers —the Gaming Act, 1835, as to securities given for money lost on certain kinds of wager; the Gaming Act, 1845, as to wagers in general; the Gaming Act, 1892, as to collateral transactions, other than securities, arising out of wagers.

Securities.

Infra, pp. 259-60

It has been pointed out that securities given for money lost on wagers still fall into two classes, because the Gaming Act, 1835, retains the distinction between wagers in respect of games and pastimes and other wagers. It will be necessary to recur to this distinction later.

The Legislature has dealt with three important commercial transactions which easily lend themselves to mere wagering contracts. These are Stock Exchange transactions, marine insurance, and insurance upon lives or other events.

[1] See also an article by Mr. Dicey in the Law Quarterley Review, 1904, p. 436. It must be remembered, however, that money lent for playing at an *illegal and prohibited* game, such as hazard (as distinguished from a loan to make a wager which is *void* under the Gaming Act, 1845), cannot be recovered. This is discussed on p. 253.

The 'infamous practice of stockjobbing' (as it was described) and particularly wagers on the price of stock or 'agreements to pay differences,' were dealt with by Sir John Barnard's Act, 1734, which is now repealed. Contracts of this kind, if wagers and nothing more, fall within the Gaming Act, 1845. Suppose that *A* contracts with *X* for the purchase of fifty French bonds at £78 for every £100 bond. The contract is to be executed on the next settling day. If by that date the bonds have risen in price, say to £80, *X*, unless he has the bonds on hand, must buy at £80 to sell at £78; and if he has them on hand, he is obliged to part with them below their market value. If, on the other hand, the bonds have gone down in the market, *A* will be obliged to pay the contract price which is in excess of the market value.

7 Geo II c 8

Stock Exchange transactions.

It is easy to see that such a transaction may be a wager and nothing more, a bet on the price of stock at a future day. *A* may never intend to buy nor *X* to sell the bonds in question; they may intend no more than that the winner should receive from the loser the difference between the contract price and the market value on the settling day. On the other hand *A* may have intended to buy, and have found so much better an investment for his money between the date of the contract and the settling day that it is well worth his while to agree to pay a difference in *X*'s favour to be excused performance of the contract.

Thacker v Hardy 4 Q B D 685

If the transaction is essentially an agreement to pay differences, and is found to be so as a fact, a term in the wagering contract that either party may at his option require completion of the purchase will not alter the character of the transaction. Such a term is said to be inserted only to 'cloak the fact that it was a gambling transaction and to enable the parties to sue one another for gambling debts.' Money due to one of the parties on such an agreement cannot be recovered, but securities deposited with one of the parties to provide for debts arising from a series of agreements to pay differences may

Universal Stock Exchange v. Strachan, [1896] A C 173

Ironmonger & Co v Dyne, 44 T L. R. 497.

be recovered by the depositor on the ground that there was no consideration for the deposit, since the agreements, the performance of which was to be secured, were themselves void.

Re Cronmire, [1898] 2 Q. B. 383.

Marine insurance.

Marine insurance is now dealt with by the Marine Insurance Act, 1906, the effect of which is to avoid all insurances on ships or merchandise, if the person effecting the insurance has no 'interest,' actual or contingent, in the thing insured, or if the policy contains words which make proof of interest unnecessary. S. 4 (2) of the Act provides in terms that a contract of marine insurance where the assured has no such interest shall be 'deemed to be a gaming or wagering contract.' And by a later Act, it has been made a criminal offence to effect a contract of marine insurance without a *bona fide* interest or expectation of an interest in the subject-matter of the insurance. What is an insurable interest, that is to say such an interest as entitles a man to effect an insurance, is a question of mercantile law with which we are not here concerned; but the reader may be referred to ss. 5–14 of the Marine Insurance Act.

6 Edw 7, c. 41. s. 4

9 Edw 7, c 12.

Insurance generally.

The Act 14 Geo. III. c. 48 deals with insurance generally (marine insurance excepted), and forbids insurances on the lives of any persons, or on any events whatsoever in which the person effecting the insurance has no interest. It further requires that the names of the persons interested should be inserted in the policy, and provides that no sum greater than the interest of the insured at the time of insurance should be recovered by him. A creditor may thus insure the life of his debtor in order to secure his debt.

But life insurance differs in an important respect from marine or fire insurance. These latter are contracts, not to pay a specific sum on the happening of a particular event, but to *indemnify* the assured against damage caused by an event insured against, up to a certain limit; within that limit, the sum payable will vary according

Darrell v Tibbitts, 5 Q. B D 560

to the loss sustained. But the assured is not permitted to make a profit out of his misfortune, and therefore if he recovers the amount of his loss from any other source the insurer may recover from him *pro tanto* [1]; and if he has renounced rights which he might have exercised, and which if exercised would have relieved the insurer, he may be compelled to make good to the insurer the full value of those rights.

West of England Fire Ins Co v Isaacs, [1897] 1 Q B 226

'Policies of insurance against fire or marine risk are contracts to recoup the loss which parties may sustain from particular causes. When such loss is made good *aliunde*, the companies are not liable for a loss which has not occurred; but in a life policy there is no such provision. The policy never refers to the reason for effecting it. It is simply a contract that in consideration of a certain annual payment, the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid, in order to purchase the postponed payment.'

Life insurance differs from other contracts of insurance.

Law v London Indisputable Life Policy Co, 1 K & J. 228

14 Geo III c 48 § 2

Thus, though in a life policy the assured is required to have an interest when the insurance is effected, that interest is nothing as between him and the company who are the insurers. 'The policy never refers to the reason for effecting it.' The insurer promises to pay a large sum on the happening of a given event, in consideration of the assured paying lesser sums at stated intervals until the happening of the event. Each takes his risk of ultimate loss, and the statutory requirement of interest in the assured is no part of the contract. And so if a creditor effects an insurance on his debtor's life, and afterwards gets his debt paid, yet still continues to pay the insurance premiums, the fact that the debt has been paid is no answer to the claim which he may have against the company. Lord Ellenborough had treated life insurance as a contract of indemnity, but in *Dalby v. India and London*

Godsall v. Boldero, 9 East 72

[1] This right is called the '*subrogation*' of the insurer to the rights of the assured: it is fully discussed in *Castellain v. Preston* and in the more recent case of *Edwards & Co. v. Motor Union*. The insurer is not merely entitled to be put in the place of the assured for the purpose of enforcing rights of action, but to have the advantage of every right of the assured by which the loss has been or can be diminished. The purpose of the doctrine is to prevent insurance contracts from being anything but contracts of indemnity.

11 Q B D 380

[1922] 2 K. B 249

5 C. B. 365 *Life Assurance Company* the rule above stated was finally established.

In other words, fire or other insurance of the kind is a contract to pay in an event which may or may not happen; life insurance is a contract to pay in an event which must happen sooner or later. In the first the uncertainty is not *when* but *whether* that event will occur; in the second the uncertainty is solely *when* it will occur.

(2) *Contracts illegal at Common Law.*

(*a*) *Agreements to commit an indictable offence or civil wrong.*

Agreement to commit a crime, or wrong.

It is plain that the Courts would not enforce an agreement to commit an act which is criminal at Common Law or by statute.

Nor again will the Courts enforce an agreement to commit a tort. An agreement to commit an assault has been

2 Lev 174 held to be void, as in *Allen v. Rescous*, where one of the

Clay v Yates, 1 H & N 73 parties undertook to beat a man. So too has an agreement involving the perpetration of a fraud; or the publication

Smith v. Clinton, 25 T. L R 34 of a libel; or even a promise by a newspaper proprietor to indemnify the printers of the newspaper against the risk of libel actions.

Mallalieu v Hodgson, 16 Q B 689 A debtor making a composition with his creditors of 6*s.* 8*d.* in the pound, entered into a separate contract with the plaintiff to pay him a part of his debt in full. This was held to be a fraud on the other creditors, each of whom had promised to forgo a portion of his debt in consideration that the others would forgo theirs in a like proportion. 'Where a creditor in fraud of the agreement to accept the composition stipulates for a preference to himself, his stipulation is altogether void.' On the same ground the Courts will not support a condition in a

Ex parte Barter, 26 Ch. D 510 contract that in the event of a man's becoming bankrupt certain articles of his property should be taken from his creditors and go to the promisee.

An agreement forming part of a scheme for promoting

a company, in which the object of the promoters was to defraud the shareholders, will not furnish a cause of action. And an agreement between a number of persons to purchase shares for the purpose of inducing the public to believe that there was a market in the shares and that the shares were selling at a real premium was held to be an illegal transaction, indictable as a conspiracy, and no action could be maintained in respect of the purchase.

Begbie v Phosphate Sewage Co. L. R 10 Q B at p 499.

Scott v Brown, [1892] 2 Q B 724

We may perhaps also classify under this head a case where newspaper proprietors, who purported to give in their journal honest advice to intending purchasers of Canadian land, nevertheless for a valuable consideration promised a person interested in Canadian land companies not to publish any comments on any land company with which he might be connected. It was held that an agreement which would prohibit them from warning the public even against a fraudulent or dishonest scheme could not be enforced.

Neville v Dominion of Canada News Co., [1915] 3 K. B. 556.

Fraud and illegality.

Fraud is a civil wrong, and an agreement to commit a fraud is an agreement to do an illegal act. But fraud as a civil wrong must be kept apart from fraud as a vitiating element in contract.

If A is induced to enter into a contract with X by the fraud of X, the contract is *voidable* because A's consent is not genuine; and if A does not discover the fraud in time to avoid the contract he may still sue in tort for such damage as he has sustained. If A and X make a contract the object of which is to defraud M the contract is *void* because A and X have agreed to do what is illegal. *Reality of consent* is a different thing from *legality of object.*

(*b*) *Agreements to do that which it is the policy of the law to prevent.*

Public policy.

The policy of the law, or public policy, is a phrase of common use in estimating the validity of contracts. Its history is obscure; it is most likely that agreements

General application.

which tended to restrain trade or to promote litigation were the first to elicit the principle that the Courts would look to the interests of the public in giving efficacy to contracts. Wagers, while they continued to be legal, were a frequent provocative of judicial ingenuity on this point, as is sufficiently shown by the case of *Gilbert v. Sykes* quoted already: but it does not seem probable that the doctrine of public policy began in the endeavour to elude their binding force. Whatever may have been its origin, it was applied very frequently, and not always with the happiest results, during the latter part of the eighteenth and the commencement of the nineteenth century. Later decisions, however, while maintaining the duty of the Courts to consider the public advantage, tended more and more to limit the sphere within which this duty may be exercised. The principle is thus stated by Jessel, M. R., in 1875: 'You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract'; and it is in reconciling freedom of contract with other public interests which are regarded as of not less importance that the difficulty in these cases arises.

16 East, 150, *ante*, p. 224

Egerton v. Earl Brownlow, 4 H L C 1

Printing Co v. Sampson, 19 Eq. 465

We may say however that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules; but at the same time the application of these to particular instances necessarily varies with the progressive development of public opinion and morality.

Wilson v Carnley, [1908] 1 K B at p. 738

We may arrange the contracts which the Courts will not enforce because contrary to the policy of the law under certain heads.

Agreements which injure the state in its relations with other states.

Contract with alien enemy,

These fall under two heads, friendly dealings with a hostile state, and hostile dealings towards a friendly state.

Contracts with alien enemies have already been dis-

cussed. It is unlawful to enter into such a contract or to perform during war a contract made with an alien enemy before war broke out. And it has been shown how a contract which in terms provides for the suspension of all rights and obligations arising under it while war continues may yet be held to be void on grounds of public policy as tending merely by its continued existence to promote the economic interests of the enemy state or to prejudice those of this country.

Esposito v. Bowden, 7E &B 763.

Ante, p 124.

An agreement which contemplates action hostile to a friendly state is unlawful and cannot be enforced. So the Courts will afford no assistance to persons who 'set about to raise loans for subjects of a friendly state to enable them to prosecute a war against their sovereign.'

or hostile to friendly state.

De Wutz v Hendricks, 2 Bing 316

There seems to be no trustworthy authority for a *dictum* of Lord Mansfield that 'no country ever takes notice of the revenue laws of another,' and it must be considered doubtful whether an agreement to break the revenue or other laws of a friendly state would now furnish a cause of action. 'This country,' it was said in a recent case, 'should not assist or sanction the breach of the laws of other independent states.'

Holman v Johnson, Cowp 343

Ralli v Compania Noviera, &c [1920] 2 K B 287, 300, 304

Agreements tending to injure the public service.

Sale of offices.

The public has an interest in the proper performance of their duty by public servants, and is entitled to be served by the fittest persons procurable. Courts of Law hold contracts to be illegal which have for their object the sale of public offices or the assignment of the salaries of such offices.

In *Card v. Hope*, which is perhaps an extreme case, a deed was held to be void by which the owners of the majority of shares in a ship sold a portion of them, the purchaser acquiring the command of the ship for himself and the nomination to the command for his executors. The ship was in the service of the East India Company, and this had been held equivalent to being in the public

2 B & C. 661.

Blachford v. Preston, 8 T. R. 89

service, but the judgment proceeded on the ground that the public had a right to the exercise by the owners of *any* ship of their best judgment in selecting officers for it.

5 & 6 Ed. 6, c. 16. 49 Geo. 3. c. 126.

The public has a right to demand that no one shall be induced merely by considerations of private gain to enter or refrain from entering its service.

Montefiore v. Menday Motor Co., [1918] 2 K. B. 241

Re Beard, [1908] 1 Ch. 383.

Thus what has been called 'the policy of the law' will not uphold a contract whereby a person agreed to use his influence or position for the purpose of securing a benefit from the government; or a disposition of property made upon the condition that the holder should never enter the naval or military service of the Crown; or an agreement whereby a member of Parliament in consideration of a salary paid to him by a political association agreed to vote on every subject in accordance with the directions of the association; or an agreement whereby a man made a donation to a charity in consideration of a promise to secure him a knighthood.

Osborne v. Amalgamated Soc. of Railway Servants, [1910] A. C. 87.

Parkinson v. College of Ambulance Ltd. [1925] 2 K B 1

Assignment of salaries,

8 M & W 151.

The rule against the assignment of the salary of a public office is based on a somewhat different principle. 'It is fit,' said Lord Abinger in *Wells v. Foster*, 'that the public servants should retain the means of a decent subsistence without being exposed to the temptations of poverty.' And in the same case, Parke, B., lays down the limits within which a pension is assignable. 'A man may always assign a pension given to him entirely for past services'; but 'where a pension is granted, not exclusively for past services, but as a consideration for some continuing duty or service, then, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable.'

or pensions.

Agreements which tend to pervert the course of justice.

Stifling criminal proceedings,

These most commonly appear in the form of agreements to stifle prosecutions, as to which Lord Westbury said, 'You shall not make a trade of a felony. If you are aware

that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself.' Williams v Bayley, L. R. 1 H L. 200, 220.

An exception to this rule is found in cases where civil and criminal remedies co-exist: a compromise of a prosecution is then permissible. The exception and its limits are thus stated in the case of *Keir v. Leeman*:— except where civil and criminal remedies co-exist.

'We shall probably be safe in laying it down that the law will permit a compromise of all offences though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.' 6 Q B 321, and see 9 Q. B 395.

This statement of the law was adopted in 1890 by the Court of Appeal in *Windhill Local Board v. Vint.* 45 Ch. D. 351

Another example of this class of agreements is an indemnity given to one who has gone bail for an accused person, whether such indemnity be given by the prisoner himself, as in *Hermann v. Jeuchner*, or by a third person on his behalf, as in the later case of *Consolidated Exploration Co. v. Musgrave.* 15 Q B D 561 (C. A.) [1900] 1 Ch 37.

Agreements to refer matters in dispute to arbitration have been regarded as attempts to 'oust the jurisdiction of the Courts,' and as such were limited in their operation by judicial decisions. The manifest convenience however of this method of settling differences invited the attention of the Legislature, and the Arbitration Act, 1889, now encourages and regulates it. A submission to arbitration can be enforced in various ways, but by s. 4 of the Act the Courts are given the right of refusing to compel a plaintiff to arbitrate, if in their opinion the case is one in which for any reason (such as an accusation of fraud against him) he is entitled to invoke the assistance of a judge or jury. Civil proceedings. Scott v Avery, 5 H L C 811 Edwards v Aberayron Insurance Society, 1 Q B D 596

Agreements which tend to abuse of legal process.

Under the old names of Maintenance and Champerty two objects of agreement are described which the law

regards as unlawful. They tend to encourage litigation which is not *bona fide* but speculative. It is not thought well that one should buy an interest in another's quarrel, or should incite to litigation by offers of assistance for which he expects to be paid.

Maintenance.

Maintenance has been defined to be 'when a man maintains a suit or quarrel to the disturbance or hindrance of right.'

Com Dig. vol. v p 22 *Re* a Solicitor, [1912] 1 K B

Champerty is where 'he who maintains another is to have by agreement part of the land, or debt, in suit.'

Maintenance is a civil wrong which does not often figure in the law of contract. It is thus defined by Lord Haldane in *Neville v. London Express*, where all the law upon the subject will be found:—

[1919] A C 368, 390

> 'It is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence.'

Bradlaugh v Newdegate, 11 Q B D 5

Thus the giving of an indemnity to an informer against costs incurred in endeavouring to enforce a statutory penalty is maintenance and the person giving it may be sued for damages by the person against whom the action was brought. Nor is the success of the maintained litigation, whether it be a claim or a defence, any answer to the action, though it will usually prevent the recovery of more than nominal damages.

Neville v. London Express, [1919] A C 368.

Harris v Brisco, 17 Q B D. 504

But it is not wrongful to provide the means by which a poor man may maintain a suit, even though the charity may be misguided and the action groundless, provided it be disinterested, and the same principle applies with greater force to the case of a kinsman or servant.

Oram v Hutt, [1914] 1 Ch 98

Champerty.

Champerty, or the maintenance of a quarrel for a share of the proceeds, is a species of Maintenance, and has been repeatedly declared to avoid an agreement made in contemplation of it. It would seem that there is no unlawfulness in the supply of information which would enable property to be recovered, in consideration of receiving a part of the property when recovered, but any further

Stanley v. Jones, 7 Bing. 369 Rees v. de Bernardy, [1896] 2 Ch. 447.

aid in the promotion of a suit by money or influence is champerty. The question whether the purchase of a right of action already accrued is obnoxious to the rules against champerty is considered later in connexion with the general subject of assignment of choses in action.

Infra, p. 288.

Agreements which are contrary to good morals.

The only aspect of immorality with which Courts of Law have dealt is sexual immorality; and the law upon this subject may be shortly stated.

A promise made in consideration of future illicit cohabitation is given upon an immoral consideration, and is unlawful whether made by parol or under seal.

Ayerst v Jenkins, 16 Eq 275

A promise made in consideration of past illicit cohabitation is not taken to be made on an illegal consideration, but is a mere gratuitous promise, binding if made under seal, void if made by parol.

Gray v. Mathias, 5 Ves 285 a.

Beaumont v Reeve, 8 Q. B. 483

And an agreement innocent in itself will be vitiated if intended to further an immoral purpose and known by both parties to be so intended.

Pearce v. Brooks, L R 1 Ex. 213

Agreements which affect the freedom or security of Marriage or the due discharge of parental duty.

Such agreements, in so far as they restrain the freedom of marriage, are discouraged on public grounds as injurious to the moral welfare of the citizen. Thus a promise under seal to marry no one but the promisee on penalty of paying her £1000 was held void, as there was no promise of marriage on either side and the agreement was purely restrictive. So too a wager in which one man bet another that he would not marry within a certain time was held to be void, as giving to one of the parties a pecuniary interest in his celibacy.

Restraint of marriage.

Lowe v Peers, 4 Burr 2225.

Hartley v Rice, 10 East 22

What are called marriage brokage contracts, or promises made upon consideration of the procuring or bringing about a marriage, are held illegal 'not for the sake of the particular instance or the person, but of the public, and

or of freedom of choice.

Cole v. Gibson, 1 Ves Sen 503

Hermann v Charlesworth, [1905] 2 K. B. 131.

that marriages may be on a proper foundation.' And so an agreement to introduce a person to others of the opposite sex with a view to marriage is unlawful, although there is a choice given of a number of persons, and not an effort to bring about marriage with a particular person.

The breach of a promise to marry after his wife's death, made by a married man to a woman who knows him to be married, is not actionable. Such a contract is 'not only inconsistent with that affection which ought to subsist between married persons, but is calculated to act as a direct inducement to immorality.'

Wilson v. Carnley, [1908] 1 K B. at p 740

Agreements for separation.

Agreements providing for separation of husband and wife are valid if made in prospect of an immediate separation; but it is otherwise if they contemplate a possible separation in the future, because then they give inducements to the parties not to perform 'duties in the fulfilment of which society has an interest.'

Cartwright v Cartwright, 3 D M & G. 989

Parental duty.

And for the same reason an agreement by a mother to transfer to another her rights and duties in respect of an illegitimate child has been held illegal, because the law imposes a duty on the mother in respect of the infant and for its benefit. In a proper case, however, an adoption order might now be obtained from the Court under the Adoption of Children Act, 1926.

Humphrys v Polak, [1901] 2 K B 385

Agreements in restraint of trade.

Restraint of Trade.

The law concerning restraint of trade has changed from time to time with the changing conditions of trade, but these changes have on the whole been a continuous development of a general rule.

The early cases show a disposition to avoid all contracts 'to prohibit or restrain any, to use a lawful trade at any time or at any place,' as being 'against the benefit of the Commonwealth.' But soon it became clear that the Commonwealth would not suffer if a man who sold the goodwill of a business might bind himself not to enter into immediate competition with the buyer; thus it was laid down

Colegate v Bacheler, Cro Eliz 872 (1596).

in *Rogers v. Parry* that 'a man cannot bind one that he shall not use his trade generally,' 'but for a time certain, and in a place certain, a man may be well bound and restrained from using of his trade.' Bulstrode, 136 (1613)

A rule thus became established that contracts in general restraint of trade were invalid, but that contracts in partial restraint would be upheld. Permissible restrictions

But as trade expanded and the dealings of an individual ceased to be confined to the locality in which he lived, the distinction between general and partial restraints passed into a distinction between restraints unlimited as to place and restraints unlimited as to time, and it was laid down that a man might not contract himself out of the right to carry on a certain trade *anywhere*, for ten years, though he might contract himself out of the right *ever* to carry on a trade within ten miles of London.

The rule as thus expressed was inapplicable to the modern conditions of trade. In the sale of a goodwill or a trade secret the buyer might in old times have been sufficiently protected by limited restrictions as to the place or persons with whom the seller should henceforth deal. This is not so where an individual or a company supplies some article of commerce to the civilized world; and the modern view of the distinction between general and partial restraints is well illustrated by *The Maxim-Nordenfelt Gun Co. v. Nordenfelt*. extended by public policy.

Nordenfelt was a maker and inventor of guns and ammunition: he sold his business to the Company for £287,500, and agreed that for twenty-five years he would cease to carry on the manufacture of guns, gun-carriages, gunpowder, or ammunition, or any business liable to compete with such business as the Company was carrying on for the time being. He retained the right to deal in explosives other than gunpowder, in torpedoes or submarine boats, and in metal castings or forgings. [1894] A C 535

After some years Nordenfelt entered into business with another Company dealing with guns and ammunition; the

plaintiffs sought an injunction to restrain him from so doing.

The House of Lords, affirming the judgment of the Court of Appeal, were of opinion—

General restraint void.

(1) That the covenant not to compete with the Company in any business which it might carry on was a general restraint of trade, that it was unreasonably wide and therefore void, but that it was distinct and severable from the rest of the contract;

Partial restraint good,

(2) that the sale of a business accompanied by an agreement by the seller to retire from the business, is not void, provided it is reasonable between the parties, and not injurious to the public.

if reasonable between the parties,

This restraint was reasonable between the parties, because Nordenfelt not only received a very large sum of money, but retained considerable scope for the exercise of his inventive and manufacturing skill, while the wider area over which the business extended necessitated a restraint coextensive with that area for the protection of the plaintiffs. Nor could the agreement be said to be injurious to the public interest since it transferred to an English Company the making of guns and ammunition for foreign lands.

and not injurious to public.

Is general restraint always void?

The House of Lords, after considering all the authorities, made it clear that the division of agreements in restraint of trade into two classes—general and partial (the former being necessarily void in all cases, the latter only if unreasonable or injurious to the public interest)—could no longer be sustained, even if it had ever existed as a rule of the Common Law.

Per Lord Macnaghten, at p 565.

'The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is,

in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.'

Lord Macnaghten's judgment in this case is the foundation of all modern law on the subject of restraint of trade, and as a result of it and of later cases in which it has been elucidated we may lay down certain propositions of law.

(1) *All* restraints of trade, in the absence of special justifying circumstances, are contrary to public policy and therefore void. This proposition, as Younger, L. J., has pointed out, was counter to a long line of cases in which it had been laid down that a partial restraint was prima facie valid; but it has been repeatedly reasserted by the House of Lords and is now beyond challenge.

Attwood v Lamont, [1920] 3 K B at p 587
Mason v Provident Clothing Co, [1913] A C 724
Morris v Saxelby, [1916] 1 A C 688

(2) It is a question of law for the decision of the court whether the special circumstances adduced do or do not justify the restraint.

(3) A restraint can only be justified if it is reasonable,

(*a*) in the interests of the contracting parties, and

(*b*) in the interests of the public.

(4) The onus of showing that a restraint is reasonable between the parties rests upon the person alleging that it is so, that is to say, upon the covenantee. The onus of showing that, notwithstanding that a covenant is reasonable as between the parties, it is nevertheless injurious to the public and therefore void, rests upon the party alleging that it is so; and it has been said that, 'if once the Court is satisfied that the restraint is reasonable as between the parties, the onus will be no light one.'

Morris' Case, *per* Lord Atkinson, at p 700
A G of Australia v Adelaide S S. Co, [1913] A. C at p 797
N.W Salt Co v. Electrolytic Alkali Co, [1914] A C at p 472.

Reasonableness however as a test for the validity of a restraint requires further elucidation.

The restraint must be reasonable not only in the interests of the covenantee, but of both parties. At first sight it might appear that *any* restraint, since it protects the covenantee alone, must be opposed to the interests of the covenantor, but if the transaction is regarded as a

whole this is clearly not necessarily so. If the vendor of a business could not covenant not to compete with the person to whom he sells it, his business would command a lower price; if an employee could not bind himself not to convey trade secrets to his employer's rival, he might find it difficult to secure training for a career or employment of trust. 'As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing.'

Morris' Case, *per* Lord Parker, at p. 707

Further the test of reasonableness is the same for both parties. The Court will not 'weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint'; in other words, it will not consider the *adequacy* of the consideration which he has received. It is reasonable that the covenantee should demand, and it is equally reasonable that the covenantor should subject himself to, a restraint which affords, adequate, but not more than adequate, protection to the covenantee.

Ibid

But the application of this test will depend on the answers to two questions: what is it that the covenantee is entitled to protect, and against what is he entitled to protect it?

In the *Nordenfelt* case Lord Macnaghten suggested that greater freedom of contract was allowable in a covenant between the buyer and seller of a business than in one between master and servant. This distinction has been developed in later cases, especially in those of *Mason* and *Morris*, and it may now be regarded as established that a covenant against competition entered into by the seller of a business, if confined to the area within which competition would probably injure the buyer in the business sold, is reasonable, but that a covenant by an employee not to compete with his employer after the relation of

master and servant has ceased is, in general, not reasonable. The ground of this distinction is thus explained by Lord Shaw:—

'When a business is sold, the vendor, who, it may be, has inherited it or built it up, seeks to realize this piece of property, and obtains a purchaser upon a condition without which the whole transaction would be valueless. He sells, he himself agreeing not to compete; and the law upholds such a bargain, and declines to permit a vendor to derogate from his own grant. Public interest cannot be invoked to render such a bargain nugatory: to do so would be to use public interest for the destruction of property. Nothing could be a more sure deterrent to commercial energy and activity than a principle that its accumulated results could not be transferred save under conditions which would make its buyer insecure. Morris' case, at p. 713

In the case of restraints upon the opportunity to a workman to earn his livelihood a different set of considerations comes into play. No actual thing is sold or handed over by a present to a future possessor. The contract is an embargo upon the energies and activities and labour of a citizen; and the public interest coincides with his own in preventing him, on the one hand, from being deprived of the opportunity of earning his living, and in preventing the public, on the other, from being deprived of the work and service of a useful member of society. In this latter case there is not a something already realized, made over to and for the use of another; but there is a something to be created, developed, and rendered to the individual advantage of the worker and to the use of the community at large.'

In both cases therefore the principle upon which reasonableness is determined is the same, though the application is necessarily different. The covenantee is entitled to protect what belongs to him, but not to acquire by the covenant some advantage that does not. The buyer of a business owns a business which from the nature of the case has hitherto been immune from competition by the man who sells it to him; it is reasonable that he should be able to protect it. But no business is, as such, immune from competition by those who have been employed in it, and it is not reasonable that an employer should try to secure such an immunity for it. On the other hand the assets of a business often include a trade connexion or trade secrets with which an employee, in the course of his employment, becomes acquainted, and which he would, if not restrained, be in a position to depreciate after the

employment has terminated; it is reasonable that an employer should be able to protect established interests such as these by a covenant against the use by his employee of information confidentially obtained or against solicitation of his customers.

Ibid., *per* Lord Parker, at p 710.

'The reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connexion or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of personal skill and knowledge acquired by the employee in his employer's business.'

It is not however always easy to say whether a covenant is directed to the protection of a trade connexion or only to the prevention of competition, for the two things may in certain circumstances be practically the same. Thus the House of Lords has upheld the validity of a covenant, unlimited in point of time, in which one who had served for many years as a solicitor's clerk, agreed with his employer not to practice as a solicitor within seven miles of Tamworth. It was pointed out that a solicitor's managing clerk must in the course of his duties acquire a knowledge of the affairs and of the clients of the business which puts him in a position in which, if not restrained, he might gravely impair the goodwill of his employer's business; and the restriction was held to be not more than was reasonably necessary for protecting this.

Fitch v. Dewes, [1921] 2 A C 158

Cases in which a restraint which is reasonable as between the parties has been held void as not being reasonable in the interests of the public are not common.

A. G. of Australia v Adelaide S S Co., [1913] A C *per* Lord Parker, at p. 796.

A contract calculated to produce 'a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent' would apparently be unreasonable in the interests of the public, but the case of *North Western Salt Co. v. Electrolytic Alkali Co.* shows that in practice it is not easy to invalidate a contract on this ground, since, as Lord Haldane there pointed out, a

[1914] A C 461.

combination to regulate supply and to keep up prices is not necessarily disadvantageous to the public.

A statutory example of an agreement which may well be reasonable as between the parties but is against the public interest now exists under the Auctions (Bidding Agreements) Act, 1927, by which the agreement known as a 'knock-out,' that is to say, an agreement between dealers at an auction that, in order to avoid competition, only one of them shall bid, and that the goods, if bought, shall be divided between them, is declared a punishable offence. This Act has established the law in the sense contended for in a dissenting judgment of Scrutton, L. J., in *Rawlings v. General Trading Co.* [1921] 1 K B 635

Usually the party complaining of a restraint of trade is the party whom it restrains, but the case of *Joseph Evans & Co. v. Heathcote* shows that even a party who receives the benefit of the restraint is not debarred from setting up its unreasonableness. The plaintiffs were members of a price-regulating trade combination called the 'Cased Tube Association,' the rules of which regulated the output of the members and provided that a member whose output in any month exceeded that permitted to him should pay the profits of the excess into a pool, and that a member whose output fell below that permitted should be entitled to receive a certain sum out of the pool. Some of the rules of the Association were in unreasonable restraint of trade; in particular, members were not to sell except to five named firms who were under no obligation to buy from them, and there was no power to withdraw from the agreement. In an action by the plaintiffs to recover money due to them from the pool it was held that the defendants, who were the other members of the Association, and therefore the very persons who had received the benefit of the restraint to which the plaintiffs had submitted, might rely on the invalidity of the contract in resisting payment. The plaintiffs succeeded in the action on another ground, but they could not succeed under the contract. [1918] 1 K B 418

Restraint of personal liberty.

Stipulations in a contract which impose restrictions on personal liberty in general would appear to be governed by the same principles as those which restrict the liberty to trade. A clerk made a contract with a money-lender the effect of which (as the Master of the Rolls observed) was almost to reduce him to the status of a villein, *adscriptus glebae*. The contract was held void as improperly fettering the clerk's personal liberty and the free disposal of his labour. With this case may be usefully compared another in which a spendthrift covenanted with his father, who had paid his debts, not to live within a certain distance of London or to go there without his father's written consent. His freedom and liberty of action were in the circumstances held to be reasonably restricted for his own good, and the contract was valid.

Horwood v. Millar's Timber Co., [1917] 1 K. B. 305

Denny's Trustee v. Denny, [1919] 1 K. B. 583

§ 2. *Effect of Illegality upon Contracts in which it exists.*

What is the effect of illegality?

The effect of illegality upon the validity of contracts in which it exists must needs vary according to circumstances. It may affect the whole or only a part of the contract, and the legal part may or may not be severable from the illegal. One of the parties may be ignorant of the illegal object which the contract is intended to serve, or both may be innocent of any illegal intention.

The contract may be discouraged in the sense that the law will not enforce it, or prohibited in such a way as to taint collateral contracts and securities given for money advanced to promote an illegal transaction or paid to satisfy a claim arising out of such a transaction.

An endeavour will be made to state some rules which may enable the reader to work his way through a complex branch of the law.

(1) *Severability of an illegal contract.*

The same contract may contain both legal and illegal terms; and in such a case we have to consider whether the legal parts of the contract may be severed from

the illegal and enforced, or whether the whole contract is bad.

Formerly the judges, fearing lest statutes might be eluded, drew a distinction in this matter between illegality by statute and illegality at common law, and they laid it down that 'the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes only void that part where the fault is and preserves the rest.'

Maleverer v. Redshaw, 1 Mod. 35.

This distinction however no longer exists, and the rule in its modern form may be thus stated:—

'Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or common law, you may reject the bad part and retain the good.'

Per Willes, J., in Pickering v. Ilfracombe Railway, L. R. 3 C. P. 250

But the application of this rule is by no means easy, for its does not indicate the circumstances in which we may or may not sever from one another the legal and illegal parts of a contract.

One point however is clear. If any part of the *consideration* for a promise is illegal, that promise cannot be enforced. There can be no severance of the legal from the illegal part of the consideration.

Lound v Grimwade, 39 Ch D 605.

Difficulty arises however where a legal consideration supports promises some of which are legal and others illegal. In such a case there is authority for saying that the legal promises are not made void merely because the promisor has made other promises in the same contract which are illegal. This is an old rule and is set forth in Coke's Reports. 'That if some of the Covenants of an Indenture or of the conditions endorsed upon a bond are against law, and some good and lawful; that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good.'

Pigot's Case, 11 Co Rep 27 b.

There are modern dicta which seem to support the principle here laid down:—

'If the consideration, or any part of it, is illegal, then every promise contained in the agreement becomes illegal also, because in such a case every part of the consideration is consideration for the promise. But

Kearney v. Whitehaven Colliery Co., [1893] 1 Q. B at p. 711.

suppose there is nothing illegal in the consideration; then upon that valid consideration may be several promises or liabilities. If any one of these be in itself illegal, then it cannot stand, not because the consideration becomes illegal, but because the promise itself is illegal. It is a bad promise which cannot be supported by the consideration. But the other promises which are good and legal in themselves remain, and can be supported by the good consideration.'

None the less it is not easy to find a clear modern application of the rule, except in cases where the illegality in the contract is of a kind not involving moral turpitude; and it seems improbable, for example, that the courts would sever a legal promise from a promise to do a criminal or sexually immoral act contained in the same agreement and supported by the same consideration. In fact most of the modern cases on the severability of promises have arisen on contracts in restraint of trade.

Even in these cases the proper test of severability is not free from doubt, for recent cases show a divergence of judicial opinion [1].

[1920] 3 K. B. at p. 577

In *Attwood v. Lamont* Lord Sterndale laid it down that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining. We have to consider, he said, whether the covenant is in effect several covenants, and then see whether a severance would alter the original meaning and effect of the agreement or only limit the sphere of its operations.

Cf. Putsnam v. Taylor, [1927] 1 K. B. 639

[1913] 1 Ch. 563

The case of *Goldsoll v. Goldman* affords an illustration of a covenant severable under this rule. The vendor of a business was restricted from dealing 'in real or imitation jewellery', a restriction which, as the plaintiff's business was in imitation jewellery only, was unreasonably wide. The Court struck out the words 'real or,' and enforced the covenant as thus cut down.

British Concrete Co. v. Schelff, [1921] 2 Ch. 563.

It has however been pointed out by Younger, L. J., sitting in the Chancery Division, that the principle of

[1] The cases, which are very numerous, are examined in detail in Moller, Voluntary Covenants in Restraint of Trade, pp. 40–55.

severance has not been applied to provisions in covenants other than those which are restrictive either of area, or subject-matter, or classes of customer. The vendors of a business covenanted for a period of years not 'directly or indirectly to carry on, or manage, or be concerned or interested in or act as servant of any person concerned or interested in the business of the manufacture or sale of road reinforcements in any part of the United Kingdom.' So far as the covenant related to the 'manufacture' of road reinforcements, he held that it was in the circumstances too wide, but he would have been prepared to strike out the words 'manufacture or,' this being a severance in respect of subject-matter. He held further however that the covenant was also too wide in respect of the restriction upon acting 'as servant,' but that these words, not being restrictive in respect either of area, or subject-matter, or classes of customer, could not be struck out; they were 'merely a part of one entire covenant in mosaic.'

On the other hand a view which would confine the application of the principle of severability within narrower limits was expressed by Lord Moulton in the following passage, which however was not necessary for the decision of the case in which it occurred:— Mason v Provident Clothing Co, [1913] A. C. at p. 745

'I do not doubt that the court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is *of trivial importance, or merely technical, and not a part of the main purport and substance of the clause.* It would, in my opinion, be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance, and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might have validly required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation in which the servant is usually at a great disadvantage in view of the longer purse of his master.'

This view of the law was accepted by Younger, L. J. (in a judgment in which Atkin, L. J., concurred), in *Attwood v.* [1920] 3 K. B at p. 593.

Lamont; but, like Lord Moulton's, his remarks on severability had not the force of a decision, since on any view of the proper test to be applied the covenant in that case was not severable. The Lord Justice thought that Lord Moulton's view departed from the previous practice of the Courts, but that the necessary effect of the cases of *Mason* and of *Morris*, which had placed the burden of showing that a restraint is reasonable upon the covenantee, had been 'to render obsolete the cases in which the Courts have severed these restrictive covenants when acting on the view that being *prima facie* valid it was their duty to bind the covenantee to them as far as was permissible.' But, he added, 'it may well be that these cases are still applicable to covenants between vendor and purchaser,' for upon such covenants the change in the law as previously understood had been little more than a matter of words.

Supra, p. 243.

(2) *Comparative effects of avoidance and illegality.*

A contract may be

We have next to consider what was the attitude of the law towards the transaction contemplated, and then what was the mind of the parties towards the law.

The law may deal with a contract which it would discourage in one of three ways.

It may impose a penalty without avoiding the contract.

It may avoid the contract.

It may avoid, and penalize or prohibit.

In this last case we must take the word 'penalize' to mean not merely the imposition of a penalty, but the liability to damage for a wrong, or to punishment for a crime. A statutory penalty is merely a suggestion of prohibition. Whether it is prohibitory or not is, in every case, a question of construction.

Thus we may suppose the State to say to the parties as regards these three kinds of transactions:—

penalized,

(*a*) You may make the contract if you please, but you will have to pay for it.

(*b*) You may make the agreement if you please, but the Courts will not enforce it. avoided,

(*c*) You shall not make the agreement if the law can prevent you. forbidden.

With the first case we are not concerned. There is a valid contract though it may be expensive to the parties.

As to the second and third, difficulties can only arise as regards collateral transactions, for in neither case can the contract itself be enforced. The intentions of the parties we will postpone for the present. They must be assumed to know the law.

Illegal agreements

It may be stated at once that there is a clear distinction between agreements which are merely *void* and agreements which are *illegal*: between agreements which the law will not aid, and agreements which the law desires to prohibit: and that this distinction comes out, not in the comparative validity of the two, for both are void, but in the effect which their peculiar character imparts to collateral transactions.

taint collateral transactions.

No contract, however innocent in itself, is good, if designed to promote an illegal transaction, whether the illegality arises at Common Law, or by Statute.

L R 1 Ex. 213

In *Pearce v. Brooks* a coach-builder sued a prostitute for money due for the hire of a brougham, let out to her with a knowledge that it was to be used by her in the furtherance of her immoral trade. It was held that the coach-builder could not recover. And a landlord, who had let premises to a woman who was to the knowledge of the landlord's agent the kept mistress of a man who was in the habit of visiting her there, was not permitted to recover his rent.

Upfill v. Wright, [1911] 1 K. B. 506.

McKinnell v Robinson, 3 M. & W. 434

McKinnell lent Robinson money to play at hazard, knowing that the money was to be so used. Hazard (together with certain other games, Ace of Hearts, Pharaoh and Basset) is forbidden [1], and the players

[1] Roulet or roly poly is similarly prohibited and penalized by 18 Geo. II. c. 34.

rendered subject to a penalty by 12 Geo. II. c. 28, a prohibitory and penal statute. It was held that the lender could not recover.

Cannan v. Bryce, 3 B. & Ald 179

Nor is a contract valid which is intended to carry into effect a prohibited transaction. Cannan was the assignee of a bankrupt, and sued Bryce to recover the value of goods given to Bryce by the bankrupt in part satisfaction of a bond, which in its turn had been given to Bryce by the bankrupt to secure the payment of money lent by Bryce to meet losses which had been incurred by the stock-jobbing transactions of the bankrupt. Now Sir John Barnard's Act forbade not only wagers on the price of stock, but advances of money to meet losses on such transactions, and Bryce had lent money knowing that it was to meet such losses. Therefore his bond was void, and no property passed to him in the goods given in satisfaction of it, and Cannan was able to recover their value.

7 Geo II. c 8 § 5

Supra, p 229.

Void agreements.

The difference between the effect of illegality and of avoidance is clear when we look at transactions arising out of wagers:—

[1908] 2 K. B at p 725

'There is certainly nothing illegal,' said Farwell, L. J., in *Hyams v. Stuart King*, 'in paying or receiving payment of a lost bet: it is one thing for the law to refuse to assist either party in their folly, if they will bet; it is quite another to forbid the loser to keep his word.'

In that case the defendant was indebted to the plaintiff as a result of certain betting transactions and desired time in which to pay. The Gaming Act, 1845, would have been a defence to legal proceedings for the debt, but on the plaintiff threatening to declare the defendant a defaulter, the defendant promised to pay in a few days, if the threat were not carried out. On this new promise and consideration he was held liable.

It was argued on his behalf that the original transactions between himself and the plaintiff were illegal, and that the promise to pay even if based on a new consideration was tainted with the illegality of the wager out of which

it arose; but the majority of the Court of Appeal held that the wager was void only and that therefore no taint of illegality affected the subsequent promise of the defendant. The force of this decision however is weakened by the strong dissenting judgment of Fletcher Moulton, L. J., who thought that the alleged new contract was only colourable, and that the promise on which the defendant was sued was in reality a promise to pay the bet and therefore void under the Act of 1845.

So, too, before the Gaming Act, 1892, altered the law in this particular respect, as between employer and betting commissioner, the ordinary relations of employer and employed held good in all respects, including the ordinary liability of an employer to indemnify the person whom he employed against loss or risk, which might accrue to him in the ordinary course of the employment, though the employment was to make void contracts.

In *Read v. Anderson*, therefore, the employer was compelled to repay the commissioner money expended by him in discharging bets owing by his employer, even though the latter had revoked his authority to do so; for had the commissioner not discharged them, he would have been posted as a defaulter and would have lost his business; and against this risk his employer was bound to indemnify him [1]. 13 Q B D 779

On the same principle *Seymour v. Bridge* was decided. An investor employed a broker to buy shares for him according to the rules of the Stock Exchange. The Stock Exchange enforces among its members, under pain of expulsion, agreements made in breach of Leeman's Act, under which a contract for the sale of bank shares is 14 Q B D 460 30 & 31 Vict. c 29

[1] The Gaming Act, 1892, however, does not touch the principle laid down in *Bridger v. Savage* that a betting commissioner is bound to pay over money actually received on account of bets won by him on behalf of his principal. But the principal would have no claim for damages against the commissioner if the latter had, contrary to the terms of his employment, made no bets at all; for there can be no damages, nominal or substantial, for breach of a contract to make other contracts declared by law to be null and void. 15 Q. B D. 363 Cheshire v. Vaughan, [1920] 3 K. B. 240.

avoided where the contract does not specify their numbers or the name of the registered proprietor. Bridge knew of the custom, but endeavoured to repudiate the purchase on the ground that it was not made in accordance with the terms of the Statute. The case was held to be governed by *Read v. Anderson.* The employer is bound to indemnify the employed against known risks of the employment. If the risks are not known to both parties, and might reasonably be unknown to the employer, he is not so bound. Thus where an investor did not know of the custom, he was held, under circumstances in other respects precisely similar to those of *Seymour v. Bridge,* not to be bound to pay for the shares.

Perry v. Barnett, 15 Q B D 388.

(3) *The intention of the parties.*

Intention is immaterial;

Where the object of the contract is an unlawful act the contract is void, though the parties may not have known that their act was illegal or intended to break the law.

But if the contract admits of being performed, and is performed in a legal way, the intention of the parties may become important; for if they did not intend to break the law, and the law has not in fact been broken, money due under the contract will be recoverable even though the performance as originally contemplated would have involved a breach of the law.

Waugh v. Morris, L R 8 Q. B 202.

Morris chartered a ship belonging to Waugh to take a cargo of hay from Trouville to London. It was subsequently agreed that the hay should be unloaded alongside ship in the river, and landed at a wharf in Deptford Creek. Unknown to the parties an Order in Council had forbidden the landing of French hay. Morris, on hearing this, took the cargo from alongside the ship without landing it, and exported it. The vessel was delayed beyond the lay-days, and Waugh sued for damages arising from the delay. Morris set up as a defence that the contract (viz. the charter-party) contemplated an illegal act, the landing

Under 32 & 33 Vict c 70. s. 78.

unless contract can be and is legally performed;

of French hay contrary to the Order in Council. But the defence did not prevail:—

'Where a contract is to do a thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so the knowledge of what the law is becomes of great importance.' at p. 208.

Again, the general rule needs modification where only one of the parties had the intention to break the law. Such a case could only arise where the contract was to do a thing innocent in itself, but designed to promote an illegal purpose. We may perhaps lay down with safety the following rules. or unless illegal intent is of one only.

Where the innocent party knows nothing of the illegal object throughout the transaction, he is entitled to recover what may be due to him. If the plaintiff in *Pearce v. Brooks* had known nothing of the character of his customer, it cannot be supposed that he would have been unable to recover the hire of his brougham. Rights of innocent party to sue, to avoid. L R 1 Ex 213

Where the innocent party becomes aware of the illegal purpose of the transaction before it is completed or while it is still executory he may avoid the contract.

Milbourn let a set of rooms to Cowan for certain days; then he discovered that Cowan proposed to use the rooms for the delivery of lectures which were unlawful because blasphemous within the meaning of 9 & 10 Will. III. c. 32, he refused, and was held entitled to refuse, to carry out the agreement [1]. Cowan v. Milbourn, L R 2 Ex 230

If the innocent party to the contract discover the illegal purpose before it is carried into effect, it would seem that he could not recover on the contract if he allowed it to be performed, and that the defendant in *Cowan v. Milbourn* could not have recovered the rent of his rooms, if, having How affected by knowledge. L R 2 Ex 230

[1] So far as *Cowan v. Milbourn* decided that the lectures intended to be given were blasphemous within the meaning of 9 & 10 Will. III. c. 32 and therefore unlawful, it is overruled by *Bowman v. Secular Society*, [1917] A. C. 406; but its authority for the principle stated in the text is not affected.

let them in ignorance of the plaintiff's intentions, he allowed the tenancy to go on after he had learned the illegal purpose which his tenant contemplated.

(4) *Securities for money due on illegal transactions.*

The validity of bonds or negotiable instruments given to secure the payment of money due or about to become due upon an illegal or void transaction, does not depend entirely upon the distinction which we have drawn between transactions which are illegal and those which are void.

Where transaction is past,

A security may be given in consideration of a transaction which is wholly past. Here comes in the elementary rule that gratuitous promises are not binding unless they are under seal. Applying this rule to bonds and negotiable instruments, we may say that a bond under seal given in respect of a past transaction would be a valid promise, and that being wholly gratuitous, and founded on motive, a Court of Law would not inquire into the character of the motive.

Thus a bond given in consideration of past illicit cohabitation is binding because under seal; while a negotiable instrument given on such consideration would, as between the immediate parties, be invalid, not on the ground that the consideration was illegal, but because there was no consideration at all.

Ayerst v Jenkins, 16 Eq. 275

Beaumont v Reeve, 8 Q B. 483

where it is future.

As regards transactions which are pending or contemplated, we are met by an anomalous distinction which divides securities for our present purpose into three groups.

Security under seal.

(*a*) Let us deal first with securities under seal.

If given for money due in respect of a *prohibited* transaction they are void.

Fisher v Bridges, 3 E. & B 642.

Fisher conveyed land to Bridges in order that it might be resold by lottery, a transaction forbidden under stringent penalties by 12 Geo. II. c. 28. After the land was conveyed, Bridges covenanted to pay a part of the purchase money by a fixed date, or failing this, by half-yearly instalments. The Exchequer Chamber, reversing

the judgment of the Queen's Bench, held that the covenant could not be enforced. It was given to secure a payment which became due as the result of an illegal transaction, and the bond was tainted with the illegality of the purpose it was designed to effect.

But a transaction may be only unlawful in the sense that it is avoided. In that case a security given in respect of it is on the same footing as a security given in respect of a transaction which is wholly past. It is valid if under seal; otherwise void as between the immediate parties.

Security under seal, transaction void.

A corporation borrowed money on mortgage without first obtaining leave of the Lords of the Treasury; this was declared to be 'unlawful' by the Municipal Corporations Act. But as they had received the money, and promised under seal to repay it, they were held bound by their promise.

5 & 6 Will IV. c. 76.

'Is there anything in the Act which prohibits a corporation from entering into a covenant to pay its lawful debts? It is argued that s. 94 renders this covenant void. But that section only says that it shall not be lawful to mortgage any lands of the corporation except with the approbation of the Lords of the Treasury, which was not obtained in this case; and although the mortgage may be invalid, that is no reason why the corporation should not be liable on their covenant to repay the mortgage money.'

Payne v. Mayor of Brecon, 3 H. & N. 579.

(*b*) We now come to negotiable instruments.

Securities not under seal,

In dealing with these we have to consider the effect of a flaw in their original making not only as between the immediate parties but as affecting subsequent holders of the instrument. And we may lay down the following rules:—

(i) A negotiable instrument made and given as security for a void, or illegal transaction, is, in either case, *as between the immediate parties*, void. A promissory note was given in payment of a bet made on the amount of the hop duty in 1854. The bet was void by the Gaming Act, 1845, and the Court was clear that as between the original or immediate parties the note was void also. There was no liability to pay the lost bet; and therefore no

void as between immediate parties.

Fitch v. Jones, 5 E. & B. 245.

consideration for the note given to secure its payment. The position of the indorsee who brought the action shall be explained presently.

Right of subsequent holder.

(ii) If the instrument is made and given to secure payment of money due or about to become due upon an *illegal* transaction a subsequent holder loses the benefit of the rule as to negotiable instruments, that consideration is

Effect on subsequent holder.

presumed till the contrary is shown: he may be called upon to show that consideration has been given either by himself or by some intermediate holder, and that he knew nothing of the illegality, before he will be entitled to recover.

But if the instrument has an honest origin the maker or acceptor cannot set up, as a defence against a subsequent indorsee, that the *indorsement* was made for an illegal consideration, unless he can show that he is injuriously affected by the transaction between indorser and indorsee.

Flower v Sadler, 10 Q. B. D. 572.

(iii) If the instrument is given to secure payment of money due or about to become due upon a *void* transaction, it is as between the immediate parties void, but a subsequent holder is not prejudiced by the fact that the original transaction was avoided by statute.

In *Fitch v. Jones*, above cited, the action was brought by the indorsee of a promissory note given in payment of a bet on the amount of the hop duty. The main question for the Court was 'whether the plaintiff was bound on proof of the origin of the note to show that he had given consideration for the note, or whether it was for the defendant to show that he had given none.'

> 'I am of opinion,' said Lord Campbell, 'that the note did not take its inception in illegality within the meaning of the rule. The note was given to secure payment of a wagering contract, . . . but it was not illegal: there is no penalty attached to such a wager; it is not in violation of any statute, nor of the Common Law, but it is simply void, so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all.'

5 & 6 Will 4, c. 41

(c) The effect of the Gaming Act, 1835, upon securities given in respect of wagers on 'games and pastimes' has

already been noticed. Such securities are deemed to be given for an illegal consideration [1]; and thus this class of wagers is placed in a peculiar position. A wager is not in itself unlawful, it is only void: but securities given for money due on wagers of a certain sort are in a worse position than the wagers themselves. The consideration for them is deemed to be illegal: thus they are not merely void but illegal as between the original parties; and the taint of illegality affects a subsequent holder, who although the original transaction was only void, must show that consideration has subsequently been given for the security, and may still be disentitled to recover, unless he also proves that he knew nothing of the illegality of its origin. If, on the other hand, the security is given in respect of a wager *not* on a game or pastime, it is immaterial whether a subsequent holder for value knows of the circumstances of its origin or not.

Supra, p. 225.

Tatam v Haslar, 23 Q. B D 349.

Lilley v Rankin, 56 L. J. Q B 248

(5) *Can a man be relieved from a contract which he knew to be unlawful?*

It remains to consider whether a party to an illegal contract can under any circumstances make it a cause of action. The rule is clear that a party to such a contract cannot come into a Court of Law and ask to have his illegal object carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim; and this rule holds although neither party had any intention of breaking the law. The rule is expressed in the maxim, '*in pari delicto potior est conditio defendentis.*'

Illegality known at the time, no ground for avoidance,

Harse v Pearl Life Assurance Co, [1904] 1 K B 558

Taylor v Chester L. R 4 Q B 309

But there are exceptional cases in which a man may be relieved of an illegal contract into which he had entered: cases to which the maxim just quoted does not apply.

[1] It will be remembered that the earlier Act of Anne had made them wholly void, and thus an innocent indorsee for value might be seriously prejudiced. This same hardship will also, by reason of s. 5 of the Betting and Loans (Infants) Act, 1892, affect the bona fide holder of a security given by a person in respect of an agreement to pay a loan contracted by him during infancy and void in law.

9 Anne, c. 14

unless plaintiff be not *in pari delicto,*

They fall into three classes: (1) The contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one; (2) the plaintiff may have been induced to enter into the contract by fraud or strong pressure; (3) no part of the illegal purpose may have been carried into effect before it is sought to recover the money paid or goods delivered in furtherance of it.

(*a*) The Moneylenders Act, 1900, illustrates the first class of cases. A contract made with a moneylender who has failed to register himself under the Act is illegal and void. The lender cannot therefore recover the money lent; but since the Act was passed for the protection of persons dealing with moneylenders, the borrower, though he has entered into an illegal contract, can recover securities placed in the hands of the lender; though he may be put on terms as to the repayment of the money borrowed.

Bonnard v. Dott, [1906] 1 Ch. 740.
Lodge v. National etc. Co, [1907] 1 Ch. 300.

(*b*) Two decisions illustrate the second class. In *Reynell v. Sprye* Sir Thomas Reynell was induced, by the fraud of Sprye, to make a conveyance of property in pursuance of an agreement which was illegal on the ground of champerty. He sought to get the conveyance set aside in Chancery. It was urged that the parties were *in pari delicto*, and that therefore his suit must fail; but the Court was satisfied that he had been induced to enter into the agreement by the fraud of Sprye, and considered him entitled to relief.

1 D. M & G. p. 660

> 'Where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given him.'

at p. 679

In *Atkinson v. Denby*, the plaintiff, a debtor, offered his creditors a composition of 5*s.* in the pound. Denby was an influential creditor, whose acceptance or rejection of the offer might determine the decision of several other creditors. He refused to assent to the composition unless

6 H. & N. 778.
7 H. & N. 934

Atkinson would make him an additional payment of £50, in fraud of the other creditors. This was done: the composition arrangement was carried out, and Atkinson sued to recover the £50, on the ground that it was a payment made by him under oppression and in fraud of his creditors. It was held that he could recover; and the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, observed—

'It is said that both parties are *in pari delicto*. It is true that both are *in delicto* because the act is a fraud upon the other creditors: but it is not *par delictum*, because one has power to dictate, the other no alternative but to submit.'

(*c*) The third exception relates to cases where money has been paid, or goods delivered, for an unlawful purpose which has not been carried out. or there is *locus poenitentiae*.

The law is not quite satisfactorily settled on this point, but its present condition may be thus stated.

In *Taylor v. Bowers* it was said by Mellish, L. J., that— 1 Q B D 291, 300

'If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out: but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action.'

The case to which these words applied was a fictitious assignment of goods in fraud of creditors; the contemplated fraud was not carried out and the plaintiff desired to recover his goods from one to whom they had been subsequently transferred under a bill of sale; and it was held that he was entitled to do so. It is however difficult to say that the fictitious assignment was anything but a part-performance of the illegal purpose; and it is permissible to doubt whether the principle as stated in *Taylor v. Bowers* was correctly applied to the facts in that case. 1 Q. B D 291

Subsequent cases bear out this view. In *Kearley v. Thomson*, Messrs. Thomson, a firm of solicitors acting for the petitioner, creditor of Clarke, a bankrupt, agreed with Kearley, a friend of Clarke, that in consideration of the payment of their costs they would not appear at the Cases of part-performance of unlawful contract. 24 Q B D. 742

public examination of Clarke, nor oppose the order for his discharge. They carried out the first part of the agreement, but before any application was made for Clarke's discharge, Kearley sought to recover the money which he had paid, on the ground that it was consideration for a promise to prevent the course of justice and that the contract was not wholly carried out. The Court of Appeal, in a judgment indicating doubts as to the correctness of
see at p 746. the decision in *Taylor v. Bowers*, held that he could not recover.

at p 747 'Suppose a payment of £100,' said Fry, L. J., 'by *A* to *B* on a contract that the latter shall murder *C* and *D*. He has murdered *C* but not *D*. Can the money be recovered back? In my opinion it cannot be. I think that case illustrates and determines the present one.'

Hermann v Jeuchner, 15 Q B. D. 561. So also in another case a man procured another to go bail for him on the terms that he deposited the amount of the bail in the hands of his surety as an indemnity against his possible default. He sued his surety for the money on the ground that his contract was illegal, that no illegal purpose had been carried out (since he did not fail to appear), that the money was still intact, and that he could recover it. The Court of Appeal (overruling an earlier decision) held that the illegal object was carried out when, by reason of the plaintiff's payment to his surety, the surety lost all interest in seeing that the conditions of the recognizance were performed.

Thus it would appear that the true rule is that where any part-performance of an illegal contract has taken place, money paid or goods delivered in pursuance of it cannot be recovered back. But we must note one true and one apparent exception in this connexion.

Marriage brokage contracts. (i) Marriage brokage contracts (though it is not easy to see why it should be so) constitute a genuine exception to the rule.

[1905] 2 K. B. 123 In *Hermann v. Charlesworth* a lady paid money to the proprietors of a newspaper with a view to obtaining by advertisement an offer of marriage. After advertisements

had appeared, but before any marriage had been arranged, she brought an action to recover the money. It was argued on behalf of the defendant that, inasmuch as the contract had been in part performed, the action could not be maintained. But Collins, M. R., said:—

'There was no objection at common law, till perhaps a hundred years ago, to such contracts; but the Courts of Equity took a different view, and in consequence the Courts of Common Law modified their view of the matter and shaped their course accordingly. Equity did not take the view that in the case of a contract of this particular kind, tainted with illegality, a case for relief could only be considered when there had been a total failure of consideration. As was pointed out by Lord Hardwicke in *Cole v. Gibson*, equity reserves to itself the right to intervene even when something has been done in part performance of the contract, *or even when the marriage has taken place*.' 1 Ves. Sen. 503

On this broad ground, therefore, the plaintiff was held entitled to recover the money she had paid.

Money placed with stakeholder

(ii) There are numerous cases in which money has been placed in the hands of a stakeholder to abide the result of a wager; in such cases the money has been held to be recoverable from the stakeholder either before or after the determination of the wager, and even after the money has been paid to the winner, if before payment the authority to pay was withdrawn by the party seeking to recover.

It does not appear to matter whether the wager turns on the result of an unlawful transaction, or not: as between the parties the wager is no more than a void transaction. Nor does the Gaming Act of 1892 affect the rights of the parties. Two cases will illustrate the law on this point.

Hampden v. Walsh, 1 Q B D 189

Hampden put £500 into the hands of Walsh to abide the result of a bet that the earth was flat. He lost the bet, and before the money was paid he reclaimed his stake from Walsh. Walsh paid it to the winner and was held liable to repay the amount to Hampden.

Barclay v. Pearson, [1893] 2 Ch. 154

Pearson started a lottery styled 'The Missing Word Competition.' A sentence was published, omitting the last word, and an invitation was issued to the public, any one of whom might send a shilling and a word suitable

to fill the vacant place in the sentence. Those who guessed the right word shared the sum thus collected.

The determination of the right word was reduced to an absolute uncertainty. One of a number of sealed packets, each containing a suitable word, was opened at hazard after the competition closed. This contained the Missing Word.

Such a lottery was unlawful, and penalized by 42 Geo. III. c. 119; but as between the various contributors the transaction was a simple wager in which each man deposited a shilling with a stakeholder to abide the chance of his guess.

The payments in one competition amounted to £23,000, and those who guessed the right word were 1,358 in number: but before their shares could be paid over to them the competition was alleged to be illegal, and the money was paid into Court. Stirling, J., found that the transaction was a lottery, and was unlawful; that the Court could not aid in the distribution of the fund, but that each contributor might recover his shilling from Pearson, to whom he ordered the entire sum to be repaid in order that he might meet any legal claim.

These cases do not conflict with the principle of *Read v. Anderson*, nor with the decision in *Kearley v. Thomson*; they are cases of payment of money to an agent to be disposed of according to the principal's direction. The person employed is only a stakeholder and cannot suffer by the revocation of his authority; and the wager itself which is the object of the transaction is only void, not illegal, and so would not be affected by the unlawfulness of the lottery which brought together the parties to the wagers; nor does the Gaming Act of 1892 affect the liabilities of a stakeholder.

Hastelow v Jackson, 8 B. & C 225

Burge v Ashley & Smith, [1900] 1 Q. B. 744

(6) *Contracts lawful where made but unlawful in England.*

We have seen that a contract, valid according to its proper law, is actionable in the Courts of this country.

So far does this rule go that a contract for the purchase and delivery of slaves, made, and to be performed, in Brazil, was held (two judges dissenting) to be actionable in England on the ground that the contract was lawful in the place where it was made and was not distinctly prohibited by our law. Santos v Illidge, 8 C B, N S 861

But the judges who took this view stated that if the transaction 'was an offence against the laws here,' if it was 'by Act of Parliament prohibited,' it could not be enforced, even though the other contracting party might by the laws of his country enter into it. No suggestion was made that slavery was an offence against morality, so grave that no dealings concerned with the purchase or delivery of slaves could be considered in English Courts. p 868. p 874

There is, however, authority to show that other conditions may exist, short of statutory prohibition, which will prevent our Courts from enforcing a contract even though it may be valid by its proper law.

In *Hope v. Hope* an agreement was made in France for obtaining a divorce by collusion. The divorce proceedings were to take place in this country. 8 D. G & M 731

In *Grell v. Levy* an agreement, also made in France, provided for the recovery, by an attorney practising in England, of a debt for his client half of which he was to retain for himself. 16 C B, N S. 73

In each case the Court declined to enforce the agreement. It should be noted that in each case the agreement was to be performed in this country, and that the one involved an interference with the course of justice, while the other not merely contemplated champerty but was made by an officer of the Courts of this country.

On the other hand in *Saxby v. Fulton*, it was held that money lent for gaming at Monte Carlo, where gaming was lawful, could be recovered in England, because the various English statutes only 'show that the policy of the Legislature is to deal in a disciplinary fashion with [1909] 2 K. B. 208. at p. 232.

certain particular manifestations of the gambling spirit, and do not establish a public policy which is contravened by any transaction connected with betting or games of chance.' But no action will lie on a *cheque* given for money lent abroad for paying gaming debts, by reason of the operation of the Gaming Act, 1835, at any rate if the cheque is one payable in England; although it seems that if the claim had been framed on the consideration only, i.e. for the money lent, the action would have succeeded. 'The result may seem a little inconsistent.'

Moulis v Owen, [1907] 1 K B 746

Société Anonyme des Grands Établissements v Baumgart, 96 L.J.K B, 789

A more difficult case is that of *Kaufman v. Gerson.* The husband of Mrs. Gerson, the defendant, living in France, had there appropriated to his own use money entrusted to him for other purposes, and was liable to criminal proceedings by French law. Kaufman threatened to prosecute, and Mrs. Gerson promised him a sum of money in consideration of his refraining from the course which he threatened.

[1904] 1 K. B. (C. A.) 591

Such an agreement was valid by French law, but the Court of Appeal held that money due under it was not recoverable in this country because the moral pressure brought to bear upon the wife to compromise proceedings which would have brought discredit on her husband conflicted 'with what are deemed to be in England essential public or moral interests.'

It is true that an agreement obtained by moral pressure of the sort here exercised would not hold good if made in England and with the object of stifling an English prosecution; but the criminal proceedings which were compromised by the agreement in question were proceedings in the French Courts, though the balance of the sum agreed to be paid was sought to be recovered here. It seems however that the English Courts will in all cases reserve to themselves the right to decide whether the conduct of a plaintiff is such as to disentitle him to enforce a contract alleged to have been obtained by unfair means,

Williams v Bayley, L R. 1 H L. 200

whatever may be the view of a foreign law upon the subject; but the 'essential public or moral interests' involved in *Kaufman v. Gerson* certainly appear slight as compared with those that *Santos v. Illidge* called in question—the purchase and sale of slaves.

It may well be, however, that the latter case would now be decided differently by an English Court.

On the whole, therefore, it is probably safe to say that a contract valid by its proper law and by the law of the place where it is to be performed is actionable in England, unless it conflicts with English ideas of public policy or morality. If, however, the contract is to be performed in England, the established rules of English law will prevail.

Dynamit Aktien-Gesellschaft v Rio Tinto, [1918] A C 260, 298

PART III

THE OPERATION OF CONTRACT

We come now to deal with the effects of a valid contract when formed, and to ask, To whom does the obligation extend? Who have rights and liabilities under a contract?

And then this further question arises, Can these rights and liabilities be assigned or pass to others than the original parties to the contract?

In answer to these questions we may lay down two general rules.

(1) No one but the parties to a contract can be bound by it or entitled under it.

(2) Under certain circumstances the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, either (*a*) by act of the parties, or (*b*) by rules of law operating in certain events.

These two rules seem at first to look like one rule subject to certain exceptions, but they are in fact distinct. The parties cannot, by their agreement, confer rights or impose liabilities, in respect of the agreement, upon any but themselves. But they may by certain methods and under certain circumstances drop out of the obligation so created, and be replaced by others who assume their rights or liabilities under the contract.

Thus—(1) If John Doe contracts with Richard Roe, their contract cannot impose liabilities or confer rights upon John Styles.

(2) But there are circumstances under which John Doe or Richard Roe may substitute John Styles for himself as a party to the contract, and there are circumstances under which the law would operate to effect this substitution.

CHAPTER VIII

The Limits of the Contractual Obligation

THE general rule that a person who is not a party to a contract cannot be included in the rights and liabilities which the contract creates—cannot sue or be sued upon it—is an integral part of our conception of contract. A contract is an agreement between two or more persons, by which an obligation is created, and those persons are bound together thereby. If the obligation takes the form of a promise by *A* to *X* to confer a benefit upon *M*, the legal relations of *M* are unaffected by that obligation. *He* was not a party to the agreement; *he* was not bound by the *vinculum juris* which it created; the breach of that legal bond cannot affect the rights of a party who was never included in it.

Contract cannot confer rights

Nor, again, can liability be imposed on *M* by agreement between *A* and *X*. In contract, as opposed to other forms of obligation, the restraint which is imposed on individual freedom is voluntarily created by those who are subject to it—it is the creature of agreement.

or impose liabilities on a third party.

The relation of principal and agent may from one point of view be held to form an exception to these rules. It needs at any rate a separate chapter.

A Trust has this in common with contract, that it generally originates in agreement, and that among other objects it aims at creating obligations. If we could place a trust upon the precise footing of contract we might say that it formed a very real and substantial exception to the general rule which we have laid down. Doubtless the creator of a trust and the trustee do, by agreement, bring rights into existence which a third party, the *cestui que trust*, may enforce. But trusts may be set aside from this discussion, for contract differs from other forms of agreement in having for its sole and direct object the creation

Trustee and *cestui que trust*.

of an obligation. The contractual obligation differs from other forms of obligation mainly in springing from the voluntary act of the parties obliged. A trust and the obligations resulting from a trust correspond to neither of these characteristics. The *agreement* which creates a trust has many other objects besides the creation of obligations, and these objects may include conveyance, and the subsequent devolution of property. The *obligation* which exists between trustee and *cestui que trust* does not come into existence by the act of the parties to it. It is better therefore, having noted the similarities between the contractual and the fiduciary obligation, to dismiss the latter altogether from our inquiries.

§ 1. *A man cannot incur liabilities under a contract to which he was not a party.*

Contract cannot impose liability upon a third party.

Two persons cannot, by any contract into which they may enter, thereby impose liabilities upon a third person

Schmaling v Thomlinson, 6 Taunt 147

Messrs. Thomlinson employed *X*, a firm of brokers, to transport goods from London to Amsterdam. *X* contracted with Schmaling to put the whole conduct of the transport into his hands; Schmaling did the work and sued the Messrs. Thomlinson for his expenses and commission. It was held that they were not liable, inasmuch as there was no privity between them and Schmaling; that is to say, there was nothing either by writing, words, or conduct to connect them with him in the transaction. *X* had been employed by them to do the whole work, and there was no 'pretence that the defendants ever authorized them to employ any other to do the whole under them: the defendants looked to *X* only for the performance of the work, and *X had a right to look to the defendants for payment, and no one else had that right.*'

But does a contract impose a *duty* on third parties?

A contract cannot impose the burdens of an *obligation* upon one who was not a party to it; yet a *duty* rests upon persons, though extraneous to the obligation, not to interfere, without sufficient justification, with its due

performance. By duty is meant that necessity which rests upon all alike to respect the rights which the law sanctions; and we may reserve the term obligation for the special tie which binds together definite, assignable members of the community.

Lumley v Gye, 2 E & B. 216

Lumley, being the manager of an opera house, engaged a singer to perform in his theatre and nowhere else. Gye induced her to break her contract. Action was brought, and it was argued that a party to a contract might sue any one who induced the other party to the contract to break it: and that if this general proposition could not be maintained an action would still lie for inducing a servant to quit the service of his master.

Peculiar relations of master and servant.

The relation of master and servant has always given the master a right of action against one who enticed away his servant, and so the Court was called upon to answer two questions: Does an action lie for procuring a breach of any contract? if not, then does the special rule applicable to the contract of master and servant apply to the manager of a theatre and the actors whom he engages?

How far applicable to case of *Lumley v. Gye*?

The majority of the Court answered both these questions in the affirmative [1]. This was in 1853.

6 Q B D 333

No similar case arose until 1881, when *Bowen v. Hall* came before the Court of Appeal, offering precisely the same points for decision as *Lumley v. Gye*. The majority of the Court, setting aside the question whether the relation of master and servant affected the rights of the parties, held that a man who induces one of two parties to a contract to break it, *intending thereby to injure the other, or to obtain a benefit for himself*, does that other an actionable wrong. In both these cases it will be observed that the element of motive was introduced, and that the judges appeared to consider the malicious intention to

2 E & B 216

Inducement to break contract.

[1] In the elaborate dissenting judgment of Coleridge, J., the exception which the law of Master and Servant seems to have engrafted upon the Common Law is traced by the learned Judge, in a detailed historical argument, to the Statutes of Labourers, and is held to be inapplicable to the case of a theatrical performer

injure as necessary to make the inducement of a breach of contract actionable. This view was negatived in *Quinn v. Leathem*, where Lord Macnaghten thus laid down the law:—

[1901] A. C. 495.

at p. 510.

'The decision [in *Lumley v. Gye*] was right, not on the ground of malicious intention—that was not I think the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law, *if there be no sufficient justification for the interference.*'

In the case of the *South Wales Miners Federation v. Glamorgan Coal Co.* no malice or ill-will was suggested, and the Federation, under circumstances which they honestly, though wrongly, regarded as furnishing sufficient justification, 'counselled and procured' a breach of contract on the part of a number of miners. It was held that they had committed an actionable wrong. A converse case, where circumstances justifying the interference with contractual relations were held to exist, is found in *Brimelow v. Casson*.

[1905] A C. 239.

[1924] 1 Ch. 302.

or not to make contract.

There is a clear distinction between inducing A to break his contract with X, and inducing A not to enter into a contract with X. The man who induces another to break a contract induces him to do what is in itself actionable: but no liability attaches to the refusal to make a contract. Consequently, where A is induced not to contract with X, the inducement, if it is to be actionable, must be of an unlawful kind, as for example acts of coercion and intimidation; or, again, where there is a conspiracy by more than one person to injure; for 'numbers may annoy and coerce, where one may not.'

Quinn v. Leathem, [1901] A. C. at p. 538.

Sorrell v. Smith, [1925] A. C. 700

This topic, however, is part of the law of tort rather than of contract.

But the effect of the Trade Disputes Act, 1906, and of the Trade Disputes and Trade Unions Act, 1926, in this connexion should be noted. It is not actionable for A to induce X to break a contract of employment with M 'in contemplation or furtherance of a trade dispute,' unless

the dispute is a strike or lock-out made illegal by the latter of these Acts. Save, however, in the case of trade disputes, the law as stated above remains unaltered.

§ 2. *A man cannot acquire rights under a contract to which he is not a party.*

Contract cannot confer rights on a third party.

This rule needs fuller explanation than the one which we have just been discussing.

'My Lords,' said Lord Haldane in *Dunlop v. Selfridge*, 'in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*.' [1915] A. C 847, 853.

It is contrary to the common sense of mankind that M should be bound by a contract made between X and A. But if A and X make a contract in which X promises to do something for the benefit of M, all three may be willing that M should have all the rights of an actual contracting party; or if A, and a group of persons which we will call X, enter into a contract, it might be convenient that M should be able to sue on behalf of the multitude of which X consists.

If A makes a promise to X, the consideration for which is a benefit to be conferred on M by X, this cannot confer a right of action on M. Such is the rule of English Law.

Price v. Easton, 4 B & Ad. 433.

Easton promised X that if X would work for him he would pay a sum of money to Price. The work was done and Price sued Easton for the money. It was held that he could not recover because he was not a party to the contract.

The judges of the Queen's Bench stated in different forms the same reason for their decision. Lord Denman, C. J., said that the plaintiff did not 'show any consideration for the promise moving from him to defendant.' Littledale, J., said, 'No privity is shown between the plaintiff and the defendant.' Taunton, J., that it was

'consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement between *X* and the defendant'; and Patteson, J., that there was 'no promise to the plaintiff alleged.'

[1904] 2 Ch 300

The principle of this decision was applied in the later case of *M^cGruther v. Pitcher*. The licensee of the owner of a patent manufactured articles under his licence, and pasted inside the lid of each box in which the article was sold a printed slip, stating that it was a condition of sale that the article was not to be resold at less than a specified price, and that 'acceptance of the goods by any purchaser will be deemed to be an acknowledgement that they are sold to him on these conditions and that he agrees with the vendors to be bound by the same.' A purchaser of the articles from an agent of the manufacturer retailed them at less than the specified price, and the manufacturer sought to restrain him from doing so. It was held that the action failed because the manufacturer could not show that any contract existed between himself and the retailer.

The plaintiff in *M^cGruther v. Pitcher* was not a patentee claiming an injunction to restrain an infringement of his patent, but merely a person who had a licence to manufacture and sell a patented article. It was therefore necessary for him to rely on the ground that he had purported to attach a condition to the resale of the goods, and that the defendant knew of this condition when he bought them. But, as was said by Romer, L. J., 'a vendor cannot in that way enforce a condition on the sale of his goods out and out, and, by printing the so-called condition upon some part of the goods or on the case containing them, say that every subsequent purchaser of the goods is bound to comply with the condition, so that if he does not comply with the condition he can be sued by the original vendor. That is clearly wrong. You cannot in that way make conditions run with goods.' If the plaintiff had been the patentee, he might have succeeded in enforcing the

condition, but on a ground which is not part of the law of contract. A patentee has by statute the sole right to make, use, exercise, and vend his invention; and no other person has a right to sell the patented article except under licence from him, and subject to any conditions which he may have attached to the licence. 'Such a case would not depend upon any condition running with or attaching to the article. It would depend only upon the limits of the licence which the patentee had granted when he first parted with the goods.'

Ibid., per Cozens-Hardy, L. J., at p. 312

There is no real conflict between the principle upon which the Court decided *M'Gruther v. Pitcher* and the decision of the Judicial Committee of the Privy Council in the recent case of the *Lord Strathcona Steamship Co. v. Dominion Coal Co.*, in which the following dictum of Knight Bruce, L. J., in *De Mattos v. Gibson* was approved and applied:—

[1926] A. C. 108

4 De G. & J. 276

'Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.'

In the *Strathcona* case the *Dominion Co.* had a long term charter-party in a ship. The owners sold the ship to the *Strathcona Co.*, who took it with notice of the charter-party, but pleaded that as there was no privity of contract between themselves and the *Dominion Co.* the charter-party was not binding upon them. The Judicial Committee pointed out that the Strathcona Co. thoroughly understood when they purchased the ship that the charter-party was to be respected; 'this is not a mere case of notice of the existence of a covenant affecting the use of the property sold, but it is the case of the acceptance of their property expressly *sub condicione*.' They proceeded to point out that the case fell under the doctrine long

ago established with regard to the user of land by the case
2 Ph. 777. of *Tulk v. Moxhay*, and that whether the subject-matter be land or a chattel the principle is the same; 'the remedy is a remedy in equity by way of injunction against acts inconsistent with the covenant, with notice of which the land was acquired.' They stated that the purchasers of the ship with notice of the charter-party were plainly in the position of constructive trustees with obligations which a court of equity would not permit them 'to violate, and granted an injunction restraining them from employing the ship in any way inconsistent with the employment provided for in the charter-party during its continuance.

The case is distinguishable from the class of case represented by *M'Gruther v. Pitcher*. In the first place the action was not brought by a vendor who had sold his property *out and out* and purported to have imposed something in the nature of a restrictive covenant on its user; it was brought by a party who, before the property was sold, had become entitled to a continuing interest in
L.C.C. v. Allen, [1914] 3 K. B. 642. it. The distinction is vital; for whether it be the user of land or of a chattel that is in question, 'an interest must remain in the subject-matter of the covenant before a right can be conceded to an injunction against the violation by another of the covenant in question.' Secondly, the relief asked for was merely an injunction to restrain the user of the property in a manner inconsistent with this pre-existing interest, subject to which the vendor had sold, and the purchaser had bought the property; it was not an attempt to obtain specific performance, or damages for breach, of a contract, against a person not a party to such contract. The position of the purchaser indeed was not unlike that of the assignee of the reversion on a lease, whose purchase of the land is necessarily subject to the existing lease.

Suggested modifications. Doubts have been thrown on the rule that a man cannot acquire rights under a contract to which he is not a party

in two sorts of case, and these we will consider, premising that the rule itself remains unshaken.

Nearness of kin to promisee.

(*a*) It was at one time thought that if the person who was to take a benefit under the contract was nearly related by blood to the promisee a right of action would vest in him. The case of *Tweddle v. Atkinson* is conclusive against this view. 1 B & S 393

M and *N* married, and after the marriage a contract was entered into between *A* and *X*, their respective fathers, that each should pay a sum of money to *M*, and that *M* should have power to sue for such sums. After the death of *A* and *X*, *M* sued the executors of *X* for the money promised to him. It was held that no action would lie. Wightman, J., said:—

'Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason*, in which it was held that the daughter of a physician might maintain *assumpsit* upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established *that no stranger to the consideration can take advantage of a contract, although made for his benefit.*' at p 397. 1 Ventr 6

The doctrine in equity.

(*b*) Equity judges have used language, sometimes very explicit, to the effect that 'where a sum is payable by *A* for the benefit of *B*, *B* can claim under the contract as if it had been made with himself.' Touche v. Metropolitan Warehousing Co, 6 Ch. 671.

The question has most frequently arisen in cases where contracts have been made or work done on behalf of a Company which has not yet come into existence. The Company when formed cannot (for reasons which are discussed later) ratify such transactions, and attempts have been made to bind it by introducing into the articles of association a clause empowering the directors to fulfil the terms of the contract, or to repay those who have given work or advanced money to promote the existence of the Company. Spiller v Paris Skating Rink, 7 Ch. D. 368. *Infra*, p 410.

Melhado v Porto Alegre Railway Co., L. R. 9 C. P. 503.

Common Law judges have uniformly held that no right of action accrues to the beneficiary under such a provision; and their judgments put this matter on a plain footing and tell us when a third party may or may not sue.

Eley v. Positive Assurance Co., 1 Ex. D 88

The articles of association of a Company provided that the plaintiff should be employed as its permanent solicitor. He sued the Company for a breach of contract in not employing him.

In considering a case of this kind we must distinguish the 'articles of association' of a Company from its 'memorandum of association.' The Memorandum contains the terms which confer and limit the corporate powers of the Company. The Articles regulate the rights of the members of the Company *inter se*.

See Ashbury Carriage Co v. Riche, L. R 7 H L. at p 667.

at p 89

'They are,' said Lord Cairns, 'an agreement *inter socios*, and in that view if the introductory words are applied to article 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now so far as that is concerned it is *res inter alios acta*, the plaintiff is no party to it. This article is either a stipulation which would bind the members, or else a mandate to the directors. In either case it is a matter between the directors and shareholders, and not between them and the plaintiff.'

Articles of association, therefore, only bind the parties to them, and the plaintiff could not recover.

Third party only entitled as *cestui que trust*. 16 Ch D 125

The impression that in any such case a third party who is to be benefited acquires equitable rights *ex contractu* arises, as was explained by Jessel, M. R., in the case of the *Empress Engineering Company*, from the fact that an agreement between two parties might well be so framed as to make one of them *trustee* for a third. Thus, it is usual to provide in a charter-party that a certain commission shall be payable to the broker by whom the charter has been negotiated. The broker no doubt has his own contract with the shipowner, of the terms of which the charter may furnish evidence; but he cannot sue on the contract contained in the charter itself. A practice, however, whereby the charterer sued the shipowner for the amount of the broker's commission *as trustee for the broker* was

confirmed by the House of Lords in *Affréteurs Réunis v. Walford*. Whether a trust has or has not in any particular case been created must be matter of construction, as may be seen by reference to the cases of *Murray v. Flavell*, and the *Rotheram Alum Co.*

[1919] A C 801.

25 Ch D 89 and 103.

It has been attempted, without success, to break the general rule in the case of unincorporated companies and societies who wish to avoid bringing action in the names of all their members. To this end they introduce into their contracts a term to the effect that their rights of action shall be vested in a manager or agent. Thus in *Gray v. Pearson*, the managers of a Mutual Assurance Company, not being members of it, were authorized, by powers of attorney executed by the members of the Company, to sue upon contracts made by them as agents on behalf of the Company. They sued upon a contract so made, and it was held that they could not maintain the action, 'for the simple reason,—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated.'

Attempts to enable a third party to sue for many joint contractors have uniformly failed.

L R 5 C P 568.

Per Willes, J., at p 574.

The inconvenience under which bodies of this description labour has been met in many cases by the Legislature. Certain companies and societies can sue and be sued in the name of an individual appointed in that behalf,[1] and the Rules of the Supreme Court made under the powers given by the Judicature Act provide that—

Statutory relaxations of the rule.

'Where there are numerous persons *having the same interest in one cause or matter*, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such cause or matter on behalf or for the benefit of all persons so interested.'

Order XVI. r. 9.

Under this rule any person may sue in a representative

[1] Statutes of this nature are—
7 Geo. IV. c. 46, relating to Joint Stock Banking Companies;
7 Will. IV. and 1 Vict. c. 73, relating to chartered companies;
34 & 35 Vict. c. 31, relating to Trade Unions;
59 & 60 Vict. c. 25, relating to Friendly Societies,
and in many cases companies formed by private Acts of Parliament possess similar statutory powers

capacity who has a common interest and a common grievance with those whom he claims to represent; thus, for instance, several persons claiming preferential rights to stalls in Covent Garden market as growers of fruit within the meaning of a certain Act, were held entitled to sue on behalf of the whole class of such growers. This rule was meant to apply the former practice of the Court of Chancery to actions brought in any division of the High Court, and is not confined to persons having some common 'beneficial proprietary right.'

Duke of Bedford v. Ellis, [1901] A. C. 1.

Agency postponed.

But although A cannot by contract with X confer rights or impose liabilities upon M, yet A may represent M, in virtue of a contract of employment subsisting between them, and thus become M's mouthpiece or medium of communication with X. This employment for the purpose of representation is the contract of agency. The difficulty of assigning to Agency a fit place in a treatise on the law of contract is described in a later chapter. It may be regarded as an extension of the limits of contractual obligation by means of representation, but, since its treatment here would constitute a parenthesis of somewhat uncouth dimensions, it will be convenient to postpone the subject to the conclusion of this book.

CHAPTER IX

The Assignment of Contract

WE have seen that a contract cannot affect any but the parties to it. But the parties to it may under certain circumstances drop out and others take their places, and we have to ask how this can be brought about, first, by the voluntary act of the parties themselves, or one of them, secondly, by the operation of rules of law. Assignment of contract.

§ 1. *Assignment by act of the parties.*

This part of the subject also falls into two divisions, the assignment of liabilities and the assignment of rights, and we will deal with them in that order.

(1) *Assignment of liabilities.*

A promisor cannot assign his liabilities under a contract. Liabilities cannot be assigned.

Or conversely, a promisee cannot be compelled, by the promisor or by a third party, to accept performance of the contract from any but the promisor.

The rule seems to be based on sense and convenience, for a man is entitled to know to whom he is to look for the satisfaction of his rights under a contract. It is illustrated by the case of *Robson & Sharpe v. Drummond.* 2 B. & A. 303. Sharpe let a carriage to Drummond at a yearly rent for five years, undertaking to paint it every year and keep it in repair. Robson was in fact the partner of Sharpe, but Drummond contracted with Sharpe alone. After three years Sharpe retired from business, and Drummond was informed that Robson was thenceforth answerable for the repair of the carriage, and would receive the payments. He refused to deal with Robson, and returned the carriage. It was held that he was entitled to do so.

'The defendant,' said Lord Tenterden, 'may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe. . . . . The latter, therefore, having said it was Reason for rule.

impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone and not with any other person.'

Apparent exceptions to the rule.

There are certain limitations to this rule. A liability may be assigned with the consent of the party entitled: but this is in effect the rescission of one contract and the substitution of a new one in which the same acts are to be performed by different parties. This is called a 'novation' and it can only take place by agreement between the parties; novation cannot be compulsory.

Kemp v Baerselman, [1906] 2 K B at p 610

British Waggon Co v. Lea, 5 Q B. D. 149

Or again, if *A* undertakes to do work for *X* which needs no special skill, and it does not appear that *A* has been selected with reference to any personal qualification, *X* cannot complain if *A* gets the work done by an equally competent person. But *A* does not cease to be liable if the work is ill done, nor can any one but *A* sue for payment.

Tolhurst's Case, [1902] 2 K. B 660, 669

'To suits on these contracts, therefore, the original contractee must be a party. . . . . This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable. What is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden of the obligation on to a substituted contractor any more than where it is special and personal, but that in the first case the contractor may rely upon the act of another as performance by himself, whereas in the second case he cannot.'

In such cases, what appears at first sight to be an assignment of a contractual liability by the original contracting party is really the procuring by him of a *vicarious performance* of it through some one else; but the word 'assignment' has been used by judges to express the legal effect of the transaction between the parties. The original contracting party still remains liable on his contract and must as a rule be made a party to any action on the contract.

British Wagon Co. v. Lea, 5 Q. B D 149.

Griffith v Tower Publishing Co., [1897] 1 Ch. 21

Robson v. Drummond therefore was a case in which the Court thought that personal, as opposed to vicarious, performance was of the essence of the contract which the parties had made. But it was said in a later case that in applying the principle the Court in *Robson v. Drummond*

'went to the utmost length to which it can be carried.' In this case the Parkgate Waggon Co. (who were co-plaintiffs in the action) had agreed to let a number of railway waggons to the defendants and to keep them in repair. The Parkgate Co. went into liquidation and assigned the agreement to the British Co. The defendants claimed to treat the contract as at an end and refused to accept the services of the British Co. The Court distinguished the case from *Robson v. Drummond* on the ground that here the defendants could not have attached special importance to the repairs being done by the Parkgate Co.; 'so long as the Parkgate Co. continues to exist, and, through the British Co., continues to fulfil its obligation to keep the waggons in repair, the defendants cannot, in our opinion, be heard to say that the former company is not entitled to performance by them.'

British Waggon Co v. Lea, 5 Q B D at p. 149

Another illustration of a contract held to admit of vicarious performance will be found in *Tolhurst v. Associated Portland Cement Manufacturers*; *Griffith v. Tower Publishing Co.*, and *Kemp v. Baerselman* on the other hand were cases in which the terms of the contracts by implication required personal performance.

[1903 A C 414. [1897] 1 Ch. 21 [1906] 2 K B 604.

Where an interest in land is transferred, liabilities attaching to the enjoyment of the interest may pass with it. But this arises from the peculiar nature of obligations attached to land, and need not be referred to here.

(2) *Assignment of rights.*

(*a*) *At Common Law.*

Assignability of the *benefit* of a contract.

At Common Law, apart from the customs of the Law Merchant, the benefit of a contract, or of rights of action arising from contract, cannot be assigned so as to enable the assignee to bring an action upon it in his own name, though the assignee might bring an action in the name of the assignor if authorized by him. The rule is sometimes expressed by the phrase 'a chose in action is not assignable.'

Powles v. Innes, 11 M. & W. 10.

Torkington v. Magee, [1902] 2 K. B. 427, *per* Channell, J.

'Chose in action' is 'an expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.' The contrasted term is 'chose in possession.' It thus includes many rights which are not contractual, e.g. patent rights, copyright. We are concerned here, however, only with the assignment of contractual rights.

at common law only by substituted agreement; Fairlie v. Denton, 8 B. & C. 400.

Practically the only way in which rights under a contract can be transferred at Common Law is not by assignment at all, but by means of a substituted agreement, or 'novation'.

If *A* owes *M* £100, and *M* owes *X* £100, it may be agreed between all three that *A* shall pay *X* instead of *M*, who thus terminates his legal relations with either party. In such a case the consideration for *A*'s promise is the discharge by *M*; for *M*'s discharge of *A*, the extinguishment of his debt to *X*; for *X*'s promise, the substitution of *A*'s liability for that of *M*.

Cuxon v Chadley, 3 B. & C. 591.

A promise by a debtor to pay a third party, even though afterwards it be assented to by the creditor, will not enable the third party to sue for the sum promised.

Liversidge v. Broadbent, 4 H. & N. 603.

Again, a written authority from the creditor to the debtor to pay the amount of the debt over to a third party, even though the debtor acknowledge in writing the authority given, will not entitle the third party to sue for the amount.

at p 610.

> 'There are two legal principles,' said Martin, B., 'which, so far as I know, have never been departed from: one is that, at Common Law, a debt cannot be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and that being the law, it is perfectly clear that *M* could not assign to the plaintiff the debt due from the defendant to him. . . . The other principle which would be infringed by allowing this action to be maintained is the rule of law that a bare promise cannot be the foundation of an action.

It is thus apparent that a contract, or right of action arising from contract, cannot be assigned at Common Law except (1) by an agreement between the original parties

to it and the intended assignee, which is subject to all the rules for the formation of a valid contract; or (2) by the rules of the Law Merchant under circumstances to be noted presently.

or by custom of merchants.

(*b*) *In Equity.*

Assignability of contract in equity.

Equity would permit the assignment of a chose in action, including debts and other contractual rights, whether such chose were legal or equitable. If the chose were equitable—enforceable, that is, only in a court of equity—such as a share in a trust fund, equity would allow the assignee to bring his suit in a court of equity in his own name, and the assignor, unless he had an interest in the suit, need not be a party to it. This course was free from objection, because in such a case there was no claim that could be asserted by an action at law, and there was therefore no risk that the trustees of the fund might be exposed to two actions, one by the assignor and one by the assignee. But when the chose was legal, e.g. a right under a contract, equity had to proceed more carefully. If equity itself enforced the claim of the assignee, that would not prevent the assignor from afterwards bringing his action at law; and the debtor would have been put to the inconvenience of resorting to equity to restrain the assignor from bringing an action on the ground that the assignee had already recovered in equity. Consequently equity did not in the ordinary case enforce the assignee's claim. What it did was to infer from the assignment a duty on the assignor, on receiving a proper indemnity against costs, to lend his name to the assignee in order that the latter might bring an action at law, and if necessary it would enforce this duty. Hence down to the passing of the Judicature Act, whenever a contractual right was assignable in equity—and it could not be assignable otherwise—the action in a court of law was necessarily brought in the assignor's name. This was primarily in the interests of the party liable, so that the result of one action should

Hammond v Messenger, 9 Sim 327

bind both assignor and assignee; and also partly in the interests of the assignor, so that he might dispute the assignment if he thought fit.

Brandt's v Dunlop, [1905] A C *per* Lord Macnaghten, at p. 462 Durham Bros v. Robertson, [1898] 1 Q. B 765, *per* Chitty, L. J.

No particular form is necessary for an equitable assignment, which need not even be in writing. 'All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril.'

Some choses in action not assignable.

But the rights thus assignable do not cover all rights *ex contractu* which might be included within the term *chose in action*.

May v Lane, 64 L. J Q B 236

In the first place, it is said that by reason of the rules against champerty and maintenance a mere right to sue for damages cannot be assigned. Save possibly for a decision of the Privy Council, by which English Courts are not necessarily bound, it appears to be generally accepted that a right of action for tort is not assignable; but a distinction has been drawn between the assignment of a bare right of action for breach of contract and the assignment of a right of action arising out of or incidental to rights of property which are assigned at the same time. Thus the purchaser of an estate was permitted to sue for arrears of rent due from a tenant at the date of purchase, and the purchaser of a ship to sue the builder for damages for a breach of contract already committed, while the assignment of a bare 'right to litigate' has been held invalid. But it has been urged that it would be strange if an admitted debt can be assigned, while a debt which the debtor has repudiated by refusing to pay became unassignable on the ground that it has thereby become a bare right of action; and it was suggested, in *County Hotel v. L. & N. W. Railway*, that the rule is intimately connected with the unassignability of choses in action at common law, and that the ground for it has really gone with the recognition of assignability, first in equity, and finally under the Judicature Act. The true scope of the rule is

King v Victoria Assurance Co , [1896] A C 250.

Dawson v G N & City Rly., [1905] 1 K. B. 260

Ellis v Torrington, [1920] 1 K B 399.

Williams v. Protheroe, 5 Bing 309

[1918] 2 K. B. 251, 258.

not perhaps finally settled, but only the House of Lords is in a position to say that it no longer exists.

Secondly, where some relation of personal confidence between the parties, or their personal qualifications are of the essence of a contract, one party cannot assign his right to the performance of the obligations of the other, since to do so would be to increase or to alter the burden undertaken by the other without his consent. If, for example, *B* has contracted to supply *K* with 'all the eggs he shall require for manufacturing purposes for one year,' *K* undertaking not to buy eggs elsewhere so long as *B* is ready to supply them, *K* cannot assign his right to be supplied with eggs to *X*; for what *B* undertook was to supply all the eggs that *K*, and not all that any one other than *K*, might require. *K* in purporting to assign his right under such a contract is really trying to impose on *B* an obligation different from that which *B* undertook in the contract.

Kemp v. Baerselman, [1906] 2 K B 604

On the other hand, where it appears from the nature of the contract that no special personal qualifications are involved, so that it can make no difference to the party on whom an obligation rests whether he performs it for the original contracting party or another, there the right to the performance of the obligation may be assigned.

Tolhurst's Case, [1903] A C 414

But certain matters affecting the rights of the assignee must be noticed.

(*a*) The question of consideration in an equitable assignment is a difficult one. As between assignor and assignee it seems that a mere *agreement* to assign a chose in action must, like other contracts, have consideration to support it, for equity will not assist a mere volunteer. But it is of course possible to make a gift of, i.e. to transfer without consideration, a chose in action, provided that the transfer is completed in whatever manner is required for a transfer of that particular chose. It is also possible to transfer the beneficial interest by a declaration of trust, though here again equity will not assist a volunteer by treating

Collyer v. Isaacs, 19 Ch. D at p 351

as a declaration of trust an attempted transfer which has not been completed. Further, when a completed transfer has been made, it will usually in practice amount to an assignment good under the Judicature Act, for which, as will be seen, consideration is not required.

There remains, however, the possible case of a completed assignment which is merely equitable. This is a most exceptional case, and there seems to be no clear authority definitely dealing with it. It seems possible that it might be held good in spite of the absence of consideration, but it is perhaps safer to follow the dicta of two very learned equity judges, who have stated in general terms that consideration is necessary to any purely equitable assignment, apparently not contemplating any distinction between an agreement to assign and a completed assignment. This was also the strong opinion of the author of this book.

Glegg v Bromley, [1912] 3 K B *per* Parker, J., at p 491 *Re* Westerton, [1919] 2 Ch *per* Sargant, J., at p 111

In any event a debtor who is directed by his creditor to pay the debt to a third party obtains a good discharge by doing so and is not concerned with the question whether or no the third party has given consideration for the assignment.

(*b*) The assignment will not bind the debtor until he has received *notice*, not necessarily in writing, although it is effectual as between assignor and assignee from the moment of the assignment.

Brandts v Dunlop, [1905] A C 454, 462

(*c*) The assignee takes 'subject to equities'; that is, subject to all such defences as might have prevailed against the assignor. In other words, the assignor cannot give a better title than he has got.

These last two propositions require some illustration.

Notice.

It is fair upon the person liable that he should know to whom his liability is due. So if he receive no notice that it is due to another than the party with whom he originally contracted, he is entitled to the benefit of any payment which he may make to his original creditor.

A convenient illustration is furnished in the case of covenants to pay interest on a mortgage debt. If the mortgage be assigned by the mortgagee without notice to the mortgagor, and interest be afterwards paid by the mortgagor to the duly-authorized agent of the mortgagee, the money so paid, though due to the assignee, cannot be recovered by him from the debtor.

Williams v. Sorrell, 4 Vesey, 389.

The *rationale* of the rule is thus expounded by Turner, L. J., in *Stocks v. Dobson*:—

4 D. M. & G. 15.

'The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? If a Court of Equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the Court has therefore required notice to be given to the debtor of the assignment *in order to perfect the title of the assignee*.'

at p 16

And the same case is authority for this further proposition that 'equitable titles have priority according to the priority of notice.' The successive assignees of an obligation rank as to their title, not according to the dates at which the creditor assigned his rights to them respectively, but according to the dates at which notice was given to the party to be charged.

Marchant v Morton, Down, & Co, [1901] 2 K B. 829

Title.

'The general rule, both at law and in equity, is that no person can acquire title to a chose in action or any other property, from one who has himself no title to it.'

Assignee takes subject to equities.

And further, 'if a man takes an assignment of a chose in action, he must take his chance as to the exact position in which the party giving it stands.'

Crouch v Credit Foncier, L. R. 8 Q. B 380.

Mangles v. Dixon, 3 H. L. C. 735.

The facts of the case last cited are somewhat complex, and the rule is so clear that a complicated illustration would not tend to make it clearer. It is enough that the assignee of contractual rights must take care to ascertain

the exact nature and extent of those rights; for he cannot take more than his assignor has to give, or be exempt from the effect of transactions by which his assignor may have lessened or invalidated the rights assigned.

Graham v. Johnson, 8 Eq 36

For instance, if one of two parties be induced to enter into a contract by fraud, and the fraudulent party assigns his interest in the contract for value to *X*, who is wholly innocent in the matter, the defrauded party may get the contract set aside in equity in spite of its assignment to an innocent party.

But the debtor cannot set up against an innocent assignee a claim of a strictly personal nature that he may have against the assignor—for example, a claim for damages for fraud for having been induced to enter into the contract. He is restricted to claims which arise out of the contract itself and do not exist independently of it.

Stoddart v. Union Trust, [1912] 1 K. B. 181, 193

'Where there is a claim arising out of the contract itself under which the debt arises, and the claim affects the value or amount of that which one of the parties to that contract has purported to assign for value, then, if the assignee subsequently sues, the other party to the contract may set up that claim by way of defence as cancelling or diminishing the amount of that to which the assignee asserts his right under the assignment.'

(3) *By Statute.*

Assignment of contract under Judicature Act.

It remains to consider, so far as mere assignment goes, the statutory exceptions to the Common Law rule that a chose in action is not assignable.

(*a*) The Judicature Act of 1873, s. 25 (6), gives to the assignee of any debt or other legal chose in action the legal right thereto and all legal and other remedies and thus enables him to sue *in his own name.* But (1) the assignee takes subject to equities; (2) the assignment must be absolute and not by way of charge, and (3) must be in writing signed by the assignor: (4) express notice in writing must be given to the party to be charged, and the title of the assignee dates from notice [1].

[1] These provisions are now repealed and substantially re-enacted by the Law of Property Act, 1925, s. 136, which, somewhat pedantically, substitutes

The sub-section does not touch the rules of assignment in equity or the rights thereby created. 'The sub-section is merely machinery; it enables an action to be brought by the assignee in his own name in cases where previously he would have sued in the assignor's own name, but only where he could so sue.' The debt assigned accordingly becomes the debt of the assignee for all purposes; and if the debtor brings an action against the assignee on another claim, the assignee can set off the assigned debt against such a claim.

Per Channell, J., Torkington v Magee, [1902] 2 K B at pp. 430 & 435

Bennett v White, [1910] 2 K B 643

The meaning of the expression 'debt or other legal chose in action' in s. 25 (6) has been considered in several cases. It is not, as might appear at first sight, confined to choses in action which were enforceable only in a court of common law, but includes any 'debt or right which the common law looks on as not assignable by reason of its being a chose in action but which a Court of Equity deals with as being assignable'; all rights, that is to say, the assignment of which a Court of Law or Equity would before the Judicature Act have considered lawful.

'Debt or other legal chose in action.'

Torkington v Magee, [1902] 2 K B. 427, 430

In re Pain, [1919] 1 Ch 38, 44

But the statutory remedy is still of narrower application than the equitable.

The Act requires the assignment to be 'absolute' and not 'by way of charge.' This means that it must not be subject to any condition, and that it must be an assignment of a sum due or about to become due, not of an amount to be determined by some deficiency in accounts between assignor and assignee. The original debtor is not to find his liability to be dependent 'on any question as to the state of accounts' between assignor and assignee.

Uncon-ditional.

Durham v Robertson, [1898] 1 Q. B. 773.

Thus an assignment in these words: 'in consideration of money advanced from time to time we hereby charge the sum of £1,080 (which was a sum about to become due to the assignor on a certain building contract) as security for the advances, and we hereby assign our interest in the

Durham v. Robertson.

for the traditional term 'chose in action,' the inelegant neologism 'thing in action.'

above-mentioned sum until the money with added interest be repaid to you' is not within the section. Nor is an assignment of so much of the assignor's salary as may be necessary to repay a sum advanced. Whether the assignment of a definite part of an existing debt is to be regarded as an 'absolute' assignment, or as merely a 'charge' upon the whole of the debt, is not quite certain. Darling, J., treated it as an 'absolute' assignment, but Bray, J., refused to follow his decision. The latter seems to be the better opinion; for the former 'leaves it in the power of the original creditor to split up the single legal cause of action into as many separate legal causes of action as he might think fit,' thus obviously prejudicing the position of the debtor. Any of these assignments, though not 'absolute' and therefore outside the section, may of course be perfectly good as equitable assignments.

Jones v. Humphreys, [1902] 1 K. B. 10.

Skipper v. Holloway, [1910] 1 K. B. 630.

Forster v. Baker, [1910] 1 K. B. 636.

Durham v. Robertson, *per* Chitty, L. J., at p. 774.

But an assignment by way of mortgage, when it passes the entire interest of the assignor in the debt, may be 'absolute,' despite the fact that it contains a proviso for redemption and reassignment on repayment. Such a transaction cannot prejudice the debtor, since he will receive notice first of the assignment and then of the reassignment so that there will always be one definite person to whom he owes the debt.

Ibid., at p. 771.

Tancred v. Delagoa Bay Ry. Co. 23 Q.B.D. 239.

The requirements of the Act as to form are also more stringent than in the case of an equitable assignment, since writing is required both for assignment and notice; and these requirements are peremptory, so that in a case where the debtor was unable to read and it was therefore thought useless to give him written notice, though the assignment was read over to him and understood by him, there was held to be no *legal* assignment. The written notice however need not be in any particular form, provided that it sufficiently indicates the fact of the assignment.

Hockley v Goldstein, 90 L. J. K. B. 111

Denney v. Conklin, [1913] 3 K. B. 177.

But it must not be forgotten that the method of assignment which the Act provides is in addition to, and not

in substitution for, methods already in existence. The object of the section was to alter procedure, and not to make any difference in the nature or extent of the things assignable. Accordingly, when the section is complied with the assignee need no longer go through the double process of applying to equity to force the assignor to lend his name, and then taking proceedings at law in the assignor's name. Further, an assignment which does not comply with one or more of the requirements of the Act may still be a perfectly good and valid equitable assignment and enforceable accordingly. Omission to take advantage of the machinery provided by the Act means only that the assignor must still be made a party to the action; but this can now be done by making him a co-plaintiff, if he is willing, or a defendant, if he is not willing, and no separate proceedings to enforce the use of his name are necessary. The Act, in other words, only affords a simplified method of assignment for those who choose to avail themselves of it.

Brandts v Dunlop, [1905] A. C. pp. 461, 462.

Performing Right Society v. London Theatre of Varieties, [1924] A. C. 1, 31.

An assignment under s. 25 (6) of the Judicature Act does not require consideration to make it valid as between assignor and assignee or to enable the assignee to sue in his own name.

Considerations. *In re* Westerton, [1919] 2 Ch 104

An assignment duly made, whether by the rules of equity or by those of the Judicature Act, operates without the consent of the party liable. In *Brice v. Bannister* (a case of equitable assignment) the defendant received express notice of the assignment of a debt accruing from him to the assignor. He refused to be bound by the assignment and paid his debt to the assignor. He was held liable notwithstanding to the assignees for the amount assigned.

3 Q. B. D. 569. Swan v Maritime Insce Co, [1907] 1 K. B 116.

(*b*) By the Policies of Insurance Act, 1867, policies of life insurance are assignable in a form specified by the Act, so that the assignee may sue in his own name. Notice must be given by the assignee to the insurance company, and he takes subject to such defences as would have been valid against his assignor.

Policies of life insurance. ss. 1, 3.

Policies of marine insurance. s. 50.

(*c*) By the Marine Insurance Act, 1906, policies of marine insurance are similarly assignable; but this statute contains no requirement as to notice.

Shares. s. 14. s. 22

(*d*) Shares in Companies are assignable under the provisions of the Companies Clauses Act, 1845, and the Companies (Consolidation) Act, 1908.

Mortgage debentures.

(*e*) Mortgage debentures issued by Companies under the Mortgage Debenture Act, 1865, are assignable in a form specified by the Act.

(4) *Negotiability.*

Assignability to be distinguished from negotiability.

So far we have dealt with the assignment of contracts by the rules of Common Law, Equity, and Statute, and it would appear that under the most favourable circumstances the assignment of a contract binds the party chargeable to the assignee, only when notice is given to him, and subject always to the rule that a man cannot give a better title than he possesses in himself.

We now come to deal with a class of promises in writing, the benefit of which is assignable in such a way that the promise may be enforced by the assignee of the benefit without previous notice to the promisor, and without the risk of being met by defences which would have been good against the assignor of the promise. In other words, we come to consider that special class of assignable contracts known as *negotiable instruments*.

Features of negotiability.

The essential features of a negotiable instrument appear to be these:—

Firstly, the title to it passes by delivery.

Secondly, the written promise which it contains gives a right of action to the holder of the document for the time being, though he and his holding may be alike unknown to the promisor.

Thirdly, the holder for the time being (if he is a *bona fide* holder for value) is not prejudiced by defects in the title of his assignor; he does not hold 'subject to equities.'

Notice therefore need not be given to the party liable, and the assignor's *title* is immaterial.

Negotiability by custom,

Certain instruments are negotiable by the custom of merchants recognized by the Courts; such are foreign and colonial bonds expressed to be transferable by delivery, and scrip certificates which entitle the bearer to become a holder of such bonds or of shares in a company, and, perhaps we may say, other instruments to which the character of negotiability may from time to time be attached by the custom of merchants proved to the satisfaction of the Courts.

Rumball v. Metropolitan Bank, 2 Q B D. 194.

Infra, p 301

by statute

Bills of Exchange were negotiable by the law merchant; promissory notes by 3 & 4 Anne, c. 9; both classes of instruments are now governed by the Bills of Exchange Act, 1882. A cheque is a bill of exchange drawn on a banker, but possesses certain features of its own which are not common to all bills of exchange. A Bank of England note is a promissory note which by statute is made legal tender, except by the Bank itself.

3 & 4 Will 4, c 98

18 & 19 Vict c 111

Bills of lading, which are affected both by the law merchant and by statute, possess some characteristics which will call for a separate consideration.

Bills of exchange and promissory notes figure so constantly in the law of contract, and are so aptly illustrative of the nature of negotiability, that we will shortly consider their principal features.

A bill of exchange.

A bill of exchange is an unconditional written order, addressed by *M* to *X*, directing *X* to pay a sum of money to a specified person or to bearer. Usually this specified person is a third person *A*, but *M* may draw a bill upon *X* in favour of himself. We must assume that the order is addressed to *X* either because he has in his control funds belonging to *M* or is prepared to give *M* credit; and since we are here dealing with bills of exchange merely as illustrative of negotiability, we will adopt the most usual, as it is the most convenient, form for illustration.

Bills of Exchange Act, 1882, s. 3 (1).

See form in Appendix D.

How drawn.

M directs *X* to pay a sum of money to '*A* or order,' or 'to *A* or bearer.' *M* is then called the drawer of the bill, and by drawing it he promises to pay the sum specified either to *A* or to any subsequent holder into whose hands it may come, if *X* do not accept the bill, or, having accepted it, fail to pay.

How accepted.

X, upon whom the bill has been drawn, is called the drawee; but when he has assented to pay the sum specified, he is said to become the 'acceptor.' Such assent (or 'acceptance') must be expressed by writing on the bill signed by the acceptor, or by his simple signature. The drawer of the bill may transfer it to another person before it has been 'accepted'; and in that case it is the business of the transferee to present it to the drawee for acceptance. He is entitled to demand an unconditional acceptance; but he may (if he pleases) take one qualified by

ss. 19, 44. conditions as to amount, time, or place [1], though this releases the drawer or any previous indorser from liability unless they assent to the qualification.

If the bill be payable to *A* or bearer, it can be transferred from one holder to another by mere delivery: if it is payable to *A* or order, it must be first indorsed. Until it is indorsed, it is not a complete negotiable instrument.

Indorsement in blank.

If the indorsement consists in the mere signature of *A*, the bill is said to be indorsed 'in blank.' It then becomes a bill payable to bearer, that is, assignable by mere delivery; for *A* has given his order, though it is an order addressed to no one in particular. The bill is in fact indorsed over to any one who becomes possessed of it.

Special indorsement.

If the indorsement takes the form of an order in favour of *D*, written on the bill and signed by *A*, it is called a 'special' indorsement. Its effect is to assign to *D* the right to demand acceptance from the drawee, if the bill

[1] Note, however, that by s. 19 (2) (c) of the Bills of Exchange Act, a condition as to place is not to be regarded as qualifying an acceptance, 'unless it expressly states that the bill is to be paid there only *and not elsewhere*.' Hence the common form 'accepted payable at the X. Bank' is not a qualified acceptance.

has not already been accepted; or payment, if the drawee has already accepted and the bill has fallen due. In the event of default in acceptance or payment, *D* has a two-fold remedy. He may demand the sum specified in the bill either from the original drawer, or from *A* the indorser; for *A* is to all intents a new drawer of the bill. Every indorser therefore becomes an additional security for payment to the holder for the time being.

A promissory note.

A promissory note is a promise in writing made by *X* to *A* that he will pay a certain sum, at a specified time, or on demand, to *A* or order, or to *A* or bearer. *X*, the maker of the note, is in a similar position to that of an acceptor of a bill of exchange; and the rules as to assignment by delivery or indorsement are like those relating to a bill of exchange [1].

See form in Appendix D.

Assignability distinguished from negotiability

We may now endeavour to distinguish, by illustration from the case of instruments of this nature, the difference between *assignability* and *negotiability*.

Let us suppose that *A* draws a bill on *X* payable to himself or order and, having procured *X*'s acceptance, indorses the bill over to *D*. When the time for payment falls due, *D* presents the bill for payment to *X*, the acceptor, and sues him upon default.

Consideration presumed. Notice not needed.

In the case of negotiable instruments consideration is presumed to have been given until the contrary is shown, and notice of assignment (as would be required in the case of an ordinary chose in action) is not necessary. *D* will therefore have to do no more than prove that the signature of acceptance on the bill is *X*'s signature, everything else being presumed in his favour.

Suppose, however, it turn out that the bill was accepted by *X* on account of a gambling debt owed by him to *A*, or was obtained from him by fraud. The position of *D* is then modified to this extent.

[1] An I.O.U., which at first sight would seem to bear some resemblance to a promissory note, is not of course a legal instrument of any kind; it is only evidence of an 'account stated'; see as to this, *infra*, p. 444

As between *A* and *X* the bill would be void or voidable according to the nature of the transaction, but this does not necessarily affect the rights of *D*, the subsequent holder, or of persons deriving their title through *D*.

Position of subsequent holder.

Every holder of a bill of exchange is prima facie deemed to be a holder in due course—that is, he is deemed to have given value for it in good faith, without notice of any defect in the title of the person who negotiated it. But if in an action on the bill evidence is given that the acceptance, issue, or subsequent negotiation of the bill is tainted with fraud or illegality of some kind, then this presumption no longer holds good; the burden of proof is shifted, and the holder of the bill must prove affirmatively that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill, though not necessarily by himself. If he can do so, he will win his action, whatever the earlier history of the bill may be, unless he was himself a party to the fraud or illegality alleged. A holder who has been a *party* to the fraud or illegality can never succeed, though mere knowledge of it will not invalidate his title, if he derives his title, not from a person whose own title is defective, but from one who is himself a holder in due course.

Tatam v Haslar, 23 Q. B D. 345.

Illegal consideration for making bill.

Flower v. Sadler, 10 Q. B D. 572.

And the effect of an illegal consideration for an indorsement should also be noticed. The indorsee cannot sue the indorser on the illegal contract made between them; but he can sue the acceptor, and probably one who indorsed the bill before the illegality.

for indorsement.

London Joint Stock Bank v. Simmons, [1892] A. C. 217.

A broker pledged his client's bonds, which were negotiable by the custom of merchants, with a bank, to secure advances made to himself. The bank had no notice that the bonds were not his own, or that he had no authority to pledge them: he became insolvent; the bank sold the bonds in satisfaction of the debt due, and the broker's client sued the bank. The House of Lords held that he could not recover; for (1) the bonds were negotiable, and (2) being so negotiable—

'It is of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary: and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title or the extent of his authority.'

The case of *Crouch v. Credit Foncier of England* was formerly cited as authority for the proposition that, so far as documents made in England by English merchants are concerned, the list of negotiable instruments is closed, and that no evidence of usage will avail unless the incident of negotiability has been annexed by the Law Merchant to the instrument in question. The Court of Exchequer Chamber in *Goodwin v. Robarts* questioned its authority on this point, and in *Bechuanaland Exploration Co. v. London Trading Bank*, Kennedy, J., held that it was overruled by *Goodwin v. Robarts*. He allowed recent mercantile usage, sufficiently proved, to make negotiable certain debentures, issued in England by an English company, made payable to bearer but not corresponding in character to any instrument negotiable by the law merchant or by statute.

L. R. 8 Q. B. 374.

The class of negotiable instruments may be added to by mercantile usage.

L. R. 10 Ex at p. 346.

[1898] 2 Q. B. 658. L. R. 10 Ex 337

at p. 675.

The decision in this case was subsequently followed and strongly approved by Bigham, J., in *Edelstein v. Schuler*. The law merchant, it was there laid down, must not be regarded as stereotyped and immutable; on the contrary, owing to the vast increase in the number of commercial transactions the law merchant may be modified far more quickly than was the case a century ago; and the Courts will now take judicial notice of the fact that debenture bonds payable to bearer are negotiable.

[1902] 2 K. B. 144

Before leaving this subject it is important to notice that the doctrine of consideration does not apply to negotiable instruments in the same way as to ordinary contracts. There is usually no consideration between remote parties to a bill, such as the acceptor and the payee: there need be none between the drawer and an indorsee when, either from acceptance being refused or the bill being dishonoured by the acceptor, recourse is had to the drawer.

Consideration and negotiable instruments.

Bills of Exchange Act, 1882.

Moreover it is possible that *A*, who has given no value for a bill, may recover from *X*, who has received no value, provided that some intermediate holder between *A* and *X* has given value for it. This is apparent if we look at the case of an 'accommodation bill.'

A is in need of £100, and his own credit is not perhaps good enough to enable him to borrow; but *M* is prepared to advance the money to him, if *X*, a friend of *A*, is willing to undertake the obligation to repay it (say) in three months' time. This arrangement is carried out by means of an 'accommodation bill.' *A* draws a bill for £100 upon *X* payable to himself or order three months after date. *X* accepts the bill, and thereby undertakes to pay the bill at maturity to the person who shall then be the holder of it. *A* negotiates the bill by indorsement to *M*, who gives him £100 for it, less a 'discount' for cash. *M*, who has given value, can sue *X*, the acceptor, who has received none [1]; but we may take the matter a stage further. *M*, who has given value, indorses the bill to *S*, who receives it as a present, giving no value for it. It would seem that, *once value is given*, any subsequent holder can sue the acceptor or any other party to the bill prior to the giving of value. And so *S*, who has given nothing, may sue *X*, who has received nothing.

Scott v Lifford, 1 Camp 246.

5 Exch 950.

An illustration is furnished by the case of *Milnes v. Dawson*, where the drawer of a bill of exchange indorsed it, without value, to the plaintiff; after having thus assigned his rights in the bill, though without consideration, he received scrip in satisfaction of the bill from the acceptor, the defendant.

'It would be altogether inconsistent with the negotiability of these instruments,' said Parke, B., 'to hold that after the indorser has transferred the property in the instrument, he may, by receiving the amount

[1] *A* will probably have induced *X* to become the acceptor of the bill by promising to provide him with funds to meet the bill when it falls due. But if he fails to do so, and *X* is called on to meet the bill out of his own pocket, he has in effect paid money to *M* at the request of *A*; and the law thereupon implies a promise by *A* to indemnify him therefor.

of it, affect the right of his indorsee. When the property is passed, the right to sue upon the bill follows also. A bill of exchange is a chattel, and the gift is complete by delivery coupled with intention to give.'

Original object of bills of exchange.

The rules of negotiability took their rise out of the custom of merchants, which assumed that the making of a bill or note was a business transaction. Value must be given at some time in the history of the instrument; but to insist that consideration should have passed between the holder and the party sued would have defeated the object for which such instruments came into existence.

For the object of a bill of exchange was to enable a merchant resident in one part of England to pay a creditor resident in another part of England, or abroad, without sending his debt in specie from one place to another. *A*, in London, owes £100 to *X* in Paris: *A* does not want to send gold or notes to France, and has no agent in Paris, or correspondent with whom he is in account, and through whom he can effect payment. But *M*, another merchant living in London, has a correspondent in Paris named *S*, who, according to the terms of business between them, will undertake to pay money on his account at his direction. *A* therefore asks *M*, in consideration of £100, more or less according to the rate of exchange between London and Paris, to give him an order upon the correspondent *S*. Thereupon *M* draws a bill upon *S* for the required sum, in favour of *A*. *A* indorses the bill, and sends it to his creditor *X*. *X* presents it for acceptance to *S*; if all goes well the bill is accepted by *S*, and in due time paid.

Sir M. Chalmers thus compares the original object, and the modern English use, of bills of exchange:—

Bills of Exchange, 8th ed. Introduction, p. lui.

'A bill of exchange in its origin, was an instrument by which a trade debt, due in one place, was transferred to another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit.'

Bill of lading.

Though lacking the traits of negotiability the instrument known as a 'bill of lading' should be noticed here.

See form, Appendix B.

A bill of lading may be regarded in three several aspects. (1) It is a receipt given by the master of a ship acknowledging that the goods specified in the bill have been put on board; (2) it is the document which contains the terms of the contract for the carriage of the goods agreed upon between the shipper of the goods and the shipowner (whose agent the master of the ship is); and (3) it is a 'document of title' to the goods, of which it is the symbol. It is by means of this document of title that the goods themselves may be dealt with by the owner of them while they are still on board ship and upon the high seas.

Three copies of the bill of lading are usually made, each signed by the master. One is kept by the consignor of the goods, one by the master of the ship, and one is forwarded to *X*, the consignee, who (in the normal case) on receipt of it acquires a property in the goods which can only be defeated by the exercise of the vendor's equitable right of stoppage *in transitu* [1].

What rights its assignment confers.

Lickbarrow v. Mason, 1 Sm. L. C 12th ed. 726

But if the consignee assigns a bill of lading by indorsement to a holder for value, that holder has a title to the goods which overrides the vendor's right of stoppage *in transitu*, and can claim them in spite of the insolvency of the consignee and the consequent loss of the price of his goods by the consignor.

By law merchant, proprietary rights,

His right, however, which in this respect is based upon the law merchant, is a right of property only. The assignment of the bill of lading gives a right to the goods. It did not at Common Law give any right to sue on the contract expressed in the bill of lading.

by 18 & 19 Vict. c. 111 contractual rights;

The Bills of Lading Act, 1855, confers this right. The assignment of a bill of lading thereby transfers to the assignee not only the property in the goods, but 'all rights of suit' and 'all liabilities in respect of the goods, as if the contract contained in the bill of lading had been made with himself.'

Sale of Goods Act, 1893, ss. 44-46.

[1] Stoppage *in transitu* is the right of the unpaid vendor, upon learning the insolvency of the buyer, to retake the goods before they reach the buyer's possession. For the history of this right the reader is referred to the judgment of Lord Abinger, C. B., in *Gibson v. Carruthers*, 8 M. & W. 339.

But a bill of lading differs from the negotiable instruments with which we have just been dealing.

Its assignment transfers rights *in rem*, rights to specific goods, and these are in a sense wider than those possessed by the assignor, because the assignee can defeat the right of stoppage *in transitu*; thus it differs from negotiable instruments, which only confer rights *in personam*.

but not independent of assignor's title.

Gurney v Behrend, 3 E. & B. at p 634

But though the assignee is relieved from one of the liabilities of the assignor, he does not acquire proprietary rights independently of his assignor's title: a bill of lading stolen, or transferred without the authority of the person really entitled, gives no rights even to a *bona fide* indorsee. And again, the contractual rights conferred by statute are expressly conferred subject to equities. A bill of lading then is a contract assignable without notice; it so far resembles conveyance, that it gives a title to property, but it cannot give a better title, whether proprietary or contractual, than is possessed by the assignor; subject always to this exception, that one who takes from an assignor with a good title is relieved from liability to the vendor's right of stoppage *in transitu* which might have been exercised against the original consignee.

§ 2. *Assignment of contractual rights and liabilities by operation of law.*

So far we have dealt with the voluntary assignment by parties to a contract of the benefits or the liabilities of the contract. But rules of law may also operate to transfer these rights or liabilities from one to another.

Assignment of interests in land.

If *A* by purchase or lease acquire an interest in land of *M*, upon terms which bind them by contractual obligations in respect of their several interests, the assignment by either party of his interest to *X* will, within certain limits, operate as a transfer to *X* of those obligations.

The subject of the assignment of obligations upon the transfer of interests in land is, however, in view of recent legislation on the law of property, best studied in the

special works on that branch of the law, and is accordingly omitted here.

Marriage.

Marriage, which once transferred to the husband conditionally the rights and liabilities of the wife, has little effect since the Act of 1882.

Representation.

Representation, in the case of death or bankruptcy, effects an assignment to the executors or administrators of the deceased, or to the trustee of the bankrupt, of his rights and liabilities; but the assignment is merely a means of continuing, for certain purposes, the legal existence of the deceased or the bankrupt. The assignees of the contract take no benefit by it, nor are they personally losers by the enforcement of it against them. They represent the original contracting party to the extent of his estate and no more.

(1) *Assignment of contractual obligation upon marriage.*

Married Women's Property Act, 1882, ss. 13, 14

The effect of marriage, in this respect, is that if the separate estate of the wife be insufficient to satisfy her antenuptial contracts the husband is liable to the extent of all property to which he shall have become entitled through his wife.

(2) *Assignment of contractual obligation by death.*

Rights of representatives.

The general rule is that the rights and liabilities under a contract, including rights of action for breach of contract, pass, on the death of a party to the contract, to his representatives.

Contracts dependent on personal skill or service.

Stubbs v. Holywell Ry. Co. L. R. 2 Exch. 311.

Baxter v. Burfield, 2 Str. 1266.

But performance of such contracts as depend upon the personal service or skill of the deceased cannot be demanded of his representatives, nor can they insist upon offering such performance, though they can sue for money earned by the deceased and unpaid at the time of his death. Contracts of personal service expire with either of the parties to them: an apprenticeship contract is terminated by the death of the master, and no claim to the services of the apprentice survives to the executor.

Nor can executors sue for a breach of contract which involves a purely personal loss. In *Chamberlain v. Williamson*, an executor sued for a breach of promise to marry the deceased. The promise had been broken and the right of action accrued in the lifetime of the testatrix. But the Court held that such an action could not be brought by representatives, since it was not certain that the breach of contract had resulted in damage to the estate. 'Although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered as an increase of the transmissible personal estate.'

2 M. & S. 408.

In *Finlay v. Chirney*, the converse proposition was laid down, and the Court held that no action would lie against the executors of a man who in his lifetime had broken a promise to marry. And in *Quirk v. Thomas* the opinion was expressed that even a claim for special damage alleged in a similar action to have been suffered by the plaintiff could not be entertained.

20 Q B D 494.

[1916] 1 K B 516

(3) *Assignment of contractual obligation by bankruptcy.*

Trustee's powers: their extent, and limits.

Bankruptcy is regulated by the Bankruptcy Act, 1914, which repealed and re-enacted with amendments and additions the existing statutes on the subject. Proceedings in Bankruptcy commence with the filing of a petition in a Court of Bankruptcy either by a creditor alleging acts of bankruptcy against the debtor or by the debtor himself alleging inability to pay his debts. Unless this petition prove unfounded, the Court makes a receiving order and appoints an official receiver who takes charge of the debtor's estate and summons a meeting of the creditors.

If the creditors decide not to accept a composition, but to make the debtor bankrupt, he is adjudged bankrupt and a trustee appointed.

To the trustee passes all the property of the bankrupt vested in him at the time of the act of bankruptcy or acquired by him before discharge, and the capacity for

taking proceedings in respect of such property; but all that we are concerned with in respect of the rights and liabilities of the trustee is to note that—

(i) Where any part of the property of a bankrupt consists of choses in action, they shall be deemed to have been duly assigned to the trustee:

(ii) He may, within twelve months of his appointment, disclaim, and so discharge, unprofitable contracts:

Drake v. Beckham, 11 M. & W 319

(iii) He is probably excluded from suing for 'personal injuries arising out of breaches of contract, such as contracts to cure or to marry,' even though 'a consequential damage to the personal estate follows upon the injury to the person.'

In re Wallis, [1902] 1 K B 719

But the trustee, as statutory assignee of the bankrupt's choses in action, is not in the same position as an ordinary assignee for value; he only takes subject to all equities existing in such choses in action at the date of the commencement of the bankruptcy. If therefore a chose in action has been assigned for value before the bankruptcy took place, and no notice of assignment given to the debtor, the trustee cannot acquire priority over the assignee by being the first to give notice.

PART IV

THE INTERPRETATION OF CONTRACT.

Interpretation of contract.

AFTER considering the elements necessary to the formation of a contract, and the operation of a contract as regards those who are primarily interested under it, and those to whom interests in it may be assigned, it seems that the next point to be treated is the mode in which a contract is dealt with when it comes before the Courts in litigation. In considering the interpretation of contract we require to know how its terms are proved; how far, when proved to exist in writing, they can be modified by evidence extrinsic to that which is written; and what rules are adopted for construing the meaning of the terms when fully before the Court.

In what the subject consists.

Rules relating (1) to evidence and (2) to construction.

The subject then divides itself into rules relating to evidence and rules relating to construction. Under the first head we have to consider the sources to which we may go for the purpose of ascertaining the expression by the parties of their common intention. Under the second we have to consider the rules which exist for construing that intention from expressions ascertained to have been used.

CHAPTER X

Rules Relating to Evidence

Provinces of Court and Jury.

If a dispute should arise as to the terms of a contract made by word of mouth, it is necessary in the first instance to ascertain what was said, and the circumstances under which the supposed contract was formed. These would be questions of fact to be determined by a jury. When a jury has found, as a matter of fact, what the parties said, and that they intended to enter into a contract, it is for the Court to say whether what they have said amounts to a contract, and, if so, what its effect may be. When a man is proved to have made a contract by word of mouth upon certain terms, he cannot be heard to allege that he did not mean what he said.

The same rule applies to contracts made in writing. When men have put into writing any part of their contract they cannot alter by parol evidence that which they have written. When they have put into writing the whole of their contract they cannot add to or vary it by parol evidence.

Why oral contracts need not be discussed.

Contracts wholly oral may be dismissed at once. For the proof of a contract made by word of mouth is a part of the general law of evidence; the question whether what was proved to have been said amounts to a valid contract must be answered by reference to the formation of contract: the interpretation of such a contract when proved to have been made may be dealt with presently under the head of rules of construction.

Three matters of inquiry.

All that we are concerned with here is to ascertain the circumstances under which extrinsic oral evidence is admissible in relation to written contracts and contracts under seal. Such evidence is of three kinds:—

1. Proof of existence of document;

(1) Evidence as to the fact that there is a document purporting to be a contract, or part of a contract.

2. Of fact of agreement;

(2) Evidence that the professed contract is in truth what it professes to be. It may lack some element necessary

to the formation of contract, or be subject to some parol condition upon which its existence as a contract depends.

(3) Evidence as to the terms of the contract. These may be incomplete, and may need to be supplemented by parol proof of the existence of other terms; or they may be ambiguous and then may be in like manner explained; or they may be affected by a usage the nature of which has to be proved. 3. Of terms of contract.

We are thus obliged to consider—

(1) evidence as to the existence of a document;

(2) evidence that the document is a contract;

(3) evidence as to its terms.

We must note that a difference, suggested some time back, between contracts under seal and simple contracts, is illustrated by the rules of evidence respecting them. A contract under seal derives its validity from the form in which it finds expression: therefore if the instrument is proved the contract is proved, unless it can be shown to have been executed under circumstances which preclude the formation of a contract, or to have been delivered under conditions which have remained unfulfilled, so that the deed is no more than an escrow. Difference between formal and simple contract. In the first the instrument is the contract,

But 'a written contract not under seal is not the contract itself, but only evidence, the record of the contract.' Even where statutory requirements for writing exist, as under the Statute of Frauds, the writing is no more than evidentiary of a previous or contemporaneous agreement. A written offer containing all the terms of the contract signed by *A* and accepted by performance on the part of *B*, is enough to enable *B* to sue *A* under that section. And where there is no such necessity for writing, it is optional to the parties to express their agreement by word of mouth, by action or by writing, or partly by one, and partly by another of these processes. Wake v Harrop, 6 H & N 775. In the second the writing is only evidence of the contract

It is always possible therefore that a simple contract may have to be sought for in the words and acts, as well as in the writing of the contracting parties. But in so far

as they have reduced their meaning to writing, they cannot adduce evidence in contradiction or alteration of it. 'They put on paper what is to bind them, and so make the written document conclusive evidence between them.'

Wake v. Harrop, 6 H. & N. 775.

§ 1. *Proof of document.*

Proof of contract under seal.

A contract under seal is proved by evidence of the signature, sealing and delivery. Formerly it was necessary to call one of the attesting witnesses where a contract under seal was attested, but now by statute this is no longer required save in those exceptional cases in which attestation is necessary to the *validity* of the deed. A warrant of attorney and a cognovit afford instances of instruments to which attestation is thus necessary.

28 & 29 Vict. c 18.

Of simple contract.

In proving a simple contract parol evidence is always necessary to show that the party sued is the party making the contract and is bound by it [1]. And oral evidence must of course supplement the writing where the writing only constitutes a part of the contract. For instance: *A B* in Oxford writes to *X* in London, 'I will give £50 for your horse; if you accept send it by next train to Oxford. (Signed) *A B*.' To prove the conclusion of the contract it would be necessary to prove the despatch of the horse. And so if *A* puts the terms of an agreement into a written offer which *X* accepts by word of mouth; or if, where no writing is necessary, he puts a part of the terms into writing and arranges the rest by parol with *X*, oral evidence must be given in both these cases to show that the contract was concluded upon those terms by the acceptance of *X*.

Supplementary oral evidence where contract written only in part,

Harris v. Rickett, 4 H. & N. 1

So too where a contract consists of several documents

[1] As a matter of practice, written contracts are commonly admitted by the parties, either upon the pleadings, or upon notice being given by one party to the other to admit such a document. Such admissions are regulated by Order xxxii of the Rules of the Supreme Court. Or one party may call upon the other to produce certain documents, and upon his failing to do so, and upon proof having been given of the notice to produce, the party calling for production may give secondary evidence of the contents of the document.

which need oral evidence to show their connexion, such evidence may be given to connect them. This rule needs some qualification as regards contracts of which the Statute of Frauds requires a written memorandum. The documents must in such a case contain a reference, in one or both, to the other, in order to admit parol evidence to explain the reference and so to connect them.

or where connexion of parts do not appear from documents.

Long v. Millar, 4 C P D. 456.

In contracts which are outside the Statute evidence would seem to be admissible to connect documents without any such internal reference. 'I see no reason,' said Brett, J., 'why parol evidence should not be admitted to show what documents were intended by the parties to form an alleged contract of insurance.'

Edwards v. Aberayron Mutual Insurance Society, 1 Q. B. D. 587.

There are circumstances, such as the loss or inaccessibility of the written contract, in which parol evidence of the contents of a document is allowed to be given, but these are a part of the general law of evidence, and the rules which govern the admissibility of such evidence are to be found in treatises on the subject.

§ 2. *Evidence as to fact of Agreement.*

Thus far we have dealt with the mode of bringing a document, purporting to be an agreement, or part of an agreement, before the Court. But extrinsic evidence is admissible to show that the document is not in fact a valid agreement.

It may be shown by such evidence that the contract was invalid for want of consideration, of capacity of one of the parties, of genuineness of consent, of legality of object. Extrinsic evidence is used here, not to alter the purport of the agreement, but to show that there never was such an agreement as the law would enforce.

It may also be shown by extrinsic evidence that a parol condition suspended the operation of the contract. Thus a deed may be shown to have been delivered subject to the happening of an event or the doing of an act. Until the event happens or the act is done the deed remains an

Evidence of condition suspending

operation of contract.

escrow, and the terms upon which it was delivered may be proved by oral or documentary evidence extrinsic to the sealed instrument.

In the case of a deed:

In like manner the parties to a written contract may

of a simple contract.

agree that, until the happening of a condition which is not put in writing, the contract is to remain inoperative.

Pym v. Campbell, 6 E. & B. 370.

Campbell agreed to purchase of the Messrs. Pym a part of the proceeds of an invention which they had made. They drew up and signed a memorandum of this agreement on the express verbal understanding that it should not bind them until the approval of one Abernethie had been expressed. Abernethie did not approve of the invention, and Campbell repudiated the contract. Pym contended that the agreement was binding, and that the verbal condition was an attempt to vary by parol the terms of a written contract. The Court held (and its decision has been affirmed in a later case) that evidence of the condition was admissible on the ground thus stated by Erle, J.:—

Pattle v. Hornibrook, [1897] 1 Ch. 25.

at p. 374

'The point made is, that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional: and if that had been so it would have been wrong. But I am of opinion that *the evidence showed that in fact there was never an agreement at all.* The parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is, that *evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.*'

§ 3. *Evidence as to the terms of the Contract.*

When we come to extrinsic evidence as affecting the terms of a contract, the admissibility of such evidence is

Evidence as to terms. General rule.

narrowed to a small compass; for 'according to the general law of England the written record of a contract must not be varied or added to by verbal evidence of what was the

intention of the parties.' This rule has of course no application to the case of a *subsequent* agreement between the parties varying the terms of the original contract.

Blackburn, J., in Burges v. Wickham, 3 B. & S. 696.

Infra, p. 330.

Arthur was lessee of a theatre and covenanted in the lease to pay the rent quarterly in advance. Before the lease was finally executed, the parties had agreed by parol that Arthur should pay each quarter by a three months bill, which he duly tendered but which was refused by the lessor. The lessor sued for the rent, which Arthur alleged that he had paid according to the parol agreement. The Court of Appeal said that the covenant meant payment in cash; that payment by bill was not payment in cash; and that therefore the parol agreement contradicted the terms of the lease and evidence of it could not be admitted.

Henderson v. Arthur, [1907] 1 K. B. 10.

We find exceptions to this rule—

Exceptions.

(*a*) where supplementary or collateral terms are admitted in evidence to complete a contract the rest of which is in writing;

(*b*) where explanation of terms in a contract is needed:

(*c*) where usages are introduced into a contract;

(*d*) where, in the case of mistake, special equitable remedies may be applicable.

Supplementary terms

(*a*) If the parties to a contract have not put all its terms into writing, evidence of the supplementary terms is admissible, not to vary but to complete the written contract.

Jervis v. Berridge, 8 Ch 351

Jervis agreed to assign to Berridge a contract for the purchase of lands from *M*. The assignment was to be made upon certain terms, and a memorandum of the bargain was made in writing, from which at the request of Berridge some of the terms were omitted. In fact the memorandum was only made in order to obtain a conveyance of the lands from *M*. When this was done and Berridge had been put in possession he refused to fulfil the omitted terms which were in favour of Jervis. On action being brought he resisted proof of them, contending

that the memorandum could not be added to by parol evidence. Lord Selborne, however, held that the memorandum was 'a mere piece of machinery obtained by the defendant *as subsidiary to and for the purposes of the verbal and only real agreement* under circumstances which would make the use of it, for any purpose inconsistent with that agreement, dishonest and fraudulent.'

Collateral terms.

Again, evidence may be given of a verbal agreement collateral to the contract proved. A term thus introduced into the written agreement must not be contrary to its tenor. A farmer executed a lease upon the promise of the lessor that the game upon the land should be killed down; he was held entitled to compensation for damage done to his crops by a breach of the verbal promise, though no reference to it appeared in the terms of the lease.

Mellish, L. J., in giving judgment said:—

Erskine v. Adeane, 8 Ch. at p. 766.

'No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself.'

Explanation of terms; to identify parties,

(*b*) Evidence in explanation of terms may be evidence of the identity of the parties to the contract, as where two persons have the same name, or where an agent contracts in his own name but on behalf of a principal whose name or whose existence he does not disclose.

Wake v. Harrop, 6 H. & N. 768.

or subject-matter,

Or it may be a description of the subject-matter of the contract. *A* agreed to buy of *X* certain wool which was described as 'your wool'; the right of *X* to bring evidence as to the quality and quantity of the wool was disputed. The Court held that the evidence was admissible.

Macdonald v. Longbottom, 1 E. & E. 977.

Or such evidence may be an explanation of some word not describing the subject-matter of the contract but the nature of the responsibility which one of the parties assumes in respect of the conditions of the contract.

Where a vessel is warranted 'seaworthy,' a house promised to be kept in 'tenantable' repair, a thing undertaken to be done in a 'reasonable' manner, evidence is admissible to show the application of these phrases to the subject-matter of the contract, so as to ascertain the intention of the parties.

to show application of phrases.

In *Burges v. Wickham*, a vessel called the Ganges, intended for river navigation upon the Indus, was sent upon the ocean voyage to India, temporarily strengthened so as to be fit to meet the perils of such a voyage. She was insured, and in every voyage policy of marine insurance there is an implied warranty by the assured that the vessel is 'seaworthy.' The Ganges was not seaworthy in the sense in which that term was usually applied to an ocean-going vessel, but the underwriters knew the nature of the vessel, and though the adventure necessarily was more dangerous than the voyage of an ordinary vessel, she was made as seaworthy as a vessel of her type could reasonably be made. The underwriters took the risk at a higher premium than usual, and in full knowledge of the facts. The Ganges was lost, and the owner sued the underwriters; they defended the action on the ground that the vessel was unseaworthy for the purpose of an ocean voyage, and they resisted the admission of evidence to show that, with reference to this particular vessel and voyage, 'seaworthiness' was understood in a modified sense. The evidence was held to be admissible on grounds stated very clearly by Blackburn, J.:—

3 B. & S. 669.

'It is always permitted to give extrinsic evidence to apply a written contract, and show what was the subject-matter to which it refers. When the stipulations in the contract are expressed in terms which are to be understood, as logicians say, not *simpliciter*, *sed secundum quid*, the extent and the obligation cast upon the party may vary greatly according to what the parol evidence shows the subject-matter to be; but this does not contradict or vary the contract. For example, in a demise of a house with a covenant to keep it in tenantable repair, it is legitimate to inquire whether the house be an old one in St. Giles's or a new palace in Grosvenor-square, for the purpose of ascertaining whether the tenant has complied with his covenant; for that which

at p. 698.

16 M. & W. 541. would be repair in a house of the one class is not so when applied to a house of the other (see *Payne v. Haine*).

'In these cases you legitimately inquire what is the subject-matter of the contract, and then the terms of the stipulation are to be understood, not *simpliciter*, but *secundum quid*. Now, according to the view already expressed, seaworthiness is a term relative to the nature of the adventure; it is to be understood, not *simpliciter*, but *secundum quid*.'

Latent and patent ambiguity.

Cases such as we have described are cases of *latent* ambiguity: and they must be carefully distinguished from *patent* ambiguities, where words are omitted, or contradict one another; for in such cases explanatory evidence is not admissible. Where a bill of exchange was expressed in words to be drawn for 'two hundred pounds' but in figures for '£245,' evidence was not admitted to show that the figures expressed the intention of the parties [1].

Saunderson v. Piper, 5 Bing. N. C. 425.

Usage.

(*c*) The usage of a trade or of a locality may be proved, and by such evidence a term may be annexed to a written contract, or a special meaning may be attached to some of its provisions.

Parol evidence of a usage which adds a term to a written contract is admissible on the principle that—

Hutton v. Warren, 1 M & W. 466.

'There is a presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.'

By way of illustration of a commercial usage we may take the warranty of seaworthiness which is always held to be included in a voyage policy of marine insurance, though not specially mentioned.

For a local usage we may take the right of a tenant quitting his farm at Candlemas or Christmas to reap corn sown in the preceding autumn, a right which the custom of the country annexed to his lease, though the lease was under seal and contained no such term.

Wigglesworth v. Dallison, 1 Sm. L. C. 12th ed. 613.

Parol evidence of usage to explain phrases in contracts,

[1] Note that now by the Bills of Exchange Act, 1882, s. 9 (2), where the words and the figures differ in a bill of exchange, the former are declared to prevail.

whether commercial, agricultural, or otherwise subject to known customs, is admissible on the principle that—

'Words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language.' Brown v. Byrne, 3 E. & B. 716.

Thus in the case of a charter-party in which the days allowed for unloading the ship are to commence running 'on arrival' at the ship's port of discharge, if by custom 'arrival' is understood to mean arriving at a particular spot in the port, evidence may be given to show what is commonly understood by 'arrival at' the port. Norden Steam Co. v. Dempsey, 1 C. P. D. 658.

And so where the lessee of a rabbit warren covenanted that he would leave 10,000 rabbits on the warren, parol evidence was admitted that, by local custom, 1000 meant 1200. Smith v. Wilson, 3 B. & Ad. 728.

Closely connected with the principle that usage may explain phrases is the admissibility of skilled evidence to explain terms of art or technical phrases when used in documents. Hills v. Evans, 31 L. J. Ch. 457.

But in order that a usage thus proved may enlarge or explain a contract it must satisfy two requirements. It must be reasonable and consistent with general rules of law, and it must not be inconsistent with the terms of the contract. For no usage can prevail against a rule of Common Law or Statute [1]; and it is always open to parties to exclude the usage either by express terms or by framing their contract so as to be repugnant to its operation. Thus in *Palgrave v. S.S. Turid* a charter-party provided that a vessel should deliver a cargo 'always afloat,' the cargo to be 'taken from alongside the vessel at charterers' risk and expense as customary.' The vessel could not lie 'always afloat' nearer than thirteen feet from the quay, and the custom of the port was to erect a wooden staging *Per* Erle, C. J., in Meyer v. Dresser, 16 C. B., N. S. 660. Conditions under which usage operates. [1922] 1 A. C. 397

[1] Nevertheless the usage of a society to compel its members to carry out contracts *avoided* by Statute may constitute a risk against which the person employed to make such contracts is indemnified by his employer, where both know of the usage. *Ante*, p. 25

over which the cargo was carried at the shipowner's expense and deposited on the quay some feet from the water's edge. In an action by the shipowner for the difference between the cost of discharging in this manner and the cost of delivery at the ship's rail, it was held that the custom was inconsistent with the express terms of the charter requiring the charterers to take delivery 'from alongside the vessel' at their own expense, and accordingly afforded no defence to the action.

A usage must in any case, it is clear, add something to the written contract, and in that sense does vary it. The true test whether it is inconsistent with, or repugnant to what is written is to be found by asking the question whether what is added by the usage 'is such as *if expressed in the contract* would make it insensible or inconsistent.'

Lord Campbell in Humfrey v. Dale, 7 E. & B. 275.

Proved mistake a ground for refusing specific performance.

(*d*) In the application of equitable remedies, and granting or refusal of specific performance, the rectification of documents or their cancellation, extrinsic evidence is more freely admitted.

Thus, though, as we have seen, a man is ordinarily bound by the terms of an offer unequivocally expressed, and accepted, evidence has been admitted to show that the offer was made by inadvertence and was not accepted in good faith. The case of *Webster v. Cecil* is here in point. *A* offered to *X* several plots of land for a round sum; immediately after he had despatched his offer he discovered that by a mistake in adding up the prices of the plots he had offered his land for a lower total sum than he intended. He informed *X* of the mistake without delay, but not before *X* had concluded the contract by acceptance. In resisting specific performance he was permitted to prove the circumstances under which his offer had been made.

30 Beav. 62.

Again, where a parol contract has been reduced to writing, or where a contract for a lease or sale of lands has been performed by the execution of a lease or conveyance, evidence may be admitted to show that a term of the contract is not the real agreement of the parties.

And this is done for two purposes and under two sets of circumstances.

Rectification of documents.

Where a contract has been reduced into writing, or a deed executed, in pursuance of a previous engagement, and the writing or deed, owing to mutual mistake, fails to express the intention of the parties, the Chancery Division will rectify the written instrument in accordance with their true intent. This may be done even though the parties can no longer be restored to the position which they occupied at the time when the contract was made, and even though the mistake has been embodied in a deed of conveyance. Should the original agreement be ambiguous in its terms, extrinsic, and, if necessary, parol evidence will be admitted to ascertain the true intent of the parties.

Earl Beauchamp v. Winn, L. R. 6 H. L. at p. 232.

Craddock v Hunt, [1923] 2 Ch 136. U.S.A. v. Motor Trucks, Ltd. [1924] A. C. 196.

But there must have been a genuine agreement: its terms must have been expressed under *mutual* mistake: and the oral evidence, if the only evidence, must be uncontradicted.

Murray v Parker, 19 Beav. 305. Mackenzie v Coulson, 8 Eq 375. Fowler v. Fowler, 4 D. & J. 250.

Where mistake is not mutual, extrinsic evidence has only been admitted in certain cases which appear to have been regarded as having something of the character of Fraud, and has been admitted for the purpose of offering to the party seeking to profit by the mistake an option of abiding by a corrected contract or having the contract annulled. Instances of such cases are *Garrard v. Frankel*, or *Paget v. Marshall*, cited in the chapter on Mistake. They are cases in which the offeree knows that an offer is made to him in terms which convey more than the offeror means to convey, and endeavours by a prompt acceptance to take advantage of the mistake.

See Pollock, 9th ed. 537–539.

Correction of mistake which is not mutual.

30 Beav. 445. 28 Ch. D. 255.

It would seem that, in such cases, these corrective powers are not used unless the parties can be placed in the same position as if the contract had not been made.

The Judicature Act reserves to the Chancery Division of the High Court a jurisdiction in 'all causes for the rectification or setting aside or cancellation of deeds or other written instruments.'

s. 34.

CHAPTER XI

Rules relating to Construction

§ 1. *General Rules.*

WE have so far considered the mode in which the terms of a contract are ascertained: we have now to deal shortly with the rules which govern the construction of those terms, premising that the construction of a contract is always a matter of law for the Court to determine.

(1) Words to be understood in their plain meaning

Mallan v May, 13 M & W 517

(1) Words are to be understood in their plain and literal meaning. This rule may lead to consequences which the parties did not contemplate, but it is followed, subject always to admissible evidence being adduced of a usage varying the usual meaning of the words.

(2) 'An agreement ought to receive that construction which will best effectuate the intention of the parties to be collected *from the whole of the agreement*'; 'greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent.'

Ford v Beech, 11 Q. B 866

(2) Subject to inference of intention from the whole document.

Rules (1) and (2) might seem to be in conflict, but they come substantially to this:—men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear. The Courts will not make an agreement for the parties, but will ascertain what their agreement was, if not by its general purport, then by the literal meaning of its words. Subsidiary to these main rules there are various others, all tending to the same end, the effecting of the intention of the parties so far as it can be discerned.

General purport of rules of construction.

Obvious mistakes in writing and grammar will be corrected by the Court.

The meaning of general words may be narrowed and

restrained by specific and particular descriptions of the subject-matter to which they are to apply. But this (the so-called *ejusdem generis* rule) is again only a canon of construction for the purpose of ascertaining what may be presumed to have been the meaning and intention of the parties to the contract. It is not a rule of law and is therefore subordinate to the parties' real intention and does not control it; and it will have no application if the parties, from a survey of the contract as a whole, can be shown to have intended a different interpretation to be given to the language which they have used.

Thorman v Dowgate S. S. Co., [1910] 1 K. B. 410.

Words susceptible of two meanings receive that which will make the instrument valid. Where a document was expressed to be given to the plaintiffs 'in consideration of your *being* in advance' to J. S., it was argued that this showed a past consideration; but the Court held that the words might mean a prospective advance, and be equivalent to 'in consideration of your *becoming* in advance,' or '*on condition* of your being in advance.'

Haigh v Brooks, 10 A. & E. 309

Words are construed most strongly against the party using them. The rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage.

Fowkes v. Manchester Assurance Association, 3 B. S. at p. 929.

§ 2. *Rules of Law and Equity as to Time and Penalties.*

Where a time was fixed for the performance of his undertaking by one of the parties to a contract, the common law held this to be 'of the essence of the contract.' If the condition as to time were not fulfilled, the other party might treat the contract as broken and discharged.

Stipulations as to time:

at common law:

Equity did not so regard condition as to time, but inquired whether the parties when they fixed a date meant anything more than to secure performance within a reasonable time. If this was found to be their intention the

in Equity:

contract was not held to be broken if the party who was bound as to time did perform, or was ready to perform, his contract within a reasonable time.

by Statute: s. 25. sub-s. 7.

The Judicature Act provides that stipulations as to time 'shall receive in all courts the same construction and effect as they would have heretofore received in equity.'

The effect of this enactment seems to be confined to such contracts as were dealt with in the Chancery Courts before the Judicature Acts; and to apply the rule to mercantile contracts has been held to be unreasonable. In contracts of this nature the general rule is (in the absence of agreement to the contrary) that stipulations as to time, *except as to time of payment*, are essential conditions.

Reuter v. Sala, 4 C. P. D. 249. Sale of Goods Act, s. 10.

Penalties.

Where the terms of a contract specify a sum payable for non-performance, it is a question of construction whether this sum is to be treated as a 'penalty,' or as 'liquidated damages.'

The distinction arises as follows.

Damages for breach of contract, as we shall see, are given by way of compensation for loss suffered by the party injured, and not by way of punishment of the party breaking it. But when the damages likely to result from a breach are uncertain, it is sometimes convenient that the parties should have 'liquidated' them, that is to say, reduced them to certainty for themselves, by specifying an agreed sum in the contract itself. If the sum specified is a 'genuine pre-estimate' of the probable damage, it is recoverable in the event of the breach provided for subsequently occurring, even though the loss actually arising from the breach may turn out to be greater or less than the parties anticipated. If, on the other hand, the sum was not a fair attempt to estimate the prospective loss, but was fixed *in terrorem*, that is to say, in order to prevent or penalize a breach, it is not recoverable, and the damages actually incurred must be assessed in the usual way. In construing the terms 'penalty' and 'liquidated damages'

Infra, p. 390.

Dunlop v. New Garage Co., [1915] A. C. 79.

a judge will not be bound by the phraseology of the parties; they may call the sum specified 'liquidated damages,' but if the judge finds it to be a penalty, it will be treated as such.

We find a good illustration of the rule in the clause commonly inserted in charter-parties: 'Penalty for non-performance of this agreement, estimated amount of freight.' Only the actual damage suffered can be recovered, irrespective of the amount of freight; and the clause has hence been described as a *brutum fulmen*. In one case the clause ran: 'Penalty for non-performance of this agreement, proved damages not exceeding estimated amount of freight.' It was held that, the clause being a penalty clause, the damage in fact suffered could be recovered, even though they actually exceeded the estimated amount of freight.

Godard v. Gray, L. R. 6 Q. B. 139, 148.

Watts v. Mitsui, [1917] A. C 227

A bond is in form a promise to pay a penal sum, generally on the non-performance of a covenant or agreement contained or recited in the bond. It may, however, take the form of a promise to pay a sum in compensation for damages arising from an act or acts specified in the bond. In the case of bonds or contracts containing provisions of this nature it has been laid down that 'the Court must look to all the circumstances of each contract—to what the parties did as well as to the language used—and must say from them what the intention of the parties was'; but the following rules may be stated.

Strickland v. Williams, [1899] 1 Q. B. 382.

Pye v. British Automobile Syndicate, [1906] 1 K. B. 425.

Webster v. Bosanquet, [1912] A. C. 394

(1) If a contract is for a matter of uncertain value, and a fixed sum is to be paid for the breach of one or more of its provisions, this sum may be recovered as liquidated damages. But the sum fixed must not be unreasonable or extravagant, having regard to all the circumstances of the case. If it is, it will be a penalty.

Dunlop v. New Garage Co., [1915] A. C. 79.

(2) If a contract is for a matter of certain value, and on breach of it a sum is to be paid in excess of that value, this is a penalty and not liquidated damages.

Astley v. Weldon, 2 B. & P. 346.

Kemble v. Farren, 6 Bing. 147.

(3) If a contract contains a number of terms, some of

certain and some of uncertain value, or some of great and some of trifling value, and a fixed sum is to be paid for the breach of any of them, there is a presumption that this is a penalty.

Dunlop v. New Garage Co., [1915] 79, 87.

An illustration of (1) is afforded by clauses in building contracts to pay a fixed sum weekly or *per diem* for delay; or, in the case of a tenant of a public-house, to pay to the landlord a fixed sum as penalty on conviction for a breach of the licensing laws.

Ward v Monaghan, 11 T. L. R 529.

An illustration of (2) is a promise to pay a larger sum if a smaller were not paid by a fixed day. The rule is harsh, for a man might suffer serious loss by the non-receipt of an expected payment: yet he can only recover the smaller sum.

On the other hand, it is no penalty to provide that if a debt is to be paid by instalments the entire balance of unpaid instalments is to fall due on default of any one payment, or that a deposit of purchase money should be forfeited on breach of any one of several stipulations, some important, some trifling.

Protector Loan Co. v Grice, 5 Q. B. D 592. Wallis v. Smith, 21 Ch. D. at p 257.

An illustration of (3) is offered by *Kemble v. Farren*. Farren agreed to act at Covent Garden Theatre for four consecutive seasons and to conform to all the regulations of the theatre; Kemble promised to pay him £3 6*s*. 8*d*. for every night during those seasons that the theatre should be open for performance, and to give him one benefit night in each season. For a breach of any term of this agreement by either party, the one in default promised to pay the other £1,000, and this sum was declared by the said parties to be 'liquidated and ascertained damages and not a penalty or penal sum or in the nature thereof.' Farren broke the contract, the jury put the damages at £750, and the Court refused to allow the entire sum of £1,000 to be recovered:—

6 Bing, 141.

'If, on the one hand, the plaintiff had neglected to make a single payment of £3 6*s*. 8*d*. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre,

at p. 148.

however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty appears to be a contradiction in terms.'

But these rules are no more than *presumptions* as to the intention of the parties; which may be rebutted by evidence of a contrary intention, appearing from a consideration of the contract as a whole.

Pye v. British Automobile Syndicate, [1906] 1 K B 425

PART V

DISCHARGE OF CONTRACT

Discharge of contract,

WE have now dealt with the elements which go to the formation of contract, with the operation of contract when formed, and with its interpretation when it comes into dispute. It remains to consider the modes in which the contractual tie may be loosed, and the parties wholly freed from their rights and liabilities under the contract. And in dealing with this part of the subject it will be proper to consider, not merely the mode in which the original contract may be discharged, but, in case of its being discharged by breach, the mode in which the right of action arising thereupon may be extinguished.

how effected.

The modes in which a contract may be discharged are these.

Agreement.

(1) It may be discharged by the same process which created it, by mutual agreement.

Performance.

(2) It may be performed; the duties undertaken by either party may be thereby fulfilled, and the rights satisfied.

Breach.

(3) It may be broken: upon this a new obligation connects the parties, a right of action possessed by the one against the other.

Impossibility.

(4) It may become impossible by reason of certain circumstances which are held to exonerate the parties from their respective obligations. As will be seen hereafter, this is really a particular example of (1)—discharge by agreement; but it is of so special a character that it is convenient to deal with it under a separate heading.

Operation of Law.

(5) It may be discharged by the operation of rules of law in certain sets of circumstances to be hereafter mentioned.

CHAPTER XII

Discharge of Contract by Agreement

CONTRACT rests on the agreement of the parties: as it is their agreement which binds them, so by their agreement they may be loosed.

Forms of discharge by agreement.

And this mode of discharge may occur in one of three forms: waiver; substituted agreement; condition subsequent.

§ 1. *Waiver, or Rescission.*

A contract may be discharged by agreement between the parties that it shall no longer bind them. This is a waiver, or rescission of the contract.

Waiver.

Such an agreement is formed of mutual promises, and the consideration for the promise of each party is the abandonment by the other of his rights under the contract. The rule, as often stated, that 'a simple contract may, before breach, be waived or discharged, without a deed and without consideration,' must be understood to mean that, where the contract is *executory*, no further consideration is needed for an agreement to rescind than the discharge of each party by the other from his liabilities.

There seems to be no authority for saying that a contract, executed upon one side, can be discharged before breach, without consideration; that where A has done all that he was bound to do and the time for X to perform his promise has not yet arrived, a bare waiver of his claim by A would be an effectual discharge to X.

Mere waiver of contractual rights invalid.

According to English law the right to performance of a contract can be abandoned only by release under seal, or for consideration. The plea of 'waiver' under the old system of pleading set up an agreement between the parties to waive a contract, an agreement consisting of mutual promises, the consideration for which is clearly the relinquishment of a right by each promisee. Discharge

Bullen and Leake, Prec. of Pleadings, Tit. Waiver; Rescission.

Ante, pp. 106–8.

by waiver, then, requires either a mutual abandonment of claims, or else a new consideration for the waiver.

Foster v. Dawler, 6 Exch. 851, *per* Parke, B

'It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. *But an executed contract cannot be discharged except by release under seal, or by performance of the obligation*, as by payment, where the obligation is to be performed by payment. But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts.'

Peculiarity of bills of exchange and promissory notes.

This last sentence deals with an exception to the principle just laid down, for it was a rule of the law merchant imported into the Common Law that the holder of a bill of exchange or promissory note might waive and discharge his rights. Such waiver needed no consideration, nor did it need to be expressed in any written form.

The Bills of Exchange Act, 1882, s. 62, has given statutory force to this rule of the law merchant, subject to the provision that the waiver must be in writing, or the bill delivered up to the acceptor.

§ 2. *Substituted Contract.*

Substituted contract may be an implied discharge;

A contract may be discharged by such an alteration in its terms as substitutes a new contract for the old one. The old contract may be expressly waived in the new one, or waiver may be implied by the introduction of new terms or new parties. This method of discharge is therefore a form of rescission with a new contract superadded.

Goss v. Lord Nugent, 5 B. & Ad *per* Lord Denman, C J, at p. 64 *Ante*, p. 314

'By the general rules of the common law, if there be a contract which has been reduced into writing, verbal 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; but after the agreement 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 agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.'

New terms substituted.

In *Morris v. Baron* a dispute had arisen out of a contract for the sale of cloth and an action had been begun. Before the case came on for trial the parties made a parol arrangement of which the chief terms were that the action and counterclaim were to be withdrawn, an extension of credit was to be given to the buyer for a sum admittedly due from him under the old contract, and as regards the balance of goods contracted for but undelivered there was to be substituted for a firm contract of sale an option for the buyer to take them if he pleased. The House of Lords held that in these circumstances it was impossible not to conclude that the parties had agreed to abrogate the old contract and substitute a new one for it. [1918] A. C. 1

Or new parties substituted.

Similarly the introduction of new parties may impliedly rescind an existing contract and substitute a new one for it.

If *A* has entered into a contract with *X* and *M*, and these two agree among themselves that *M* shall retire from the contract and cease to be liable upon it, *A* may (1) insist upon the continued liability of *M*, or (2) he may treat the contract as broken and discharged, or (3) by continuing to deal with *X* after he becomes aware of the retirement of *M* he may enter into a new contract to accept the sole liability of *X*; he cannot then hold *M* to the original contract.

Per Parke, B., Hart v Alexander, 2 M. & W. 484

'If one partner goes out of a firm and another comes in, the debts of the old firm may, by the consent of all the three parties—the creditor, the old firm, and the new firm—be transferred to the new firm,' and this consent may be implied by conduct, if not expressed in words or writing [1].

Form of discharge by agreement.

As regards the form needed for the expression of an agreement which purports to discharge an existing contract, there was a general rule that a contract must be discharged in the same form as that in which it was made.

[1] In the case of partnership these rules are substantially embodied in the Partnership Act, 1890, s. 17.

At common law a contract under seal could only be discharged by agreement expressed under seal: a parol contract may be discharged by parol.

(1) In case of contract under seal.

But while at common law parties to a deed could only discharge their obligations by deed, they might make a parol contract creating obligations separate from and at variance with the deed: giving a right of action to which the deed furnishes no answer: and affording, by performance, an equitable answer to an action on the deed.

Steeds v. Steeds, 22 Q. B. D. 537.

Since the Judicature Acts the rule of equity prevails, and an executed parol contract will discharge a deed.

(2) In case of parol contracts.

A parol or simple contract, whether it be in writing or no, may be discharged by writing or by word of mouth. The agreement of the parties is evidenced by the writing in which it is expressed. The *terms* of that agreement, once put in writing, may not be varied by unwritten words; but the agreement as a whole consists in the expressed intention of the parties, not in the writing which is the instrument of that expression; and this agreement may be discharged '*eo ligamine quo ligatum est*,' by a valid expression of the intention to put an end to it.

Even a contract required by statute to be evidenced by writing may be discharged by a subsequent verbal agreement, for s. 4 of the Statute of Frauds and s. 4 of the Sale of Goods Act merely make certain contracts unenforceable by action unless they are in writing, but nothing in either of these Statutes requires those same contracts to be dissolved by writing. In *Morris v. Baron* [1918] A. C. 1. the substituted contract was itself unenforceable because it did not comply with s. 4 of the Sale of Goods Act, but it operated none the less as a discharge of the old contract, and the buyer, who claimed damages for non-delivery of the goods alternatively under the original, and under the substituted, contract, was unable to succeed on either ground.

The intention to discharge must be clear:

But the intention to discharge the first contract must be clear, for it is possible that in the second arrangement into which the parties have entered they may merely

have intended to vary the terms of the original contract, and not to rescind it and substitute a wholly new contract for it. In that case the original contract, as varied, remains in full force and effect.

British & Benningtons Ltd., v. N.W. Cachar Tea Co Ltd., [1923] A. C. 48.

A undertook building operations for *X*, which were to be completed by a certain date, or a sum to be paid as compensation for delay. While the building was in progress an agreement was made between the parties for additional work, by which it became impossible that the whole of the operations should be concluded within the stipulated time.

not a mere variation of terms: Thornhill v. Neats, 8 C. B., N. S. 831.

Byles, J., pointed out that the original contract was not one which needed to be in writing, and might therefore be varied by parol; though not completely rescinded by the second agreement, it was altered so far as related to the sum stipulated to be paid for delay.

If however such a variation has been made by verbal agreement and the contract is one required by statute to be in writing, the variation cannot take effect, and this was what happened in the case of *Goss v. Lord Nugent.* 5 B. & A. 58.

By an agreement in writing the plaintiff had contracted to sell to the defendant several lots of land and to make a good title to them. It was afterwards discovered that a good title could not be made to one of the lots, and the defendant had verbally agreed to waive the title to that lot. The defendant later, relying on the defective title, refused to pay the purchase money, and it was held that the contract as varied could not be enforced since it was not wholly a contract in writing.

Whether there has been a mere variation of terms or a rescission will depend upon the facts of the particular case and is often not easy to determine; but the following test has been suggested by Lord Dunedin:

'In the first case [variation] there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second [rescission] you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the

Morris v. Baron, [1918] A. C. 1, 26.

same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.'

nor a mere postponement of performance.

The necessity of finding a clear indication of an intention to discharge the first contract is also illustrated in another class of cases. A mere postponement of performance, for the convenience of one of the parties, does not discharge the contract.

This question has often arisen in contracts for the sale and delivery of goods, where the delivery is to extend over some time. The purchaser requests a postponement of delivery, then refuses to accept the goods at all, and then alleges that the contract was discharged by the alteration of the time of performance; that a new contract was thereby created, and that the new contract is unenforceable for non-compliance with statutory requirements as to form.

Hickman v Haynes, L R 10 C. P. 606

But the Courts have always recognized 'the distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another,' and will not regard the latter as affecting the rights of the parties further than this, that if a man asks to have performance of his contract postponed, he does so at his own risk. For if the market value of the goods which he should have accepted at the earlier date has altered at the latter date, the rate of damages may be assessed, as against him, either at the time when the performance should have taken place, and when by non-performance the contract was broken, or when he ultimately exhausted the patience of the vendor, and definitely refused to perform the contract.

Levey & Co v Goldberg, [1922] 1 K B 688

Ogle v Earl Vane, L R. 2 Q. B. 275, & 3 Q. B. 272

§ 3. *Provisions for Discharge contained in the Contract itself.*

A contract may contain within itself the elements of its own discharge, in the form of provisions, express or implied, for its determination in certain circumstances.

These circumstances may be the non-fulfilment of a condition precedent; the occurrence of a condition subsequent; or the exercise of an option to determine the contract, reserved to one of the parties by its terms.

Discharge optional on non-fulfilment of a term.

The first of these three cases is somewhat near akin to discharge of contract by breach, a matter which is discussed hereafter. But there is a difference between a non-fulfilment contemplated by the parties, the occurrence of which they agree shall make the contract determinable at the option of one, and a breach, or non-fulfilment not contemplated or provided for by the parties.

Head v Tattersall, L R 7 Ex 7

Head bought a horse of Tattersall. The contract of sale contained, among others, these two terms: that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to its description the buyer should be at liberty to return it by the evening of a specified day. The horse did not answer to its description and had never been hunted with the Bicester hounds. It was returned by the day named, but had in the meantime been injured, though by no fault of Head. Tattersall disputed, but without success, Head's right to return the horse.

at p 14

'The effect of the contract,' said Cleasby, B., 'was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revest in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property revested, and he must therefore bear the loss.'

Occurrence of a specified event.

In the second case the parties introduce a provision that the fulfilment of a condition or the occurrence of an event shall discharge either one of them or both from further liabilities under the contract.

Condition of Bond.

Such a provision is called a 'condition subsequent'; it is well illustrated by a Bond, which is a promise subject to, or 'defeasible' upon, a condition expressed in the Bond.

Excepted risks of charter-party.

See form, Appendix A.

It may be further illustrated within certain limits by the 'excepted risks' of a charter-party. The ship-owner agrees with the charterer to make the voyage on the terms expressed in the contract, 'the act of God, the King's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatsoever nature or kind, during the said voyage, always excepted.' If while the contract is in course of performance the ship is sunk by a peril of the seas, the ship-owner commits no breach of contract by failing thereafter to carry out his contractual obligations; he is protected by the exception in the contract. In the above case the contract is obviously at an end and the parties are discharged; but the excepted peril may only partially affect performance or delay or hinder it, as if the ship should be laid up for a time for the purpose of repairs necessitated by bad weather. The ship-owner cannot be sued for damages caused by the delay, but the contract (unless the delay is so excessive as to frustrate the whole purpose of the adventure) is not discharged, and the ship-owner must continue to perform it as soon as the repairs are completed. The occurrence of an excepted peril does not therefore necessarily discharge the whole contract, though it may do so.

Infra, p. 377

Limitations of carrier's liability.

As an example of an implied provision providing for discharge in certain circumstances we may take the contract made by a common carrier. Such a carrier has a common law liability imposed on him arising from the nature of his business, and is said to warrant or insure the safe delivery of goods entrusted to him; and by this we mean that he promises to bring the goods safely to their destination or to indemnify the owner for their loss or injury, whether happening through his own default or not. But his promise is defeasible upon the occurrence of certain excepted risks,—the 'act of God,' the 'King's enemies,' and also injuries arising from defects inherent in the thing carried. This qualification is implied in every contract

made with a common carrier, and the occurrence of the risks exonerates him from liability for loss thereby incurred.

Lister v. Lancashire and Yorkshire Railway Co., [1903] 1 K. B 878

The 'act of God' is a phrase which needs explanation.

In *Nugent v. Smith* the defendant, a common carrier by sea, received from the plaintiff a mare to be carried from London to Aberdeen. In the course of the voyage the ship met with rough weather, and the mare, being much frightened and struggling violently, suffered injuries of which she died. No negligence was proved against the defendant.

1 C. P. D. 423.

Meaning of phrase 'act of God.'

It was argued that the weather, though rough, was not so violent or unusual as to be an 'act of God,' and that the struggling of the mare was not of itself enough to show that she was injured from her own inherent vice; but the Court of Appeal (reversing the decision of the Common Pleas) held that the defendant was not liable.

'The "act of God," said James, L. J., 'is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to have been expected of him. In this case the defendant has made this out.' at p 444

And Mellish, L. J., said, 'A carrier does not insure against acts of nature and does not insure against defects in the thing carried itself, but in order to make out a defence he must be able to prove that either cause taken separately or both taken together, formed the sole and direct and irresistible cause of the loss.' at p. 441.

A common carrier is therefore discharged where an excepted risk occurs, if he show that the loss could by no reasonable precaution in the circumstances have been prevented.

This exception from liability is a known and understood term in every contract which a common carrier makes. It may be called an implied term, but it would perhaps be more correct to say that it is a term which is annexed by law to a common carrier's contract. A term may however be implied in a contract, either because the written

contract would be meaningless without it, or because it is impossible without implying it to give full effect to the intention of the parties. We shall see hereafter that the cases where a contract is said to be discharged by reason of a subsequent impossibility not expressly provided against in the contract are really cases in which a term has been implied that in certain events the contract shall be regarded as discharged. This subject will be discussed under the head of Impossibility of Performance.

Discharge optional with notice.

Thirdly, a continuing contract may contain a provision making it determinable at the option of one of the parties upon certain terms. Such a provision is always implied in the ordinary contract of domestic service; the servant can terminate the contract by a month's notice, the master by a month's notice or the payment of a month's wages. Similar terms may be incorporated in other contracts between employer and employed, either expressly or by the usage of a trade; and even where the duration of a written contract is on the face of the instrument indefinite and unlimited, such a provision may sometimes be implied from the nature of the contract.

Nowlan v Ablett, 2 C. M & R 54

Parker v Ibbetson, 4 C B., N S 347

Crediton Gas Co. v. Crediton U.D C , [1928] 1 Ch. 447

CHAPTER XIII

Discharge of Contract by Performance

Kinds of performance;

WE must distinguish performance which discharges one of two parties from his liabilities under a contract, and performance which discharges the obligation in its entirety.

where promise is given for executed consideration;

Where a promise is given upon an executed consideration, the performance of his promise by the promisor discharges the contract: all has been done on both sides that could be required to be done under the contract.

where promise is given for promise.

Where one promise is given in consideration of another, performance by one party does no more than discharge him who has performed his part. Each must have done his part in order that performance may be a *solutio obligationis*, and so if one has done his part and not the other, the contract is still in existence and may be discharged in any one of the ways we have mentioned.

Whether the alleged performance is a discharge to the party concerned must be a question to be answered, first by ascertaining the *construction* of the contract, so as to see what the parties meant by performance, and then by ascertaining the facts, so as to see whether that which has been done corresponds to that which was promised. But two sorts of Performance should be briefly noticed: these are Payment and Tender.

§ 1. *Payment.*

Payment as a mode of discharge,

Payment may be a discharge of the original contract between the parties, or of an agreement substituted for such contract.

of original contract,

If in a contract between A and X the liability of X consists in the payment of a sum of money in a certain way or at a certain time, such a payment discharges X by the performance of his agreement.

of substituted contract,

Or if X, being liable to perform various acts under his contract, wishes instead to pay a sum of money, or, having to pay a sum of money, wishes to pay it in a manner at variance with the terms of the contract, he must agree with A to accept the proposed payment in lieu of that to which he may have been entitled under the original contract. The new contract discharges the old one, and payment is a performance of X's duties under the new contract, and, for him, a consequent discharge.

of liability arising from breach of contract.

Again, where one of two parties has made default in the performance of his part of the contract, so that a right of action accrues to the other, the obligation thus formed may be discharged by 'accord and satisfaction,' an agreement the consideration for which is usually (but not necessarily) a money payment, made by the party against whom the right exists, and accepted in discharge of his right by the other.

Infra, p. 397.

Payment is performance.

Payment, then, may be performance (1) of an original contract, or (2) of a substituted contract, or (3) of a contract in which payment is the consideration for the renunciation of a right of action.

Negotiable instrument as payment;

A negotiable instrument may be given in payment of a sum due, whether as the performance of a contract or in satisfaction for the breach of it; and the giving of such an instrument in payment of a liquidated or unliquidated claim is the substitution of a new agreement for the old one; but it may effect the relations of the parties in either one of two different ways. The giver of the instrument may be discharged from his previous obligation either absolutely or conditionally.

may be an absolute,

A may take the bill or note, and promise, in consideration of it, expressly or impliedly to discharge X altogether from his existing liabilities. In such a case he relies upon his rights conferred by the instrument, and, if it be dishonoured, must sue on it, and cannot revert to the original cause of action. But the presumption, where a negotiable

Sard v. Rhodes, 1 M. & W. 153.

instrument is taken in lieu of a money payment, is, that the parties intended it to be a conditional discharge only. Their position then is this: A, having certain rights against X, has agreed to take a negotiable instrument instead of immediate payment or immediate enforcement of his right of action; so far X has satisfied A's claim. But if the bill be dishonoured at maturity, the consideration for A's promise has wholly failed and his original rights are restored to him. The agreement is 'defeasible upon condition subsequent'; the payment by X which is the consideration for the promise by A is not absolute, but may turn out to be, in fact, no payment at all.

Re Romer & Haslam, [1893] 2 Q. B. *per* Lord Esher, M. R., at p. 296.

or conditional discharge.

Sayer v. Wagstaff, 5 Beav. 423.

Payment then consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring the right to receive money; and in this last event the payee may have taken the instrument in discharge of his right absolutely, or subject to a condition (which will be presumed in the absence of evidence to the contrary) that, if payment be not made when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract or rights to satisfaction for the breach of one.

Robinson v Read, 9 B & C. at p. 455.

Sayer v. Wagstaff, 5 Beav 423.

§ 2. *Tender.*

Tender is attempted Performance; and the word is applied to attempted performance of two kinds, dissimilar in their results. It is applied to a performance of a promise to do something, and of a promise to pay something. In each case the performance is frustrated by the act of the party for whose benefit it is to take place.

Tender is of two kinds.

Where in a contract for the sale of goods the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.

Tender of goods.

Startup v. Macdonald, 6 M. & [illegible] 593.

56 & 57 Vict. c. 71, s. 37.

Tender of payment.

But where the performance due consists in the payment of a sum of money, a tender by the debtor, although it may form a good defence to an action by the creditor, does not constitute a discharge of the debt.

Walton v. Mascall, 13 M. & W. 458.

The debtor is bound in the first instance 'to find out the creditor and pay him the debt when due': if the creditor will not take payment when tendered, the debtor must nevertheless continue always ready and willing to pay the debt. Then, when he is sued upon it, he can plead that he tendered it, but he must also pay the money into Court.

Dixon v Clarke, 5 C. B. 377.

If he proves his plea, the plaintiff gets nothing but the money which was originally tendered to him, while the defendant gets judgment for his costs of defence, and so is placed in as good a position as he held at the time of the tender.

Tender, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place, and mode of payment. And the tender must be an offer of money produced and accessible to the creditor, not necessarily of the exact sum, but of such a sum as that the creditor can take exactly what is due without being called upon to give change [1].

Finch v Brook, 1 Bing, N C 253

[1] The statutes which define legal tender are these: The Bank of England Act, 1833, s. 6, and the Currency and Bank Notes Act, 1928, which enact that Bank of England notes, including notes for £1 and 10*s*., are legal tender, even by the Bank itself; and the Coinage Act, 1870, s. 4, which enacts that the coinage of the Mint shall be legal tender as follows:—gold coins, to any amount; silver coins, up to forty shillings; bronze coins, up to one shilling.

CHAPTER XIV

Discharge of Contract by Breach

§ 1. *Meaning of Discharge by Breach.*

Breach of contract

If one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise, a right of action conferred upon the party injured by the breach. Besides this, there are circumstances in which the breach not only gives rise to a cause of action but will also *discharge* the injured party from such performance as may still be due from him.

Its result.

Breach always gives right of action, not always a discharge.

Thus, though every breach of the contractual obligation confers a right of action upon the injured party, it is not every breach that will discharge him from doing what he has undertaken to do under the contract. The contract may be broken wholly or in part; and if in part, the breach may or may not be sufficiently important to operate as a discharge; or, if it be so, the injured party may choose not to regard it as a breach, but may continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained. It is often very difficult to ascertain whether or no a breach of one of the terms of a contract discharges the party who suffers by it.

By *discharge* we must understand, not merely the right to bring an action upon the contract because the other party has not fulfilled its terms (the contract still being in existence), but the right to consider oneself exonerated from any further performance under the contract,—the right to treat the legal relations arising from the contract itself as having come wholly to an end.

We have therefore to ask, what are the circumstances which give rise to these rights and liabilities? What is the nature of the breach which amounts to a discharge?

§ 2. *Forms of Discharge by Breach.*

Modes in which those rights may arise.

A contract may be wholly discharged by breach in any one of three ways: one party to the contract (1) may renounce his liabilities under it, (2) may by his own act make it impossible that he should fulfil them, (3) may totally or substantially fail to perform what he has promised. And it is discharged because in each of the three cases he has repudiated his contractual obligations. In the first case, he has expressly repudiated them; in the second, he has repudiated them by conduct; in the third, he has repudiated them by a total or substantial failure to perform them, and not the less because his failure may not have been wilful or deliberate.

Of these forms of breach the first two may take place not only in the course of performance but also while the contract is still wholly executory, i.e. before either party is entitled to demand a performance by the other of his promise. The last can, of course, only take place at or during the time for the performance of the contract.

(1) *Discharge by renunciation.*

Renunciation before performance is due

This may take place either before performance is due or during performance itself.

(*a*) The parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due.

Michael v. Hart, [1902] 1 K. B. *per* Collins, M. R., at p. 490.

The renunciation of a contract by one of the parties before the time for performance has come, does not of itself put an end to the contract, for there must be two parties to a rescission, but it discharges the other, if he so choose, and entitles him at once to sue for a breach. A contract is a contract from the time it is made, and not from the time that performance of it is due.

2 E. & B. 678.

Hochster v. Delatour is the leading case upon this subject. *A* engaged *X* upon the 12th of April to enter

into his service as courier and to accompany him upon a tour; the employment was to commence on the first of June, 1851. On the 11th of May *A* wrote to *X* to inform him that he should not require his services. *X* at once brought an action, although the time for performance had not arrived. The Court held that he was entitled to do so.

Frost v. Knight, L. R. 7 Ex. 114. is a discharge even if performance be contingent.

The sense of the rule is very clearly stated by Cockburn, C. J., in a case which goes somewhat further than *Hochster v. Delatour*. In that case a time was fixed for performance, and before it arrived the defendant renounced the contract; but in *Frost v. Knight* performance was contingent upon an event which might not happen within the lifetime of the parties.

A promised to marry *X* upon his father's death, and during his father's lifetime renounced the contract; *X* was held entitled to sue upon the ground explained above. 'The promisee,' said Cockburn, C. J., 'has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. *In the meantime he has a right to have the contract kept open as a subsisting and effective contract.* Its unimpaired and unimpeached efficacy may be essential to his interests.'

L. R. 7 Ex. at p. 114.

There are two limitations to this rule.

But must go to the whole performance, Mersey Steel and Iron Co. v. Naylor, 9 App. Ca. p. 442. Rhymney Railway Co. v. Brecon Railway Co., [1900] 69 L. J. Ch. 813.

The first is that the renunciation must deal with the entire performance to which the contract binds the promisor. It is possible that the promisor might announce his intention of breaking so much, or so vital a part, of the contract as to entitle the promisee to treat his act as amounting in effect to a complete renunciation. But there is no case in which a partial renunciation has been treated as a breach by anticipation conferring an immediate right of action.

The second is that if the promisee refuses to accept the renunciation, and continues to insist (as he has a right to do) on the performance of the promise, the contract remains in existence for the benefit and at the risk of both parties, and if anything occur subsequently to discharge

and must be treated as a discharge.

it from other causes, the promisor, whose renunciation has been refused, may neverthless take advantage of such discharge.

5 E. & B. 714.

Thus in *Avery v. Bowden*, *A* agreed with *X* by charter-party that his ship should sail to Odessa, and there take a cargo from *X*'s agent, which was to be loaded within a certain number of days. The vessel reached Odessa, and her master demanded a cargo, but *X*'s agent refused to supply one. Although the days within which *A* was entitled to load the cargo had not expired, his agent, the master of the ship, might have treated this refusal as a repudiation of the contract and sailed away. *A* would then have had a right to sue at once upon the contract. But the master of the ship continued to demand a cargo, and before the running days were out—before therefore a breach by non-performance had occurred—a war broke out between England and Russia, and the performance of the contract became legally impossible. Afterwards *A* sued for breach of the charter-party, but it was held that as there had been no actual failure of performance before the war broke out (for the running days had not then expired), and *as the agent had not accepted the renunciation*, *X* was entitled to take advantage of the discharge of the contract brought about by the declaration of war.

Renunciation during performance.

(*b*) If during the performance of a contract one of the parties by word or act definitely refuses to continue to perform his part, the other party is forthwith exonerated from any further performance of his promise, and is at once entitled to bring his action.

17 Q. B. 127.

In *Cort v. The Ambergate Railway Company*, Cort contracted with the defendant Company to supply them with 3,900 tons of railway chairs at a certain price, to be delivered in certain quantities at specified dates. After 1,787 tons had been delivered, the Company desired Cort to deliver no more, as they would not be wanted. He brought an action upon the contract, averring readiness and willingness to perform his part, and that he had been

prevented from doing so by the Company. He obtained a verdict, and when the Company moved for a new trial on the ground that Cort should have proved not merely readiness and willingness to deliver, but an actual delivery, the Court held that where a contract was renounced by one of the parties, the other need only show that he was willing to have performed his part.

'When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract.' at p. 148.

So, too, in *General Bill-posting Co. v. Atkinson*, the defendant contracted to serve the Company and not to compete with them for a certain period after the termination of his engagement. The House of Lords held that he was no longer bound by his covenant not to compete, when the Company had repudiated the contract on their side by wrongfully dismissing him without notice. [1909] A C 118

(2) *Discharge by reason of impossibility created by the act of one party to the contract.*

Here also the impossibility may be created either before performance is due or in the course of performance.

(*a*) If *A*, before the time for performance arrives, makes it impossible that he should perform his promise, the effect is the same as though he had renounced the contract. Impossibility created before performance.

A promised to assign to *X*, within seven years from the date of the promise, all his interest in a lease. Before the end of seven years *A* assigned his whole interest to another person. It was held that *X* need not wait until the end of seven years to bring his action:— Lovelock v Franklyn, 8 Q B. 371.

'The plaintiff has a right to say to the defendant, You have placed yourself in a situation in which you cannot perform what you have promised; you promised to be ready during the period of seven years,

and during that period I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but if I now were to tender you the money, you would not be ready; this is a breach of the contract.'

Omnium d'Entreprises v. Sutherland, [1919] 1 K. B. 618.

A chartered a ship to *X*, the ship to be placed at *X*'s disposal as soon as she was released from the Government service in which she was at the time engaged. Before her release *A* sold her to another person. It was held that as he had put it out of his power to perform thereafter his contract with *X*, the contract was at an end and *X* might bring an action for damages forthwith. It was argued that *A* might have bought the ship back in time to place her at *X*'s disposal, but this was regarded as too speculative a possibility to take into account [1].

Impossibility created during performance.

(*b*) The rule of law is similar in cases where one party during performance has by his own act made the complete performance of the contract impossible.

O'Neil v. Armstrong, [1895] 2 Q. B. 418.

An Englishman was engaged by the captain of a warship owned by the Japanese Government to act as fireman on a voyage from the Tyne to Yokohama. In the course of the voyage the Japanese Government declared war with China, and the Englishman was informed that a performance of the contract would bring him under the penalties of the Foreign Enlistment Act. It was held that he was entitled to leave the ship and sue for the wages agreed upon, since the act of the Japanese Government had made his performance of the contract legally impossible.

[1905] A. C. 109.

The later case of *Ogdens Ltd. v. Nelson* is a further authority for the proposition that where there is an express promise to do a certain thing for a certain time, the promisor, if he puts it out of his power to continue performance of his promise, is immediately liable to an action for loss sustained.

[1926] A. C. 108, *ante*, p. 277.

[1] It may be noted that in this case the buyer of the ship had no notice of the charter-party at the time of the sale. If there had been notice it would seem that the plaintiff might have enforced the charter-party against the buyer on the principle of the *Strathcona* Case.

(3) *Discharge by failure of performance.*

Breach may discharge,

When one party to a contract declares that he will not perform his part, or so acts as to make it impossible for him to do so, he thereby releases the other from the contract and its obligations. One of two parties is not required to tender performance when the other has by act or word indicated that he will not or cannot accept it, or will not or cannot do that in return for which the performance was promised.

or only give right of action.

But one of the parties may claim that though he has broken his promise wholly or in part the contract is not thereby brought to an end nor the other party discharged from his liabilities. We have then to ascertain whether the promise of the party injured was given conditionally on the performance by the other of that in which he has made default. If it was, he is discharged from his promise: if it was not, he must perform his promise, and bring an action for the damage occasioned by the default of the other.

Independent and conditional promises.

Herein lies the difference between promises that are independent of one another and promises that are interdependent, that is, so intimately connected with one another that the performance of one is *conditional* upon the performance of the other.

We shall find that the discharge of contract by failure of performance involves questions of three sorts.

Concurrent conditions.

(*a*) If *A* and *X* agree that the performance of their respective promises shall be simultaneous, or at least that each shall be ready and willing to perform his promise at the same time, then the performance of each promise is conditional on this concurrence of readiness and willingness to perform; the conditions are *concurrent*. Thus in a sale of goods where no time is fixed for payment, the buyer must be ready to pay and the seller ready to deliver at one and the same time. The promises are interdependent and conditional upon each other, so that if *A* fails

to deliver, X may not only sue for damages but may also refuse to pay.

Discharge by virtual failure of consideration.

(*b*) A contract may contain a promise which is divisible, in the sense that it is a promise to do a number of successive acts. It is thus capable not only of complete performance, but of performance in part to a greater or less degree. A failure by X to perform any part would give a right of action to A; but it would not necessarily discharge A from the performance of his own obligations under the contract. We have to inquire therefore what degree of failure by X will entitle A to say that the consideration for which he made his promise has in effect wholly failed and that he will not, and is not bound to, perform that which he had undertaken to perform.

Conditions[1] and Warranties.

(*c*) A contract may be made up of several terms of varying importance; and it is then necessary to inquire which, if any, is considered by the parties as vital to the contract. In other words, we must ascertain, as a matter of construction, whether the term that has been broken is to be regarded as a 'Condition' or as a 'Warranty.'

We may now discuss these three matters in greater detail.

(*a*) *Independent promises and Conditional promises.*

The contrast here is between promises wholly independent of one another and promises in the nature of *concurrent conditions*; the performance of each of which is conditional on the simultaneous performance of the other.

[1] Where A's promise is conditional on the prior performance by X of his part of the contract, X's promise is often called a 'condition *precedent*'; but to avoid confusion in the student's mind, we may speak of it as a 'condition' simply; that is, a vital term in a contract, the breach of which discharges the contract, as opposed to a 'warranty,' the breach of which only gives rise to an action for damages. For there is another kind of condition precedent, as when A promises X that he will do or pay something on the happening of a certain event, possibly beyond the control of the parties altogether. Until the event happens, the operation of the contract is *suspended*. The opposite of this kind of condition precedent is a 'condition subsequent,' as when two parties agree that the promise of one is to be defeasible, or *liable to be annulled*, on the happening of a certain event; but that until the event happens the promise shall be binding.

Ante, p. 335.

An independent or absolute promise means a promise made by *A* to *X* in consideration of a promise made by *X* to *A*, and in such a manner that the total failure in the performance of one promise does not discharge the promisor. He must perform or tender performance of his promise and bring an action for such loss as he has sustained by the breach of the promise made to him.

Thus where a separation deed contained amongst other terms covenants that the husband should pay an annuity to a trustee for the wife and that the wife should not molest the husband, it was held by the Court of Appeal that a breach of the wife's covenant not to molest was not an answer to an action against the husband for non-payment of the annuity. The two covenants were absolute and independent. If it had been intended that the husband should only pay the annuity so long as the wife did not molest him, it would have been easy to say so.

Fearon v Earl of Aylesford, 14 Q B D 792.

Modern decisions incline against the construction of promises as independent of one another. Where a time is definitely fixed for the performance of one promise and no date assigned for the performance by the other—if *A* and *X* agree that *A* will buy *X*'s property and pay for it on a certain day and no day is fixed for the conveyance by *X*—then *X* may bring his action in default of payment on the day named, and need not aver that he has conveyed or offered to convey the lands. But, generally, it is safe to say that, in the absence of clear indications to the contrary, promises, each of which forms the *whole* consideration for the other, will be held to be concurrent conditions—the antithesis of absolute or independent promises.

Tendency of modern decisions.

Mattock v. Kinglake, 10 A. & E. 50.

Kidner v. Stimpson, 35 T. L. R. 63.

In the contract for the sale of goods, the rule of Common Law, now embodied in the Sale of Goods Act, was that, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions.

Concurrent conditions.

56 & 57 Vict. c. 71. s 28.

Morton agreed to buy a certain quantity of corn from Lamb at a fixed price, the corn to be delivered in one

Morton v. Lamb, 7 T. R. 125.

month. It was not delivered and Morton sued for damages, alleging that he had been always ready and willing to *receive* the corn. But the Court held that this was not enough to make a cause of action. He should have alleged that he was always ready and willing to *pay* for the corn; he might, for aught that appeared on the pleadings, have discharged the defendant by his non-readiness to pay.

4 B. & C. 941. Thus Bayley, J., in *Bloxham v. Sanders*, says:—

at p. 948. 'Where goods are sold, and nothing is said as to the time of the delivery or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, *and the seller is liable to deliver them whenever they are demanded upon payment of the price*; but the buyer has no right to have possession of the goods *till he pays the price*.'

(*b*) *Divisible promises: what degree of failure of performance discharges the contract?*

Divisible promises. We now come to cases in which it is alleged by one party to a contract that he is discharged from the performance of his part by the fact that the other party has failed to do his, either wholly or to such an extent as to defeat the objects for which the contract was made.

It is plain that a total failure by *A* to do that which was the entire consideration for the promise of *X*, and which should have been done before the performance of *X*'s promise fell due, will exonerate *X*. But it may be that *A* has done something, though not all that he promised; or the performance of a contract may extend over a considerable time during which something has to be done by both parties, as in the case of delivery of goods and payment of their price by instalments. Here we deal with questions of degree. Has one party so far made default that the consideration for which the other gave his promise has in effect wholly failed?

Delivery and payment by instalments. The best illustrations of divisible promises are to be found in contracts to receive and pay for goods by instalments. Where these are numerous, and extend over a

long time, a default either of delivery or payment does not necessarily discharge the contract, though it must of course in every case give rise to an action for damages.

In *Simpson v. Crippin* it was agreed that 6,000 to 8,000 tons of coal should be delivered in twelve monthly instalments, the buyer to send waggons to receive them: the buyer sent waggons for only 158 tons in the first month, but the seller was not held entitled to rescind the contract. Failure to accept: L R 8 Q B. 14.

In *Freeth v. Burr* there was a failure to pay for one instalment of several deliveries of iron, under an erroneous impression on the part of the buyer that he was entitled to withhold payment as a set-off against damages for non-delivery of an earlier instalment. In the *Mersey Steel and Iron Co. v. Naylor* there was a similar failure to pay for an instalment, under an impression that, the appellant company having gone into liquidation, there was no one to whom payment could safely be made when the instalment fell due. In neither case was the seller held entitled to repudiate the contract by reason of the default L. R. 9 C. P. 208. failure to pay. 9 App. Ca. 434

On the other hand, where iron was to be delivered in four monthly instalments of about 150 tons each, a failure to deliver more than 21 tons in the first month was held to discharge the buyer. failure to deliver Hoare v. Rennie, 5 H. & N. 19.

Again, where 2,000 tons of iron were to be delivered in three monthly instalments, failure to accept any during the first month discharged the seller. Honck v. Muller, 7 Q. B. D. 92

But the question of degree may appear in other forms. In a charter-party containing a promise to load a *complete* cargo the contract is not necessarily discharged because the cargo loaded is not complete. Incomplete performance. Ritchie v. Atkinson, 10 East 308

Again, a term in a charter-party that a ship should arrive at a certain place at a certain day, or should use all due diligence to arrive as soon as possible, is one which admits of greater or less failure in performance, and according to the circumstances such failure may or may not discharge the charterer. Freeman v. Taylor, 8 Bing. 124

The question to be answered in all these cases is one

Questions to be solved

of fact; the answer must depend on the terms of the contract and the circumstances of each case. The question assumes one of two forms—does the failure of performance amount in effect to a renunciation on his part who makes default? does it go so far to the root of the contract as to entitle the other to say, 'I have lost all that I cared to obtain under this contract; further performance cannot make good the past default'?

Withers v Reynolds, 2 B. & A 882.

Bloomer v. Bernstein, L R 9 C P 588.

The answer to the question may be provided by the parties themselves. The party who makes the default may so act as to leave no doubt that he will not or cannot carry out the contract according to its terms.

Cutter v. Powell, 6 T R. 320

Or again, the parties may expressly agree that though the promises on both sides are in their nature divisible, nothing shall be paid on one side until after entire performance has taken place on the other. In such case the Courts are relieved of the task of interpretation.

But if the parties have not provided an answer, we come back to the question of fact; was the breach so substantial as to go to the root of the whole contract? or, at any rate, was it such that an intention to repudiate the contract may be inferred from it? The rule was stated

100 L T 128

very clearly by Bigham, J., in *Millar's Karri Co. v. Weddel*, a case of a contract to deliver by instalments:—

> 'If the breach is of such a kind or takes place in such circumstances *as reasonably to lead to the inference* that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If for instance a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what will happen; he can at once cancel the contract and rid himself of the difficulty.'

Ridgway v. Hungerford Market Co. 3 Ad & E. 171.

If the breach of a contract by one party has been such as to entitle the other to treat the contract as discharged, it does not matter that the other in electing to do so pur-

ports to do so on an insufficient ground. So if a man were to dismiss his servant for some reason which would not justify the dismissal, and were afterwards to discover that the servant had been guilty of theft or drunkenness, he might rely on this as a justification if the servant should bring an action against him for wrongful dismissal.

British & Benning-ton's v. N W Cachar Tea Co. [1923] A C *per* Lord Sumner, at p 70.

(c) *Conditions and Warranties.*

We have now dealt with promises which admit of more or less complete performance; when default is made on one side, the Courts must determine whether or no that default amounts to a renunciation of the contract by the party making it, or so frustrates the objects of the contract as to discharge the party injured from his liabilities.

But contracts are often made up of various statements and promises on both sides, differing in character and in importance; the parties may regard some of these as vital, others as subsidiary, or collateral, to the main purpose of the contract. Where one of these is broken the Court must discover, from the tenour of the contract or the expressed intention of the parties, whether the broken term was vital or not. This is always a matter for the Court to determine, and is not a question of fact for the jury.

If the parties regarded the term as essential, it is a Condition: its failure discharges the contract. If they did not regard it as essential, it is a Warranty: its failure can only give rise to an action for such damages as have been sustained by the failure of that particular term.

Warranty and Condition alike are parts, and only parts, of a contract consisting in various terms.

Vital statement.

Bearing in mind that a Condition may assume the form either of a promise that a thing *is* or of a promise that a thing *will be*, we find a good illustration of the former in *Behn v. Burness*, where a ship was stated in the contract of charter-party to be 'now in the port of Amsterdam,'

3 B. & S. 751.

and the fact that the ship was not in that port at the date of the contract discharged the charterer.

Vital promise. 2 M. & G. 257

The second kind of Condition is illustrated by the case of *Glaholm v. Hays*. A vessel was chartered to go from England to Trieste and there load a cargo, and the charter-party contained this clause: 'the vessel to sail from England on or before the 4th day of February next.'

The vessel did not sail for some days after the 4th of February, and on its arrival at Trieste the charterer refused to load a cargo and repudiated the contract. The judgment of the Court was thus expressed:—

at p. 268.

'Whether a particular clause in a charter-party 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 upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates. . . . Upon the whole, we think the intention of the parties to this contract sufficiently appears to have been, to insure the ship's sailing at latest by the 4th of February, and that the only mode of effecting this is by holding the clause in question to have been a condition precedent.'

Warranty. 1 Q B D 183

The nature of a Warranty as compared with a Condition is illustrated by the case of *Bettini v. Gye*. Bettini entered into a contract with Gye, director of the Italian Opera in London, for the exclusive use of his services as a singer in operas and concerts for a considerable time and on a number of terms. Among these terms was an undertaking that he would be in London six days at least before the commencement of his engagement, for rehearsals. He only arrived two days before his engagement commenced, and Gye thereupon threw up the contract.

Condition and warranty.

Blackburn, J., in delivering the judgment of the Court described the process by which the true meaning of such terms in contracts is ascertained.

First he asked, does the contract give any indication of the intention of the parties?

'Parties may think some matter, apparently of very little importance,

essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one: or they may think that the performance of some matter apparently of essential importance and prima facie a condition precedent is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.' Bettini v. Gye, 1 Q B D. 187

He found in the contract no such expression of the intention of the parties; this being so, the interpretation of the disputed term remained for the Court. The Court pointed out that if the engagement had been only to sing in operas, or if it had been only for a few performances, the term as to rehearsals might well have been vital to the contract, but in all the circumstances of this particular contract they held that it was not a condition; its breach therefore did not operate as a discharge and could be compensated by damages.

With this case we may contrast *Poussard v. Spiers & Pond* where, on a contract similar in subject-matter to that in *Bettini v. Gye*, a failure to attend rehearsals and the first performance of a new piece was held to be the breach of a condition. 1 Q B D 410

A Warranty may be called a more or less unqualified promise of indemnity against a failure in the performance of a particular term in the contract. The phrase can be illustrated by the contract between a railway company and its passengers. It is sometimes said that a railway company as a common carrier warrants the safety of a passenger's luggage, but does not warrant his punctual arrival at his destination in accordance with its time tables. In the true use of the term *warranty*, as distinct from *condition*, the company warrants the one just as much as it warrants the other. In each case it makes a promise subsidiary to the entire contract, but in the case of the luggage its promise is qualified only by the excepted risks incident to the contract of a common carrier; in the case of the time table its promise amounts to no more than an undertaking to use reasonable diligence Richards v L. B & S C Railway Co, 7 C B 839

Le Blanche v L & N.W Railway Co, 1 C. P. D. 286

to ensure punctuality. The answer to the question whether a promise is or is not a warranty does not depend on the greater or less degree of diligence which is exacted or undertaken in the performance of it, but on the mode in which the breach of it affects the liabilities of the other party.

It is right to observe that the word Warranty is used in a great variety of senses [1], and that in insurance law the term is not unfrequently convertible with Condition. It is so used in the Marine Insurance Act, 1906. But it is submitted that its primary meaning is that above assigned to it. 'A warranty is an express or implied statement of something which the party undertakes shall be a term in the contract and, though part of the contract, collateral to the express object of it;' or, to take a definition from a more recent case, 'the proper significance of the word in the law of England is an agreement which refers to the subject-matter of a contract, but, not being an essential part of the contract either intrinsically or by agreement. is collateral to the main purpose of such contract.'

ss 33-41

Lord Abinger, C B., in Chanter v Hopkins, 4 M. & W 404

Lord Haldane in Dawsons v Bonnin, [1922] 2 A C 413, 422

A breach of condition turns it into a warranty.

One cause of the confusion which overhangs the use of the term warranty arises from the rule that a condition may, as it were, change its character in the course of the performance of a contract; a condition the breach of which would have effected a discharge if treated so at once by the promisee, ceases to be a condition if he goes on with the contract and takes a benefit under it. It is then called a warranty *ex post facto.*

Graves v Legg, 9 Ex 717

This aspect of a condition is well illustrated by the case of *Pust v. Dowie.* A vessel was chartered for a voyage to Sydney; the charterer promised to pay £1,550 in full for this use of the vessel on condition of her taking a cargo of not less than 1,000 tons weight and measurement. He had the use of the vessel as agreed upon; but she was not capable of holding so large a cargo as had been made a condition of the contract. He refused to pay the sum

32 L J.Q.B 179

[1] See note on meaning of the word 'Warranty' at the end of the chapter.

agreed upon, pleading the breach of this condition. The term in the contract as to weight and bulk of cargo was held to have amounted, in its inception, to a condition. Blackburn, J., said:—

'*If, when the matter was still executory,* the charterer had refused to put any goods on board, on the ground that the vessel was not of the capacity for which he had stipulated, *I will not say that he might not have been justified in repudiating the contract altogether;* and in that case the condition would have been a condition precedent in the full sense.' But he added:—'Is not this a case in which a substantial part of the consideration has been received? And to say that the failure of a single ton (which would be enough to support the plea) is to prevent the defendant from being compelled to pay anything at all, would be deciding contrary to the exception put in the case of *Behn v. Burness.*'

Sale of Goods.

The Sale of Goods Act, 1893, which codifies the Law relating to the contract of sale of goods, affords instructive illustrations of the nature and importance of the distinction between conditions and warranties; and its provisions are of such constant application that they deserve to be treated in some detail even in a work which is concerned with the general principles of contract and not with the law of special contracts.

s. 1 (1)

The matter is somewhat complicated by an ambiguity in the term 'contract of sale of goods,' which is defined as 'a contract whereby the seller *transfers or agrees to transfer* the property in goods to the buyer for a money consideration called the price.' As the words in italics indicate, the contract of sale itself may or may not transfer the property in the goods to the buyer; and where the contract has been broken by the seller, the extent of the buyer's remedy will sometimes depend upon whether the property has or has not passed to him. When the property has passed, the contract is called a 'sale'; when it has not, it is called an 'agreement to sell.' Further, since the property may pass with or without delivery of the goods to the buyer, 'sale' includes both 'bargain and sale,' i.e. a contract in which the property passes without delivery, and 'sale and delivery.'

s. 1 (3)

The terms 'condition' and 'warranty' are used in the Act in the senses given on p. 355; that is to say, a

condition is a stipulation the breach of which gives rise to a right to treat the contract as repudiated, a warranty is one the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated. Whether a stipulation is one or the other depends in each case on the construction of the contract; but it is laid down that stipulations as to time of payment are, unless a different intention appears, not deemed to be of the essence of the contract. Other stipulations as to time will usually be conditions, at any rate in mercantile transactions.

ss 2 (1) (*b*) and 62

s. 10.

Chalmers, Sale of Goods Act, 10 ed. p. 33.

Supra, p 358. We have already seen however that it is possible for a condition to change its character in the course of the performance of a contract, and that the party injured by its breach may sometimes lose his right to treat the contract as repudiated and have to fall back on his remedy in damages; in other words he may have to treat the breach of a condition as if it had been the breach of a mere warranty.

Warranties ex post facto. Section 11 specifies three cases in which this may happen in a contract of sale of goods.

s 11 (1) (*a*). (1) 'Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.'

s 11 (1) (*c*) (2) 'Where a contract of sale is not severable and the buyer has accepted the goods, or part thereof,

(3) or where the contract is for specific goods, the property in which has passed to the buyer,

the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.'

Two points require explanation as regards the second of these cases.

Acceptance in performance of contract. (*a*) 'Acceptance' in this connexion is quite different from 'acceptance' within the meaning of s. 4. The 'acceptance' which has the effect of taking away the right to reject the goods occurs when the buyer 'intimates to

Supra, p. 87.

the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.' s. 35.

(*b*) We must observe that 'acceptance' does not necessarily have this effect if the contract is severable, that is to say, if delivery of the goods is to be made by instalments. In such a case the Act provides that if 'the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.' Cases which illustrate this point have already been cited. s 31 (2). *Supra*, p. 353

Passing of property in goods.

The third of the above cases in which the right to reject the goods for breach of a condition is lost requires some consideration of the circumstances in which the property in goods sold is transferred from seller to buyer.

From the nature of the case 'where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.' But when goods are either *specific* or *ascertained* the general rule is that the property in them passes when the parties *intend* it to be transferred, and their intention is to be collected from the terms of the contract, the conduct of the parties, and the circumstances of the case. The Act however qualifies the vagueness of this general principle by laying down certain rules for ascertaining the intention of the parties in the absence of a different intention appearing in the contract. It is desirable to set out these rules in full. s 16 s 17

s. 18.

'Rule (1). Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule (2). Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule (3). Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule (4). When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer:—

(*a*) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction:

(*b*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule (5). Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.'

Implied Conditions.

The parties to a contract of sale of goods may of course include in the contract such terms, whether conditions or warranties, as they may agree upon. But the contract is of such everyday occurrence, and it is commonly made with so little consideration of the exact legal results which the parties would desire to produce by it, that if their rights and obligations were to be determined only by what they say or do when they make the contract their reasonable expectations would often be defeated. Consequently

certain conditions and warranties are *implied* by the Act in a contract of sale.

Where the contract is by description, there is an implied condition that the goods shall correspond with the description. s 13

Where it is by sample there are implied conditions (*a*) that the bulk shall correspond with the sample in quality; (*b*) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (*c*) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. s. 15 (2)

If the sale is by sample as well as by description, it is not sufficient that the bulk of the goods should correspond with the sample if they do not also correspond with the description. s. 13

As an illustration of a sale by description we may take the case of *Varley v. Whipp*. *V* agreed to sell and *W* to buy a reaping machine, which *W* had never seen, but which *V* stated to have been new the previous year and to have been used to cut only fifty or sixty acres. The machine was delivered and turned out to be an old one. *W* returned it, and *V* brought this action for the price. The Court held that this was a sale by description, and there was therefore implied a condition that the machine should correspond with the description that *V* had given of it. They pointed out that although the most usual application of that term is to unascertained goods, it extends 'to all cases where the purchaser has not seen the goods, but is relying on the description alone.' [1900] 1 Q. B. 513

The Court had then to deal with the further question whether *W* was entitled to return the machine on account of the broken condition. In view of s. 11 (1) (*c*) he would not be entitled to do so if he had 'accepted' it, or, the contract being for specific goods, if the property in the machine had passed to him. As regards the former of these possibilities there was nothing in the facts which

amounted to an acceptance. As regards the latter, rules 1, 2, and 3 of s. 18 deal with the passing of the property in specific goods, but the only one under which this case might be supposed to fall is rule 1, and the Court held that it did not fall under that rule since the contract was not 'unconditional.' None of the rules which the Act lays down for ascertaining the intention of the parties as to the time of the passing of the property therefore applied to this case, and the Court had to ascertain that intention under s. 17 as well as it could. They thought that in the circumstances of this case the property could have been intended to pass only on acceptance, and that as there had been no acceptance, *W* was entitled to return the machine.

[1911] A. C. 394.

Wallis v. Pratt was a case of sale by sample and description. A sample of seed was described as 'common English sainfoin,' whereas it was in fact 'giant sainfoin,' a seed indistinguishable from, but inferior to, the former. The vendors delivered giant sainfoin, and the buyers accepted it believing it to be common English sainfoin. They resold it to other parties, to whom they had to pay damages for the mistake, which was discovered only when the seed came up. There was therefore a clear breach of the condition implied by s. 13, and the buyers would have been entitled to return the seed if they had discovered the mistake in time. But they had of course accepted the goods, and therefore by s. 11 (1) (*c*) could only treat the breach of condition as a breach of warranty; and there was an express provision in the contract that 'the seller gives no warranty, express or implied as to growth, description, or any other matters.' The House of Lords held, however, that though the buyers must treat the broken condition as if it had been a warranty, it did not thereby *become* a warranty so as to be excluded by this clause. Accordingly the buyers were entitled to recover damages for the breach of the condition, including a sum in respect of what they had had to pay to the parties to whom they had resold the seed.

The general rule of a contract of sale, as of other contracts, is 'caveat emptor.' Ordinarily therefore there is no implied condition or warranty of the quality of goods sold or of their fitness for any particular purpose. But the Act contains certain qualifications of this principle, one of which we have already seen in s. 15 (2) (*c*). Others are the following:

'(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer 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), there is an implied condition that the goods shall be reasonably fit for such purpose; Provided that in the case of a contract 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.' s 14 (1).

Chapronière v. Mason illustrates the meaning of this section. The plaintiff bought a bath bun at the defendant's shop, and when he bit the bun, one of his teeth struck a stone and was broken by it. It is clear that one who buys a bun from a baker makes known to him by implication that he requires it for the particular purpose of eating; that in such a case the buyer relies on the baker's skill or judgment; and that buns are goods which it is in the course of a baker's business to supply. In this case therefore there was an implied condition that the bun should be reasonably fit for eating. The Court of Appeal, in ordering a new trial, thought, without deciding, that the presence of a stone in a bath bun is strong evidence that the bun is not reasonably fit for eating. 21 T L R 633

'(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; s 14 (2) (3) & (4)

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.'

[1903] 1 K. B. 610. In *Wren v. Holt* the defendant kept a beer house in which, as the plaintiff was aware, only *X*'s beer was supplied. The beer supplied to the plaintiff contained arsenic and his health was injured by drinking it. The Jury found as a fact that the plaintiff did not rely on the skill or judgment of the defendant for the quality of his beer, and the case therefore did not fall within s. 14 (1). But it was held that the plaintiff having asked for *X*'s beer, the case fell within s. 14 (2). The beer was bought by description from a seller who dealt in beer of that description; it was not of merchantable quality; the defect could not have been revealed by examination. The plaintiff having, however, 'accepted' the beer, necessarily had to treat the breach of condition as a breach of warranty, for which he recovered £50 damages.

NOTE ON THE VARIOUS MEANINGS OF 'WARRANTY'

For the purposes of the contract for the sale of goods the sense in which the word *warranty* is used in this chapter is adopted in the Sale of Goods Act, 1893, s. 62, but it may be worth setting out some of the uses of the term to be found in the Reports:—

(1) It has been used as equivalent to a condition precedent in the sense of a descriptive *statement* vital to the contract: *Behn v. Burness*, 3 B. & S. 751.

(2) It has been used as equivalent to a condition precedent in the sense of a *promise* vital to the contract: *Behn v. Burness.*

(3) It is used as meaning a condition the breach of which has been acquiesced in, and which therefore forms a cause of action but does not create a discharge: *Behn v. Burness.*

(4) In relation to the sale of goods it is used as meaning an independent subsidiary promise, 'collateral to the main object of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods': *Chanter v. Hopkins*, 4 M. & W. 404. This, it is submitted, is the proper use of the word.

(5) In relation to the sale of goods, warranty has been used for an express promise that an article shall answer a particular standard of quality; this promise is a condition until the sale is executed, a warranty after it is executed: *Street v. Blay*, 2 B. & A. 456 (the sale of a horse 'warranted sound').

(6) *Implied warranty* is a term used very often in such a sense as to amount to a repetition by implication of the express undertaking of one of the contracting parties: *Jones v. Just*, L. R. 3 Q. B. 197. Thus there was said to be an implied warranty in an executory contract of

sale that goods shall answer to their specific description and be of a merchantable quality. This is now an implied *condition*: Sale of Goods Act, ss. 13, 14.

Implied warranty of seaworthiness is a *condition* of the same character. It is an undertaking, which is implied in every voyage policy of marine insurance, that the vessel insured shall be reasonably fit 'as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it': *Dixon v. Sadler*, 5 M. & W. 414; Marine Insurance Act, 1906, s. 39.

Implied warranty of title has been a vexed question, and there are conflicting cases (*Eicholz v. Bannister*, 17 C. B., N. S. 708; *Baguely v. Hawley*, L. R. 2 C. P. 625). In the contract of sale of goods, the undertaking for title is now an implied *condition*: Sale of Goods Act, 1893, s. 12.

Implied warranty of authority is the undertaking which a professed agent is supposed to give to the party with whom he contracts, that he has the authority which he professes to have. Implied warranty of possibility is a supposed undertaking that a promise is not impossible of performance: *Collen v. Wright*, 7 E. & B. 301; 8 E. & B. 647; *Clifford v. Watts*, L. R. 5 C. P. 577.

And it is to be noticed that even in marine insurance policies, in which as a general rule the word 'warranty' is used in the sense commonly assigned to 'condition', examples to the contrary are found. Thus 'warranted free of particular average' only means that it is agreed that no claim is to be made under the policy for a partial (as opposed to total) loss.

See Appendix, Forms B & C

CHAPTER XV

Impossibility of Performance

IMPOSSIBILITY of performance may appear on the face of the contract, or may exist, unknown to the parties, at the time of making the contract, or may arise after the contract is made. It is with this last sort of impossibility that we have to do.

Unreality of consideration.

Where there is obvious physical impossibility, or legal impossibility apparent upon the face of the promise, there is no contract, because such a promise is no real consideration for any promise given in respect of it.

Mistake.

Scott v Coulson, [1903] 2 Ch 249, note 1

Impossibility which arises from the non-existence of the subject-matter of the contract avoids it. This may be based on mutual *mistake*, for the parties have contracted on an assumption, which turns out to be false, that there is something to contract about.

Subsequent impossibility.

Grant Smith & Co v. Seattle, &c, Co., [1920] A C 162, 169

Impossibility which arises subsequently to the formation of a contract is commonly said not to excuse from performance. This was, as a matter of history, undoubtedly the general rule at one time, and, in theory at any rate, it may still be so stated; yet the exceptions allowed in modern times (as will be seen hereafter) have so eaten into it as almost to outgrow in importance the rule itself.

We have spoken of what are termed 'conditions subsequent,' or 'excepted risks,' and what was then said may serve to explain the rule now laid down. If the promisor make the performance of his promise conditional upon its continued possibility, the promisee takes the risk. If performance should become impossible, the promisee must bear the loss. If the promisor makes his promise unconditionally, he takes the risk of being held liable even though performance should become impossible by circumstances beyond his control.

Paradine sued Jane for rent due upon a lease. Jane

pleaded 'that a certain German Prince, by name Prince Rupert, an alien born, enemy to the king and his kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled and held out of possession . . . . . whereby he could not take the profits.' The plea then was in substance that the rent was not due because the lessee had been deprived, by events beyond his control, of the profits from which the rent should have come. But the Court held that this was no excuse—

Paradine v. Jane, Aleyn, 26

'and this difference was taken, that *where the law creates a duty or charge* and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of Waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. . . . But when the party *by his own contract creates a duty or charge upon himself*, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it.'

The case suggested by the concluding words of the above quotation did in fact occur during the late war, a house being damaged by a bomb discharged by an enemy aeroplane, and it was held that, in accordance with the judgment in *Paradine v. Jane*, the lessee must repair the damage.

Redmond v Dainton, [1920] 2 K. B 256, and see Matthey v Curling, [1922] 2 A C 180.

Modern illustrations of the rule are to be found in the promise made by the charterer of a vessel to the ship-owner that the cargo shall be unloaded within a certain number of days or payment made as 'demurrage.'

See note to Appendix A

A cargo of timber was agreed to be made up into rafts by the master of the ship, and in that state removed by the charterer. Storms prevented the master from doing his part, but this default did not release the charterer from his promise to have the cargo unloaded within the time specified. So too a dock strike affecting the labour engaged both by ship-owner and charterer does not release the latter. He makes 'an absolute contract to have the cargo unloaded within a specified time. In such a case

Thus v. Byers, 1 Q. B. D 244

Budgett v Binnington, [1891] 1 Q B. 35.

the merchant takes the risk [1].' It need hardly be said that the parties may, if they choose, provide expressly in their contract against such risks, and, as a matter of fact they commonly do so, the tendency in modern charter parties being always to expand the list of excepted risks.

There is, however, a group of cases in which (in certain circumstances) impossibility of performance does discharge the contract. The law on this subject has been rapidly developed of recent years and may be still in the making. The principles on which it is based were for a long time not clearly appreciated, but have now been expounded in a series of decisions arising out of the late war and its effect on contractual obligations.

10 East 530. Lord Ellenborough in *Atkinson v. Ritchie* (1809) explained the decision in *Paradine v. Jane* on the ground that no term could be implied in a contract which the parties might themselves have expressed. So the law stood

3 B & S 826 until *Taylor v. Caldwell* (1863) where the defendant had agreed to give the plaintiff the use of a music-hall for the purpose of a concert. Before the day of performance arrived, the music-hall was destroyed by fire, and Taylor sued Caldwell for damages for breach of the contract which Caldwell, through no fault of his own, was no longer able to perform. It was held that such a contract must be regarded as 'subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor.'

The doctrine of the implied term, whereby a contract might be discharged through subsequent impossibility of performance, being once accepted, the question then arose as to the nature of the circumstances in which such a

Hulthen v. Stewart, [1903] A.C. 389.

[1] Compare this case with one in which the charter-party does not fix a definite time for unloading the cargo. In such cases a reasonable time is allowed, and the event of a dock strike or any other obstacle beyond the control of the charterer would extend the time which should be regarded as reasonable.

term could or ought to be implied. Was the doctrine confined to cases like *Taylor v. Caldwell*, or was it of more general application? The judgment of Lord Loreburn in *Tamplin v. Anglo-Mexican Co.* explains the doctrine and the reasons on which it is based:— [1916] 2 A C 397, 403

'A Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. . . . Sometimes it is put that performance has become impossible, and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at the bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted. . . . Were the altered circumstances such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, "If that happens, of course it is all over between us"? What, in fact, was the true meaning of the contract?'

Bearing in mind these general principles, we find that the cases in which the Courts have implied a term whereby a contract is discharged through impossibility of performance may be grouped under five heads.

(1) *Where performance becomes impossible through a change of law.*

(1) Where there be change of the law.

Baily v De Crespigny, L R 4 Q B. 180

Baily was lessee to De Crespigny, for a term of 89 years, of a plot of land: De Crespigny retained the adjoining land, and covenanted that neither he nor his assigns would, during the term, erect any but ornamental buildings on a certain paddock fronting the demised premises. A Railway Company, acting under parliamentary powers, took the paddock compulsorily, and built a station upon it. Baily sued De Crespigny upon the covenant: it was

held that impossibility created by Statute excused hin from the observance of his covenant.

at p 186. 'The Legislature, by compelling him to part with his land to railway company, whom he could not bind by any stipulation, as h could an assignee chosen by himself, *has created a new kind of assign such as was not in the contemplation of the parties when the contra was entered into.* To hold the defendant responsible for the acts of suc an assignee is to make an entirely new contract for the parties.'

Ralli v Compañia Naviera Sota y Aznar, [1920] 2 K. B. 287, 304. And it seems that the same result will now follow wher a contract to be performed abroad becomes impossible c performance because a change in the foreign law has mad its performance illegal.

'Where a contract requires an act to be done in a foreign country it is, in the absence of very special circumstances, an implied term c the continuing validity of such a provision that the act to be done i the foreign country shall not be illegal by the law of that country.'

(2) Destruction of subject-matter. (2) *Where performance becomes impossible through th destruction of a specific thing essential to the performance c the contract.*

3 B & S. 826. The case of *Taylor v. Caldwell*, already cited, is th leading case under this head.

L. R. 2 C. P. 651 The same principle was applied in *Appleby v. Myers* The plaintiffs undertook to erect certain machinery upo the defendant's premises and keep it in repair for tw years. While the work was in progress the premises wer wholly destroyed by fire. It was held that there was n absolute promise by Myers that his premises should con tinue in a fit state for Appleby's work, that the fire wa a misfortune equally affecting both parties, and that th contract was discharged.

And it is not necessary that the destruction of the thin should be absolute: it is enough if it ceases so to exist a to be fit or available for the purpose contemplated by th contract. In *Nickoll v. Ashton*, a cargo sold by the defend ants to the plaintiffs was to be shipped by a specified ship without default on the defendants' part the ship was s damaged by stranding as to be unable to load within th

[1901] 2 K. B. 126.

time agreed, and the Court held that in these circumstances the contract must be treated as at an end.

In another case, the Government requisitioned under statutory powers a parcel of wheat lying in a Liverpool warehouse which *A* had contracted to sell to *X*. It was held that the vendor was discharged from his obligation to deliver.

Shipton & Harrison's Arbitration, [1915] 3 K B 679.

(3) *Where performance becomes impossible because a particular state of things, the existence or continuance of which formed the basis of the contract, ceases to exist or continue.*

(3) Non-existence or non-occurrence of a particular state of things.

This group of cases was much discussed in connexion with contracts made in view of the ceremonies contemplated at the time of the coronation in 1902, and frustrated by the illness of King Edward.

In *Krell v. Henry*, the defendant agreed to hire the plaintiff's flat for June 26 and 27; the contract contained no reference to the coronation processions, but they were to take place on those days and to pass by the flat. The rent had not become payable when the processions were abandoned and the Court of Appeal held that the plaintiff could not recover it.

[1903] 2 K B 740

'I do not think,' said Vaughan Williams, L. J., 'that the principle . . . . is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract, or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but if required from necessary inferences drawn from surrounding circumstances, recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things.'

at p 749

But if the existence of a particular state of things is merely the *motive or inducement* to one party to enter into the contract but cannot be said to be the basis on which the contract was entered into, the rule has no application. The charter of a ship to see the coronation review and to

at p 501

cruise round the fleet was held to be a contract of this kind in *Herne Bay SS. Co. v. Hutton*; but obviously it is often very difficult to draw the distinction, and it may be observed that the case was decided before *Krell v. Henry*

[1903] 2 K. B 683.

It is not perhaps strictly accurate to say that in *Krell v. Henry* the contract became impossible of performance by reason of King Edward's illness; for the flat was still at Henry's disposal. It may be that the case should rather be regarded as an example of a contract discharged by reason of an implied condition subsequent, unless indeed it can be said that Krell's contract was to supply a flat from which a procession could be seen on the days fixed.

Supra, p 339

(4) *Where through supervening circumstances performance becomes impossible within the time, or in the manner, contemplated by the parties.*

(4) Supervening circumstances beyond parties' control

If the supervening circumstances which make performance impossible are such that the parties must necessarily have contracted on the footing that, if they occur, the basis and the object of the contract are gone then their occurrence will operate as a discharge. Mere unexpected delay is not sufficient. The interruption must be so long 'as to destroy the identity of the work or service, when resumed, with the work or service when interrupted.' This is sometimes expressed by saying that a contract is discharged by supervening circumstances which bring about its 'commercial frustration.' But the rule is not different in commercial contracts from what it is in other contracts, though it is usually less difficult to say when the object of a commercial contract is in fact frustrated. The rule is a general one for contracts of all kinds.

Jackson v Union Marine, L R 10 C P 148.

Metrop. Water Board v Dick, Kerr, [1918] A C 118, 128

Lord Loreburn in Tamplin v Anglo-Mexican Co, [1906] 2 A C 397, 404

The three following cases afford illustrations; but reference should also be made to the judgments of the House of Lords in *Bank Line v. Capel*, and especially that of Lord Sumner, for a discussion of the principles which

[1919] A C. 435.

underlie the rule and of the manner of its application to the circumstances of particular cases.

Geipel v Smith, L R 7 Q B 404

Geipel chartered a vessel belonging to Smith to go to a spout, load a cargo of coals and proceed thence to Hamburg. War broke out between France and Germany, and the port of Hamburg was blockaded by the French fleet. It was held that the contract was discharged.

Metrop Water Board v Dick, Kerr, [1918] A C. 118

Messrs. Dick, Kerr & Co. contracted with the Metropolitan Water Board to construct a reservoir within six years. During the course of construction the Minister of Munitions, acting under statutory powers, required them to cease work on their contract and remove their plant. No period of time was fixed during which the orders of the Minister were to remain effective, and the House of Lords held that the interruption created by the prohibition was of such a character and duration as to make the contract, when resumed, in effect a different contract, and that the original contract was therefore discharged.

Horlock v Beal, [1916] 1 A C 486

A ship-owner engaged a seaman under articles which provided for a two years' engagement. While the articles were still running, the ship was seized by the German authorities in a Belgian port and the crew were interned for an indefinite period. The contract was held to be discharged, and the ship-owner to be no longer under any obligation to continue the payment of the seaman's wages.

Parties must contract on same assumption as basis of their contract.

In all these cases there was 'a failure of something which was at the basis of the contract in the mind and intention of the contracting parties'—free access to Hamburg, liberty to proceed with the construction of the reservoir without arbitrary interference by the Executive, a right to sail the seas without let or hindrance for two years. These matters must have been assumed by *both* parties as the foundation of the contracts into which they respectively entered. But a contract may often be rendered impossible of performance by a supervening event which never entered into the calculations of one party at all. Thus a vendor may find it impossible

Blackburn Bobbin Co. v Allen, [1918] 1 K. B. 540; 2 K. B 467

to obtain the goods which he has contracted to sell, because the outbreak of war has cut off a particular source of supply of which he had intended to avail himself; but the purchaser may know nothing of his intentions in this respect and may (if he thought about it at all) have assumed that the goods would be sold from the vendor's own stocks. The fact that they were intended by the vendor to be obtained from a country, access to which was cut off by the war, was not therefore the basis of the contract in the mind of both parties, and the vendor must in such a case fulfil his bargain or pay damages if he does not.

(5) Incapacity for personal service.

(5) *Where performance of a contract for personal services is rendered impossible by the death or incapacitating illness of the promisor.*

It is easy to see how readily such a term might be implied in a contract for personal services, and it is probable that it was in this class of case that the first exception was made (though not consciously so by the Courts) to the rule laid down in *Atkinson v. Ritchie.*

L. R. 2 Exch. 311, 314

In *Stubbs v. Holywell Ry. Co.* it was held that a contract for personal services was put an end to by the death of the party by whom the services were to be rendered. 'The man's life,' said Martin, B., 'was an implied condition of the contract.'

L. R. 6 Exch. 269.

In *Robinson v. Davison* an action was brought for damage sustained by a breach of contract on the part of an eminent pianoforte player, who having promised to perform at a concert, was prevented from doing so by dangerous illness. Judgment was given for the defendant, on the ground that the continued good health of the defendant was a condition 'annexed to the agreement.'

Contracts discharged by implied

One or two matters remain to be noticed in connexion with this subject.

First, it will be seen that all the above cases are,

strictly speaking, examples of discharge *by agreement*; for the discharge takes place in virtue of an implied term in the contract itself, which it is assumed that the parties intended and agreed should form part of their bargain.

term really discharged by agreement.

Secondly, it must be remembered that no term can be implied which would be inconsistent with any of the express terms of the contract. *Expressum facit cessare tacitum*. But it must always be a question of construction whether the suggested implication is inconsistent with an express term. Where a time-charterer sought to treat the charter-party as at end because by reason of an embargo for many months he could not have any use of the ship, the ship-owner relied on an exception of 'restraint of princes,' alleging that he had only promised such services as were possible in face of such restraints, and claimed that the charterer must go on paying the hire. The Court overruled this contention: the contract contemplated a certain adventure, in the course of performing which the exception was to apply. But when by an overpowering cause the contemplated adventure became impossible, the whole contract, including the exceptions expressed in it, was held to be at an end in virtue of an implied term that it should be so in such an event.

Implied term must be consistent with rest of contract.

Scottish Navigation Co v Soutter, [1917] 1 K B 222

Bank Line v Capel, [1919] A C. 435.

Thirdly, the contract is valid and subsisting up to the moment of discharge, and all rights accrued up to that moment can be enforced. Thus in one of the Coronation cases, where the rent of the windows was payable in advance, and the plaintiff had paid £100 on account, it was held not only that he could not recover that sum but that he must also pay the balance. The law on this point, however, as Lord Dunedin has pointed out in a passage which indicates some doubt of the correctness of this decision, has never yet been considered by the House of Lords.

Accrued rights not affected.

Chandler v Webster, [1904] 1 K B 493

Cantiare San Rocco v Clyde Shipbuilding Co:, [1924] A. C at p. 247.

Fourthly, after the event which constitutes the frustration of the contract has occurred, the contract is at an

Hirji Mulji v. Cheong Yue S.S. Co., [1926] A. C. 497.

end forthwith, and no rights or obligations can arise under it. So an arbitrator appointed under an arbitration clause has no jurisdiction to make an award, since 'a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction.'

CHAPTER XVI

Discharge of Contract by Operation of Law

THERE are rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract, and these we will briefly consider.

Merger.

Merger.

If a higher security be accepted in the place of a lower, the security which in the eye of the law is inferior in operative power, *ipso facto*, whatever may be the intention of the parties, merges and is extinguished in the higher.

We have already seen an instance of this in the case of judgment recovered which extinguishes by *merger* the right of action arising from breach of contract.

And, in like manner, if two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged.

The rules governing this process may be thus summarized:—

(*a*) The two securities must be different in their legal operation, the one of a higher efficacy than the other. A second security taken in addition to one similar in character will not affect its validity, unless there be discharge by substituted agreement.

Higgen's case, 6 Co Rep 45 b

(*b*) The subject-matter of the two securities must be identical.

Holmes v Bell, 3 M & G 213

(*c*) The parties must be the same.

The rights and liabilities under a contract are also extinguished if they become vested by assignment or otherwise in the same person, for a man cannot contract with himself. Where a term of years becomes vested in the immediate reversioner, it merges in the reversion and all covenants attached to it are extinguished, though by a rule of Equity, which since the Judicature Acts applies in

Capital and Counties' Bank v Rhodes, [1903] 1 Ch. 631

Nash v. De Freville, [1900] 2 Q. B. 72.

all Courts, the intention of the parties may operate to prevent the occurrence of a merger. Similarly, a bill of exchange is discharged, if the acceptor should eventually become the holder of it.

Alteration or Loss of a Written Instrument.

Rules as to alteration.

If a deed or contract in writing be altered by addition or erasure, it is discharged, subject to the following rules:—

Pattinson v Luckley, L. R. 10 Ex 330

(*a*) The alteration must be made by a party to the contract, or by a stranger while the document is in the possession of a party to the contract and for his benefit.

Wilkinson v. Johnson, 3 B. & C 428

Alteration by accident or mistake occurring under such circumstances as to negative the idea of intention will not invalidate the document.

(*b*) The alteration must be made without the consent of the other party, else it would operate as a new agreement.

Materiality.

(*c*) The alteration must (it seems) be made in a material part [1]. What amounts to a material alteration must needs depend upon the character of the instrument, and it is possible for the character of an instrument to be affected by an alteration which does not touch the contractual rights set forth in it. In a Bank of England note the promise to pay made by the Bank is not touched by an alteration in the number of the note; but the fact that a Bank note is a part of the currency, and that the number placed on it is put to important uses by the Bank and by the public for the detection of forgery and theft, causes an alteration in the number to be regarded as material and to invalidate the note.

Suffell v Bank of England, 9 Q. B. D 555

An alteration, therefore, to effect a discharge of the contract, need not be an alteration of the *contract*, but must be 'an alteration of the instrument in a material way.' The Bills of Exchange Act, 1882, s. 64, provides that a bill

[1] In *Croockewit v. Fletcher*, 1 H. & N. 893, 912, the rule appears to have been stated in terms which would imply that *any* alteration would effect a discharge; but this seems unreasonable.

shall not be avoided as against a holder in due course, though it has been materially altered, 'if the alteration is not apparent,' and the holder may enforce payment of it according to its original tenor. The provisions of the Act respecting bills apply to promissory notes 'with the necessary modifications.' These last words have been held to exclude Bank of England notes, and therefore do not affect the decision in *Suffell's* case.

s. 89.

Leeds Bank v. Walker, 11 Q. B. D. 84

The loss of a written instrument only affects the rights of the parties in so far as it may occasion a difficulty of proof [1]; but an exception to this rule exists in the case of bills of exchange and promissory notes. If the holder of the instrument lose it, he loses his rights under it, unless he offer to the party primarily liable upon it an indemnity against possible claims.

Loss.

Hansard v Robinson, 7 B & C. 90

Conflans Quarry Co v Parker, L R 3 C P. 1

Bankruptcy.

Bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the Court an order of discharge. It is sufficient to call attention to this mode of discharge, without entering into a discussion as to the nature and effects of Bankruptcy, or the provisions of the Bankruptcy Act, 1914, which consolidates earlier enactments upon the subject.

Bankruptcy.

When a man becomes bankrupt his property passes to his trustee, who can, as far as rights *ex contractu* are concerned (and we are not concerned with anything else), exercise the rights of the bankrupt, and can also do what the bankrupt could not do, since he can repudiate contracts if they appear to be unprofitable.

When the bankrupt obtains an order of discharge he is discharged from all debts provable under the bankruptcy,

s 28

Heather v Webb, 2 C P. D 1.

[1] Where the documents are proved to be lost, parol evidence may be given of the contents of a written acknowledgment of a debt barred by the Statute of Limitation (*Haydon v. Williams*, 7 Bing. 163). In the case of a memorandum under the Statute of Frauds the matter is not clear (*Nichol v. Bestwick*, 28 L. J. Ex. 4).

whether or no they were proved, and even if the creditor was in ignorance of the bankruptcy proceedings. But
s. 26 (2) the bankrupt's discharge may also be granted subject to conditions. The Court may require that he shall consent to judgment being entered against him for debts unsatisfied at the date of the discharge: and execution may be issued on such judgment with leave of the Court.

s. 28 (1) In no case is the bankrupt discharged from liability incurred by fraud or fraudulent breach of trust committed by him.

PART VI

REMEDIES FOR BREACH OF CONTRACT

CHAPTER XVII

Remedies for Breach of Contract

§ 1. *Nature of the Remedies for Breach.*

Remedies for breach.

WE have already endeavoured to ascertain the rules which govern the *discharge* of contract by breach, and it now remains to consider the various remedies which are open to the person injured by the breach, whether the breach is of such a kind as to discharge the contract or not.

If a contract is broken, the person injured acquires or may acquire three distinct rights: (1) a right (in certain circumstances) to be exonerated from further performance; (2) a right, if he has done anything under the contract, to sue upon a *quantum meruit*, a cause of action distinct from that arising out of the original contract, and based upon a new contract originating in the conduct of the parties; (3) a right of action upon the contract, or upon the term of the contract that has been broken.

(1) We have in an earlier chapter sufficiently discussed breaches of contract which effect a discharge of the whole contract; and no more need be said upon the subject here.

Quantum meruit.

(2) The injured party, however, may have already done a part, though not all, of that which he was bound to do under the contract. In such a case, if the breach amounts to a discharge, he may sue for damages arising from the breach, or he may sue upon a *quantum meruit*; that is, for the value of so much as he has already done.

Best, C. J. in Mavor v. Pyne,

'If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline

taking any more, he is at all events entitled to recover against me the value of the ten that I have received.'

Breach of contract is merely one occasion which may give rise to a *quantum meruit* claim. Such a claim rests on the wide general principle that where one has expressly or impliedly requested another to render him a service without specifying any remuneration, but the circumstances of the request imply that the service is to be paid for, the law will imply a promise to pay *quantum meruit*, i.e. so much as the party doing the service has deserved, or, as we normally say, a reasonable sum. Such a claim is precisely parallel to that which arises whenever goods are bought and sold without express agreement as to the price, in which case the Sale of Goods Act says that the buyer must pay a 'reasonable price'; under the old form of pleading he was bound to pay *quantum valebant*, so much as the goods were worth. A *quantum meruit* claim is therefore exceedingly common as a claim for work done where there has been no special or express contract fixing the remuneration for the work. We have also seen that it has been admitted where services have been rendered under a contract unenforceable on account of the Statute of Frauds.

Supra, p. 18.

s. 8 (2)

Scott v. Pattison, [1923] 2 K B 723

Supra, p 74.

But the same principle may also afford a remedy for work done in part performance of work contracted to be done under an express contract, or for work professedly done in performance of such a contract but not in exact conformity with the terms agreed upon. It is clear that if *A* by the terms of a contract is to do a certain piece of work for a certain lump sum, and, for whatever reason, he does only part of that work, or does something different from what the contract requires him to do, he cannot, *under that contract*, claim anything at all for what he has done. If he can claim anything it must be on another ground. He must claim *quantum meruit*, and to do this he must show an implied promise to pay for what he has actually done.

Appleby v. Myers, L R. 2 C P at p. 661.

This claim for a *quantum meruit*, therefore, is not a claim upon the original contract (as the claim for damages would be) but is in effect a claim upon a new and distinct contract arising from the offer of that which the party suing has done and its acceptance by the other party. It might be more safely and correctly described as an incident of, rather than a remedy for, Breach.

A *new* contract.

The right of the injured party to sue in this way on a *quantum meruit* for work done under the original contract is frequently and emphatically stated to depend on the fact that the original contract has been discharged:—

When it may be sued upon.

'It is said to be an invariably true proposition, that wherever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a *quantum meruit*, for anything which he had done under it previously to the rescission.'

Hulle v. Heightman, 2 East 145

It is possible that *A* may have done nothing under the contract which can be estimated at a money value: then if the breach is such as to amount to a discharge, *A*'s sole remedy is to sue upon the original contract for the damage that he has sustained; though he is of course exonerated from such performance as may still be due from him on his own part.

But if what *A* has done under the contract is capable of being estimated at a money value, and he has been prevented by the wrongful act of the other party from completing his performance and thus putting himself into a position to claim the sum agreed upon in the contract, it would obviously be unjust that he should not also be entitled to claim payment for that which he has already done and was ready and willing to complete, if he had been allowed to do so.

Planché v. Colburn, 8 Bing 14.

A *quantum meruit* claim is also occasionally available to a party who has himself broken the contract after doing part of what he was bound by its terms to do, and such a case illustrates very clearly the principle upon which

the claim must always be based, namely, that the work has been done in circumstances from which a promise to pay for it can be implied.

[1898] 1 Q B 673

In *Sumpter v. Hedges* the plaintiff contracted to build certain buildings on the defendant's land for a lump sum. He abandoned the work, leaving the buildings half finished. The defendant then finished the buildings himself, using for the purpose certain materials which the plaintiff had left on the ground. The plaintiff claimed to recover (*a*) for the value of the work he had done; (*b*) for the value of the materials used by the plaintiff. It was held that the plaintiff must fail on the former of these claims. A. L. Smith, L. J., said:—

'Under such circumstances what is a building owner to do? He cannot keep the buildings on his land in an unfinished state for ever. The law is that where there is a contract to do work for a lump sum, until the work is completed, the price of it cannot be recovered. Therefore the plaintiff could not recover on the original contract. It is suggested however that the plaintiff was entitled to recover for the work he did on a *quantum meruit*. But in order that that may be so, there must be evidence of a fresh contract to pay for the work already done.'

But the matter was different as regards the second claim of the plaintiff. The defendant was not obliged to use the plaintiff's materials; he elected to do so, thereby accepting an implied offer of the materials by the plaintiff and making an implied promise to pay for them. On this part of his claim therefore the plaintiff succeeded.

Dakin v Lee [1916] 1 K B 566

The principles upon which payment can be recovered for work done under a contract, but not in exact accordance with its terms are the same.

A defendant cannot be called on to pay for work which is not in accordance with the terms of the contract and which he has had no opportunity given him of deciding to accept or reject. Where a ship-repairer agreed for a lump sum to repair a ship, and not only did the work agreed upon in a manner which departed materially from the terms of his contract but also did a good deal more than was agreed upon without any authority from the ship-

Forman v Liddesdale, [1900] A C 190.

owner, it was held that he could recover nothing. He could not recover under the original contract, because he had not performed it; nor under a substituted contract because the ship-owner had not agreed to any substituted performance; nor could any agreement be inferred from the fact that the defendant had received his ship back and kept her. The ship was his own property and he had no option but to take her back in the condition in which the plaintiff had left her, and to make the best of circumstances which had arisen through no fault of his own.

Remedies whether contract discharged or not.

(3) Lastly, we have to consider what are the remedies open to a person who is injured by the breach of a contract made with him whether or no that breach discharges him from further performance.

Damages.

Specific performance.

The remedies are of two kinds: he may seek to obtain *damages* for the loss he has sustained; or he may seek to obtain a decree for *specific performance*, or an *injunction* to enforce the promised acts or forbearances of the other party.

But there is this difference between the two remedies; every breach of contract entitles the injured party to *damages*, though they be but nominal; but it is only in the case of certain contracts and under certain circumstances that *specific performance* or an *injunction* can be obtained.

The topic is one which barely comes within the scope of this work: but an endeavour will be made to state briefly some elementary rules which govern the two remedies in question.

§ 2. *Damages.*

When a contract is broken and action is brought upon it,—the damages being unliquidated, that is to say, unascertained in the terms of the contract,—how are we to arrive at the amount which the plaintiff, if successful, is entitled to recover?

(1) 'The rule of the Common Law is, that where a

Parke, B., in Robinson v. Harman, 1 Ex. 855.

party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'

Damages should represent loss sustained;

Where no loss accrues from the breach of contract, the plaintiff is nevertheless entitled to a verdict, but for nominal damages only, and 'nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity.' And so in an action for the non-payment of a debt, where there is no promise to pay interest upon the debt, nothing more than the sum due can be recovered; for the possible loss arising to the creditor from being kept out of his money is not allowed to enter into the consideration of the jury in assessing damages, unless it was expressly stated at the time of the loan to be within the contemplation of the parties, or unless an agreement to pay interest can be inferred from the course of dealing between the parties. There are, however, certain statutory exceptions. By the Civil Procedure Act, 1833, a jury may allow interest at the current rate by way of damages in all cases where a debt or sum certain was payable by virtue of a written instrument or on a policy of insurance, or if not so payable was demanded in writing with notice that interest would be claimed from the date of the demand; and by s. 57 of the Bills of Exchange Act, 1882, interest may be claimed in an action on a dishonoured bill. By a long-established practice also the Admiralty Court, differing in this respect from the Courts of Common Law, awards interest on damages recovered in Admiralty suits; but these are actions based on delict and not on contract.

Maule, J., in Beaumont v. Greathead, 2 C. B. 499.

In re Marquis of Anglesey, [1901] 2 Ch. (C. A.) 548.

3 & 4 Will IV, c. 42, ss 28, 29.

The Gertrude, 13 P. D. 105

so far as it was in contemplation of the parties.

(2) The rule laid down by Parke, B., in *Robinson v. Harman* must be taken subject to considerable limitations in practice in view of the rule in *Hadley v. Baxendale*.

'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 of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it. Now, 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 of such a contract, 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.'

Per Alderson, B., 9 Exch at p. 354.

The breach of a contract may result in losses which neither party contemplated, or could contemplate at the time that the contract was entered into. In such a case the damages to which the plaintiff is entitled are no more than might have been expected by the parties to be the natural result of a breach of the contract. In determining the measure of damages—as in determining the meaning of a contract—where the parties have left the matter doubtful, we ask what would have been in the contemplation of a reasonable man, when the contract was made, as the probable result of the breach of it.

Agius v. G W. Colliery Co, [1899] 1 Q. B 41: Hammond v. Bussey, 20 Q B. D 79.

A special loss which would not naturally and obviously flow from the breach, must, if it is to be recovered, be matter of express terms in the making of the contract.

Exceptional los should b matter o special terms. L R 8 C 131

In *Horne v. Midland Railway Company*, the plaintiff being under contract to deliver shoes in London at an unusually high price by a particular day, delivered them to the defendants to be carried, with notice of the contract only as to the date of delivery. The shoes were delayed in carriage, and were consequently rejected by the intending purchasers. The plaintiff sought to recover, in addition to the ordinary loss for delay, the difference between the price at which the shoes were actually sold and the high price at which they would have been sold if they had been punctually carried. It was held that this damage was not recoverable, unless it could be proved that the Company were informed of, and undertook to be liable for,

See Bostoc v. Nicholson, [1904 1 K. B. 72

the exceptional loss which the plaintiff might suffer from an unpunctual delivery.

L R 3 C P. 499, 505

Again, in *British Columbia Sawmills v. Nettleship*, the plaintiffs delivered to the defendant to be shipped on the defendant's vessel certain cases of machinery intended for the erection of a sawmill at Vancouver. The defendant failed to deliver one of the cases, but was unaware of the fact that it contained a material part of the machinery without which the sawmill could not be erected at all. The plaintiffs claimed as damages not only the cost of replacing the lost parts, but also the loss incurred by the stoppage of their works during the time that the rest of the machinery remained useless owing to the absence of the lost parts. It was held that the measure of damages was the cost of replacing the lost machinery at Vancouver only, and the Court said—

> 'The defendant is a carrier and not a manufacturer of goods supplied for a particular purpose. . . . He is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time of entering into the contract. It must be something which could be foreseen and reasonably expected, and to which he assented expressly or impliedly by entering into the contract.'

Damages for breach of contract not vindictive.

Addis v. Gramophone Co., [1909] A. C 488, at p 491

(3) Damages for breach of contract are by way of compensation and not of punishment. Hence a plaintiff can never recover more than such pecuniary loss as he has sustained, subject to the above rules. Thus, in an action by a servant for wrongful dismissal, 'the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.'

Finlay v Chirney, 20 Q. B D at p. 498.

To this rule the breach of a promise of marriage is an exception; in such cases the feelings of the person injured are taken into account, in addition to such pecuniary loss as can be shown to have arisen.

(4) The parties to a contract not unfrequently assess the

damages at which they rate a breach of the contract by one or both of them, and introduce their assessment into the terms of the contract. Under these circumstances arises the distinction between penalty and liquidated damages, which we have already dealt with in considering the construction of contracts.

Assessment by parties.

Ante, p 32

(5) Difficulty in assessing damages does not disentitle a plaintiff from having an attempt made to assess them, unless they depend altogether upon remote and hypothetical possibilities.

Robinson v Harman 1 Ex. 855

Sapwell v Bass, [1910] 2 K B. 486

A manufacturer was in the habit of sending specimens of his goods for exhibition to agricultural shows, and he made a profit by the practice. He entrusted some such goods to a railway company, who promised the plaintiff, under circumstances which should have brought his object to their notice, to deliver the goods at a certain town on a fixed day. The goods were not delivered at the time fixed, and consequently were late for a show at which they would have been exhibited. It was held that though the ascertainment of damages was difficult and speculative, the difficulty was no reason for not giving any damages at all.

Difficulty of assessment must be met by jury.

Simpson v L & N W Railway Co., 1 Q B D 274

Chaplin v Hicks, [1911] 2 K B 786

And further, the plaintiff is entitled to recover for prospective loss arising from a refusal by the defendant to perform a contract by which the plaintiff would have profited. Thus where a contract was made for the supply of coal by the defendants to the plaintiff by monthly instalments, and breach occurred and action was brought before the last instalment fell due, it was held that the damages must be calculated to be the difference between the contract price and the market price at the date when each instalment should have been delivered, and that the loss arising from the non-delivery of the last instalment must be calculated upon that basis, although the time for its delivery had not arrived. And the rule that the difference between the contract price and the market price

Roper v Johnson, L R 8 C 167

Brown v. Muller, L R 7 Exch. 319

is the measure of damages in such a case applies even where the purchaser, having arranged to resell at less than the market price, would not in fact have realized that difference if the vendor had carried out his contract; for after the breach the purchaser would have been compelled to buy at the market price in order to put himself into the same position as if the contract had been fulfilled.

William v. Agius, [1914] A. C. 510.

But the rule is subject to this qualification. A man whose contract has been broken must act reasonably, and if he has the opportunity of mitigating the damages which the breach of contract has caused or is likely to cause him, it is his duty to take it. Thus, though the measure of damages for breach of a contract to deliver goods is ordinarily the difference between the contract price of the goods and the market price at the time when delivery should have been given, yet if the plaintiff might have mitigated his loss, as, for example, by an immediate purchase at a low price of goods to replace those not delivered, or by accepting a reasonable offer from the defendant to make good part of the loss, this is to be taken into account in assessing his damages. It is a question of fact in each case, and not of law, whether he has acted as a reasonable man might have been expected to act.

Payzu v. Saunders, [1919] 2 K. B. 581.

§ 3. *Specific Performance and Injunction.*

Under certain circumstances a promise to do a thing may be enforced by a decree for specific performance, and an express or implied promise to forbear by an injunction.

Specific performance a matter of grace.

These remedies were once exclusively administered by the Chancery. They supplemented the remedy in damages offered by the Common Law, and were granted at the discretion of the Chancellor acting as the administrator of the king's grace.

When refused.

It will be enough here to illustrate the two main characteristics of these remedies—that they are supplementary—that they are discretionary.

(1) Where damages are an adequate remedy, specific performance will not be granted:—

'The remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary and confined within well-known rules.' Ryan v. Mutual Tontine Association, [1893] 1 Ch. at p 126.

Damages may be a very insufficient remedy for the breach of a contract to convey a plot of land: the choice of the intending purchaser may have been determined by considerations of profit, health, convenience, or neighbourhood: but damages can usually be adjusted so as to compensate for (let us say) a failure to supply goods. In the case of an agreement to sell goods the Chancery would decree the specific performance only in the case of chattels possessing a special beauty, rarity, or interest; but now by statute, in the case of a breach of contract to deliver *specific* or *ascertained* goods, the Court may direct the contract to be performed specifically without allowing the seller an option to retain the goods and pay damages. Sale of Goods Act, 1893, s 52

(2) Where the Court cannot supervise the execution of the contract specific performance will not be granted.

If the Court endeavoured to enforce a contract of employment, or a contract for the supply of goods to be delivered by instalments, it is plain 'that a series of orders and a general superintendence would be required which could not conveniently be undertaken by any Court of Justice,' and 'the Court acts only where it can perform the very thing in the terms specifically agreed upon.' Wolverhampton Railway Co v. L & N W Railway Co., L R 16 Eq. 439

(3) Unless the contract is 'certain, fair, and just,' specific performance will not be granted.

It is here that the discretionary character of the remedy is most strongly marked. It does not follow that specific performance will be granted although there may be a contract actionable at Common Law, and although damages may be no adequate compensation. The Court will

Webster v Cecil, 30 Beav. 62

consider the general fairness of the transaction and refuse the remedy if there is any suspicion of sharp practice on the part of the suitor.

Kekewich v Manning, 1 D. M. & G at p. 188.

Akin to this principle is the requirement that there must be *mutuality* between the parties. This means that at the time of making the contract there must have been consideration on both sides or promises mutually enforceable by the parties. Hence specific performance of a gratuitous promise under seal will not be granted; nor can an infant enforce a contract by this remedy. His promise is not enforceable against himself, and though he might bring action upon it for damages in the King's Bench Division of the High Court, 'it is a general principle of Courts of Equity to interfere only where the remedy is mutual.'

In re Lucan, 45 Ch D 470

Flight Bolland, 4 Russ 298

Injunction,

An injunction may be used as a means of enforcing a simple covenant or promise to forbear. Such would be the case of a building covenant restraining the use of property otherwise than in a certain specified manner.

when granted,

Or it may be the only means of enforcing the specific performance of a covenant where damages would be an inadequate remedy, while to enforce performance of the covenant would involve a general superintendence such as the Court could not undertake. Thus an hotel-keeper who obtained a lease of premises with a covenant that he would buy beer exclusively of the lessor and his assigns was compelled to carry out his covenant by an injunction restraining him from buying beer elsewhere.

Clegg v Hands, 44 Ch D 503

1 D M. & G. 604.

Lumley v. Wagner is an extreme illustration of the principle. Miss Wagner agreed to sing at Lumley's theatre, and during a certain period to sing nowhere else. Afterwards she made a contract with another person to sing at another theatre, and refused to perform her contract with Lumley. The Court refused to enforce Miss Wagner's positive engagement to sing at Lumley's theatre, but compelled performance of her promise not to sing elsewhere by an injunction.

Here there was an express negative promise which the Court could enforce, and it has been argued that an express *positive* promise gives rise to a negative undertaking not to do anything which should interfere with the performance of this promise. But the Courts have refused in contracts of personal service to enforce by injunction anything but an express negative stipulation, for they are disinclined to carry any further the principle of *Lumley v. Wagner*. It is said to be 'an anomaly to be followed in cases like it, but an anomaly which it would be dangerous to extend.'

when refused.

Fry, Specific Performance, §§ 860–862

Mortimer v Beckett, [1920] 1 Ch 571

In fact we may lay down that as a general rule contracts of personal service will not be dealt with either by decree for specific performance or by injunction.

A manager was employed by a Company and agreed to 'give the whole of his time to the Company's business': afterwards he gave some of his time to a rival Company.

Whitwood Chemical Co v. Hardman, [1891] 2 Ch 428

'I think,' said Lindley, L. J., 'the Court will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone: and whether it is attempted to enforce these contracts directly by a decree for specific performance or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief will be done at all events to one of the parties, that the Court declines in cases of this kind to grant an injunction, and leaves the party aggrieved to such remedy as he may have apart from the extraordinary remedy of injunction.'

And this principle will be acted upon although a stipulation, affirmative in substance, is couched in a negative form. An employer agreed with his manager that he would not require him to leave the employment except under certain circumstances. It was held that such an undertaking could not be enforced by an injunction to restrain the employer from dismissing the manager.

Davis v Foreman, [1894] 3 Ch 654

The limited scope of the principle of *Lumley v. Wagner* is indicated in two later cases.

A traveller promised that he would serve a firm for ten years and would not, during that period, 'engage or

Ehrman v Bartholomew, [1898] 1 Ch. 671.

employ himself in any other business.' An injunction to restrain him from accepting other employment was refused, and *Lumley v. Wagner* was distinguished on the ground of the special character of the services there promised. But if the contract for a term of service is of a special character, as for instance that of a confidential clerk in possession of trade secrets, an injunction will, if necessary, be granted to restrain him from accepting other employment, because the engagement contemplates the betrayal or injury of his first employer.

Robinson v. Heuer, [1898] 2 Ch 451.

The contract of personal service would seem to be regarded by the Courts as distinguishable from other contracts in respect of this remedy. In *The Metropolitan Electric Supply Co. v. Ginder* an express promise by the defendant to take the whole of his supply of electricity from the Company was held to import a negative promise that he would take none from elsewhere, and an injunction was accordingly granted.

[1901] 2 Ch. at p. 807.

Two points remain to be noted:—

General Accident Corporation v. Noel, [1902] 1 K. B. 377.

(1) Where the contract fixes a sum as liquidated damages, the party aggrieved by breach of the contract cannot claim damages and an injunction as well, but must elect between the two.

Effect of Judicature Acts. 36 & 37 Vict. c. 66. s. 34. sub-s. 3.

(2) An equitable claim or counter-claim may be asserted in any Division of the High Court of Justice; but there is assigned to the Chancery Division, as a special department of its business, suits for 'specific performance of contracts between vendors and purchasers of real estate, including contracts for leases.' Such a suit, if brought in any other than the Chancery Division, would be transferred to that Division by an order of the Court.

§ 4. *Discharge of Right of Action arising from Breach of Contract.*

Discharge of right of action.

The right of action arising from a breach of contract may only be discharged in one of three ways:—

(*a*) By the consent of the parties.

(*b*) By the judgment of a Court of competent jurisdiction.

(*c*) By lapse of time.

(*a*) *Discharge by consent of the parties.*

This may take place either by Release or by Accord and Satisfaction; and the distinction between these two modes of discharge brings us back to the elementary rule of contract, that a promise made without Consideration must, in order to be binding, be made under seal. A Release is a waiver, by the person entitled, of a right of action, accruing to him from a breach of a promise made to him.

by Release,

In order that such a waiver should bind the person making it, it is necessary that it should be made under seal; otherwise it would be nothing more than a promise, given without consideration, to forbear from the exercise of a right.

To this rule bills of exchange and promissory notes form an exception. We have already seen that these instruments admit of a parol waiver before they fall due. One who has a right of action arising upon a bill or note can discharge it by an unconditional gratuitous renunciation, in writing, or by the delivery of the bill to the acceptor.

Bills of Exchange Act, 1882, s 62

Accord and Satisfaction is an agreement, not necessarily under seal, the effect of which is to discharge the right of action possessed by one of the parties to the agreement.

by Accord and Satisfaction.

Formerly in this phrase the words *satisfaction* meant that the consideration for the discharge must be executed, but in modern law not only the *performance* of a new promise, but a new promise of itself, that is to say, a promise of something different from that which the debtor was bound to perform by the original contract, will discharge the original cause of action, provided that it is clear that the intention was that the promise should be taken in satisfaction.

Ante, p 108.

Morris v. Baron, [1918] *per* Lord Atkinson at p 35

(*b*) *Discharge by the judgment of a Court of competent jurisdiction.*

The judgment of a Court of competent jurisdiction in the plaintiff's favour discharges the right of action arising from breach of contract. The right is thereby *merged* in the more solemn form of obligation which we have dealt with elsewhere as one of the so-called Contracts of Record.

The result of legal proceedings taken upon a broken contract may thus be summarized:—

Effect of bringing action;

The bringing of an action has not of itself any effect in discharging the right to bring the action. Another action may be brought for the same cause in another Court;

R S C Order 25 r 4

and though proceedings in such an action would be stayed, if they were merely vexatious, upon application to the summary jurisdiction of the Courts, yet if action for the same cause be brought in an English and a foreign Court, the fact that the defendant is being sued in the latter would not in any way help or affect his position in the former. But when judgment is given in an action, whether by consent, or by decision of the Court, the obligation is discharged by *estoppel*. The plaintiff cannot bring another action for the same cause so long as the judgment stands. The judgment given may be reversed on appeal and entered in his favour, or the parties may be remitted to their original positions by a new trial of the case being ordered by the Court of Appeal.

of judgment,

Ex parte Bank of England, [1895] 1 Ch 37

Conquer v Boot, [1928] 2 K. B. 336.

by way of estoppel,

But such an estoppel can only result from an adverse judgment if it has proceeded upon the merits or substance of the case. If a man fail because he has sued in a wrong character, as executor instead of administrator; or at a wrong time, as where action is brought before a condition of the contract is fulfilled, such as the expiration of a period of credit in the sale of goods, a judgment proceeding on these grounds will not prevent him from succeeding in a subsequent action.

Palmer v. Temple, 9 A & E 508

If the plaintiff get judgment in his favour, the right of

action is discharged and a new obligation arises, a form of the so-called Contract of Record. It remains to say that the obligation arising from judgment may be discharged if the judgment debt is paid, or satisfaction obtained by the creditor from the property of his debtor by the process of execution.

by way of merger.

4 & 5 Anne, c 16 s 12

(c) *Lapse of Time.*

At Common Law lapse of time does not affect contractual rights. Such a right is of a permanent and indestructible character, unless either from the nature of the contract, or from its terms, it be limited in point of duration.

Per Lord Selborne, Llanelly Railway Co v L & N W Railway Co, L R 7 H L 567

But though the rights possess this permanent character, the remedies arising from their violation are, by various statutory provisions, withdrawn after a certain lapse of time; *interest reipublicae ut sit finis litium.* The remedies are barred, though the rights are not extinguished.

It was enacted by 21 Jac. I. c. 16. s. 3 that—

Simple contract.

'All actions of account, and upon the case . . . all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent . . . shall be commenced and sued within . . . six years next after the cause of such action or suit and not after.'

'Action upon the case' includes actions of Assumpsit, as was explained in an earlier chapter: but actions 'on accounts' between merchants and merchants, their factors or servants, were expressly excepted from the Act of James, and the limitation of six years was only applied to these by the Mercantile Law Amendment Act, 1856, s. 9 [1].

21 Jac I c 16
19 & 20 Vict c 97

The Civil Procedure Act, 1833, s. 3, limits the bringing

[1] Before the Judicature Acts only a few statutes of limitation expressly applied to equitable claims, e.g. the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27); but Courts of Equity accepted by analogy the limitation period prescribed by other statutes in cases where a legal right was in question Statutes of limitation are now binding on all Courts in every case to which they apply; in other cases they are still applied by analogy in Courts of Equity, unless the remedy sought is altogether dissimilar to the concurrent legal remedy, e.g. the enforcement of a vendor's lien for unpaid purchase-money.

In re Greaves, 18 Ch D 554. *Re* Robinson, [1911] 1 Ch 502

In re Stucley, [1906] 1 Ch. 67.

Specialties.

of actions upon any contract under seal to a period of twenty years from the cause of action arising.

Disabilities suspending operation of Statutes:

21 Jac. I c. 16 s 7. disability of plaintiff:

3 & 4 Will. 4. c 42. s 4.

The statutory period of limitation begins to run as soon as the cause of action arises, but there may be circumstances which suspend its operation. The Statute of James I provided that infancy, coverture, insanity, imprisonment, or absence beyond seas should, if the plaintiff was under any such disabilities when the cause of action arose, suspend the operation of the Statute until the removal of the disability. The Statute of William IV applied the same rule, except in case of imprisonment, to actions on specialties. Coverture has ceased to be a disability since the Married Women's Property Acts.

19 & 20 Vict. c. 97. s 10.

The Mercantile Law Amendment Act, 1856, has now taken away the privilege of a plaintiff who is imprisoned or beyond seas in actions on simple contract or specialty.

disability of defendant.

3 & 4 Will 4. c. 42. s. 4. 4 Anne, c. 16. s. 19. 19 & 20 Vict. c. 97 s 11.

If the defendant is beyond seas at the time the right of action accrues, the operation of the Statutes is suspended until he returns. But where one of two or more defendants is beyond the jurisdiction, action brought against those who are accessible will not affect the rights of the plaintiff against such as may be beyond seas. There is no suspension on account of the defendant's infancy or insanity.

[1894] 2 Q. B. 352

The case of *Musurus Bey v. Gadban* affords a good illustration of the law. There the defendant counter-claimed for a debt due from the plaintiff as executor of Musurus Pacha, who had incurred the debt to Gadban twenty years before while he was Turkish ambassador in London. It was held that no right of action could accrue against Musurus Pacha while he was ambassador, nor within a reasonable time during which he remained in England after his recall, by reason of his diplomatic privilege; that thenceforward he was beyond seas, until his death in 1890, and that therefore the Statute had not begun to take effect at that date, and the counter-claim was sustainable.

A disability arising *after* the period of limitation has

begun to run will not affect the operation of the Statute: nor will ignorance that a right of action existed. But where that ignorance is produced by the fraud of the defendant, and no reasonable diligence would have enabled the plaintiff to discover that he had a cause of action, the statutory period commences with the discovery of the fraud. This is an equitable rule generalized in its application by s. 24, sub-s. 1 of the Judicature Act, 1873.

Blair v Bromley, 5 Hare, 559

Gibbs v. Guild, 9 Q B D 66.

Statutes of Limitation may be so framed as not merely to bar the remedy, but wholly to extinguish the right: such is the case as to realty under 3 & 4 Will. IV. c. 27. But in contract, the remedy, which alone is barred by 21 Jac. I. c. 16, may be revived.

Revival of right of action.

Where a specialty contract results in a money debt, the right of action may be revived, (1) by an acknowledgment of the debt in writing, signed by the party liable, or his agent; or (2) by part payment, or part satisfaction on account of any principal or interest due on such a specialty debt. Such a payment if made by the agent of the party liable will also have the effect of reviving the claim.

In case of specialty.

3 & 4 Will 4. c 42 s. 5.

Where a simple contract has resulted in a money debt the right of action may also be revived by subsequent acknowledgment or promise to the creditor or his agent, and this rule is affected by two Statutes: Lord Tenterden's Act, 1828, s. 1, which requires that the acknowledgment or promise, to be effectual, must be in writing; and the Mercantile Law Amendment Act, 1856, s. 13, which provides that such a writing may be signed by the agent of the party chargeable, duly authorized thereto, and is then as effective as though signed by the party himself.

Of simple contract.

In re Beavan [1912] 1 Ch 196

By promise.

The law relating to the revival of a simple contract debt by an 'acknowledgment' or 'promise' (unlike that which relates to the acknowledgment whereby a specialty debt may be revived, which is statutory) is entirely judge-made law; it received a statutory recognition in Lord Tenterden's Act, but it owes its existence to 'the decisions

Spencer v Hemmerde, [1922] 2A C. *per* Lord Sumner, at p 519.

of three centuries, which have been directed to what is after all the task of decorously disregarding an Act of Parliament,' namely, the Statute of Limitations of James I.

It is now, however, settled law

Ibid *per* Lord Cave, L. C., at p. 513

'(1) that a written promise to pay a debt given within six years before action is sufficient to take the case out of the operation of the statute of James I; (2) that such a promise is implied in a simple acknowledgment of the debt; but (3) that where an acknowledgment is coupled with other expressions, such as a promise to pay at a future time or on a condition or an absolute refusal to pay, it is for the Court to say whether those other expressions are sufficient to qualify or negative the implied promise to pay.'

The whole doctrine whereby a promise to pay will sometimes be inferred from an acknowledgment of a debt and sometimes not, is, in Lord Sumner's words in the same case, 'purely artificial.' We may note the following points, which Lord Sumner, after an exhaustive review of a long line of decisions not always consistent with one another, considers to be now established.

(1) Since the revival of the right of action depends not upon the acknowledgment of indebtedness *per se*, but upon the inference of a promise from the acknowledgment it might be thought that the cause of action would be the new promise which is inferred. This, however, is not so. The cause of action is the original promise, and an action on a statute-barred debt is consequently no exception to the ordinary rule against past consideration. The

Ibid at pp 524, 533

legal significance of implying a new promise from the acknowledgment is merely that it is 'the mode of determining the character of the acknowledgment,' that is to say, of determining whether the acknowledgment is or is not the sort of acknowledgment that will take the debt out of the Statute.

(2) It is for the Court to say what is the meaning of the words used when fairly construed, and the question is

Ibid at p. 526

'what the debtor's words mean, and not what he meant when he wrote them.' A debtor's actual intention, in

acknowledging a debt, is usually merely to gain time or avert some pressure from the creditor, and if it were necessary to find as a fact that he had intended to promise to pay, the doctrine of acknowledgment would cease to be of much use to the creditor.

This being the principle, its application in every case must turn on the construction of the words of the alleged promisor; and 'when the question is, what effect is to be given to particular words, little assistance can be derived from the effect given to other words in applying a principle which is admitted.'

Cleasby, B., in Skeet v Lindsay, 2 Ex D 317

A simple contract debt may also be revived by part payment, or payment on account of the principal, or interest; and, Lord Tenterden's Act provides that nothing therein contained 'shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person.' But the payment must be made with reference to the original debt, and in such a way as to amount to an acknowledgment of it and a promise to pay the remainder. Payment to a third party is insufficient; so that where the maker of a promissory note made a payment on account to the original payee after six years had expired, the note having, in the meantime, been indorsed to a third party, the payment was not an acknowledgment which revived the rights of the indorsee.

By payment.

Waters v Tompkins, 2 C M & R 723

Stamford Banking Co v Smith, [1892] 1 Q B 765

PART VII

AGENCY

CHAPTER XVIII

Nature of the Relation of Principal and Agent

WHEN dealing with the Operation of Contract we had to note that although one man cannot by contract with another confer rights or impose liabilities upon a third, yet that one man might represent another, as being employed by him, for the purpose of bringing him into legal relations with a third. Employment for this purpose is called Agency.

Outline of subject.

The rules which govern the relation of Principal and Agent fall under three heads.

1. The mode in which the relation is formed.

2. The effects of the relation when formed; and here we have to consider—

(*a*) The relations of principal and agent;

(*b*) The relations of the parties where the agent contracts for a principal whom he names;

(*c*) The relations of the parties where the agent contracts as agent, but without disclosing the principal's name;

(*d*) The relations of the parties where the agent contracts in his own name, without disclosing his principal's existence.

3. The mode in which the relation is brought to an end.

CHAPTER XIX

The Mode in which the Relation of Principal and Agent is created

Capacity of parties.

FULL contractual capacity is not necessary to enable a person to represent another so as to bring him into legal relations with a third. An infant can be an agent, although he cannot incur liability on any contract of agency with his principal. But no one can enter into a contract through an agent, which is outside his own contractual capacity.

How the relation may arise.

The authority given by the principal to the agent, enabling the latter to bind the former by acts done within the scope of that authority, may be given by writing, words, or conduct.

Formal grant of authority requisite for contract under seal.

In one case only is it necessary that the authority should be given in a special form. In order that an agent may make a binding contract under seal it is necessary that he should receive authority under seal. Such a formal authority is called a *power of attorney*.

Conduct.

The conduct of the parties may create an inference that an authority has been conferred by one upon the other.

15 East 38.

In *Pickering v. Busk* the plaintiff allowed a broker to purchase for him a quantity of hemp, which by the plaintiff's desire was entered in the place of deposit in the broker's name. The broker sold the hemp and it was held that the conduct of the plaintiff gave him authority to do so.

at p 43

'Strangers,' said Lord Ellenborough, 'can only look to the act of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority.'

We may, if we please, apply to such a case the term agency by *estoppel*, for estoppel means only that a man

is not permitted to resist an inference which a reasonable person would necessarily draw from his words or conduct.

Members of Clubs.

There may, on the other hand, be cases in which a man is the agent of another in the sense that he acts on his behalf, but the circumstances negative any intention that he should have authority to pledge the other's credit. Such is the case of the committee of a club who manage the affairs of the club on behalf of the whole body of members. The committee have no authority, as such, to pledge the personal credit of individual members, nor can they be said to be held out by individual members as having such authority.

Flemyng v Hector, 2 M. & W. 172

Wise v Perpetual Trustee Co., [1903] A. C. 139

The inference of intention to confer authority may be affected by the relation in which the parties stand to one another, and in this connexion the relation of husband and wife requires special consideration.

Husband and wife.

Only in one special case—that of *agency of necessity*, which will be considered later—does marriage as such confer an inherent authority on a wife to act as her husband's agent. Apart from this she may receive his authority expressly, or she may receive it by implication from his conduct. If, for example, the husband has recognized, and taken on himself the liability in respect of, his wife's past dealings with a tradesman, he has by his own acts held her out as his agent and as having his authority, and he will be liable on such contracts as she may make with that tradesman, unless and until he brings to the actual knowledge of the tradesman the fact that her agency is determined. But in such cases as these the authority of a wife differs in no way from that of any other agent, for if, for example, a master allows his servant to purchase goods for him of *X* habitually, upon credit, *X* becomes entitled to look to the master for payment for such things as are supplied in the ordinary course of dealing.

Debenham v Mellon, Ihesiger, L. J., 5 Q. B. D. 403

1 Shower, 95

It is indeed (apart from *agency of necessity*) not the legal tie of marriage, but the fact of cohabitation, that makes

a wife's position in any way a special one, for cohabitation (whether or not the parties are legally married) raises a presumption *of fact* that the wife has authority to contract for her husband 'in all domestic matters ordinarily entrusted to a wife, as the reasonable supply of goods, and services for the use of the husband, his wife, children, and household, suitable in kind and sufficient in quantity, and necessary in fact, according to the condition in which they live.' This presumption, however, being one of fact only may be rebutted by evidence which shows that in fact the authority does not exist. Thus the husband may rebut it by proving (1) that he expressly warned the tradesman not to supply goods on credit; (2) that the wife was already supplied with a sufficiency of the articles in question; (3) that the wife was supplied with a sufficient allowance or sufficient means for the purpose of buying the articles without pledging the husband's credit; (4) that the husband expressly forbade his wife to pledge his credit; (5) that the order, though for necessaries, was excessive in point of extent, or (having regard to the smallness of the husband's income) extravagant. It follows that one who deals with a married woman on credit, does so, so far as regards his remedy against the husband, at his own risk.

Morel Bros v Lord Westmorland, [1904] A C 11
Miss Gray Ltd v Earl Cathcart, 38 I L R. 562

We may contrast this relation with that of partnership. Marriage does not of itself create the relation of agent and principal: partnership does. The contract of partnership confers on each partner an authority to act for the others in the ordinary course of the partnership business. And each partner accepts a corresponding liability for the act of his fellows.

different rule for partners.

Partnership Act, 1890, s. 5
Hawken v Bourne, 8 M & W 710

In certain circumstances the law confers an authority on one person to act as agent for another without requiring the consent of the principal. Such agency is called *agency of necessity*.

Agency of Necessity.

A husband is bound to maintain his wife; and if he

Eastland v Burchell, 3 Q. B D at p. 436. Wilson v. Glossop, 20 Q B D. 354

makes no adequate provision for her maintenance she is entitled to supply the needs of herself and her children upon his credit. The extent of her authority in such a case is not altogether clear, but it would seem reasonable that it should not be limited to what is necessary to save her from actual destitution, but that it should extend to 'necessaries,' in the usual legal sense of goods and services suitable to the style of living maintained by the husband. Agency of necessity may exist either during cohabitation, or after separation, provided that the separation takes place through the husband's fault.

Agency of necessity arises in cases other than that of husband and wife.

Kemp v Pryor, 7 Ves 246

A carrier of goods, or a master of a ship, may under certain circumstances, in the interest of his employer, pledge his credit, and will be considered to have his authority to do so. It has even been held that where goods are exported, unordered, or not in correspondence with samples, the consignee has, in the interest of the consignor, an authority to effect a sale.

Apart from these cases the limits of the doctrine are not very clear. There is certainly in English law nothing which corresponds to the *negotiorum gestio* of Roman law.

Binstead v. Buck, 2 W Bl 1117

As long ago as 1776 it was held that the finder of perishable goods is not in such a position. In that case the defendant had found a pointer dog, and refused to give him up unless paid for the expense of his keep, but the defendant's counsel declined even to argue the case. It has been suggested by McCardie, J., that the doctrine should be extended to all agents when an emergency arises necessitating immediate action on the agent's part beyond the limits of his mandate. This would only occur (1) when the agent is unable to communicate with his principal; (2) when he acts under a definite commercial necessity, and (3) when he acts bona fide in the interests of the principal. But it is not clear that the courts are prepared to extend the doctrine as far as this.

Prager v. Blutspiel, [1924] 1 K B 566

Jebara v Ottoman Bank, [1927] 2 K. B. 270

Ratification:

It remains to consider Ratification, or the adoption by A of the benefit and liabilities of a contract made by X on his behalf, but without his authority. A Ratification duly made places the parties exactly in the position in which they would have been if X had had A's authority at the time he made the contract. It is said to 'relate back.' *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*

Koenigsblatt v Sweet, [1923] 2 Ch. at p. 325.

The rules which govern Ratification may be stated thus:—

rules which govern it.

The agent must contract as agent, for a principal who is in contemplation, and who must also be in existence at the time, for such things as the principal can and lawfully may do.

Wilson v. Tumman, 6 M & G. 242

'An act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. In that case the principal is bound by the act whether it be for his detriment or his advantage, and whether it be in tort or in contract.'

(*a*) The agent must purport to contract *as agent.*

Agency must be declared.

He must not incur a liability on his own account and then assign it to some one else under colour of ratification. If he has a principal and contracts in his own name he cannot divest himself of the liability to have the contract enforced against him by the party with whom he dealt, who is entitled under such circumstances to the alternative liability of the agent and principal. If he has no principal and contracts in his own name he can only divest himself of his rights and liabilities in favour of another by *assignment* to that other, subject to the rules laid down elsewhere in this book; and in such a case it is immaterial that the person contracting intends to contract on behalf of some third person, if he 'at the same time keeps his intention locked up in his own breast.'

Keighley, Maxsted & Co. v. Durant, [1901] A C 240.

(*b*) The agent must act for a principal who is in contemplation.

He must not make a contract, as agent, with a vague

for a contemplated principal,

expectation that parties of whom he is not cognizant at the time will relieve him of his liabilities. The act must be 'done *for another* by a person not assuming to act for himself but for such other person.'

Wilson v. Tumman, 6 M & G 242

Apparent, though not real, exceptions to this rule should be noted. A broker may make contracts, as agent, expecting that customers with whom he is in the habit of dealing will take them off his hands. Thus, in contracts of marine insurance made by an insurance-broker, persons 'who are not named or ascertained at the time the policy is effected are allowed to come in and take the benefit of the insurance. *But then they must be persons who were contemplated at the time the policy was made.*'

Watson v Swann, 11 C. B., N S 769

6 Edw 7 c 41 s 86.

Graham Shipping Co v Merchants Marine Insurance Co, [1923] 1 K B 634

So too where work is done on behalf of the estate of a deceased person, if it is done by order of one who afterwards becomes administrator and ratifies the contract for the work so done, such a ratification creates a binding promise to pay for the work. Here the principal contemplated is really the estate of the deceased person; this is in existence, although there may be no one capable of acting on its behalf until letters of administration have been obtained.

In re Watson, 18 Q B D 116

[1899] 2 Q B 36

The converse of these cases is seen in *Tiedemann v. Ledermann*, where an agent, without authority and fraudulently, entered into a contract for the sale of wheat in his principal's name, but intending to avail himself of it, for his own ends. The principal could nevertheless ratify and adopt the contract and hold the buyers to their bargain.

(*c*) The principal must be in existence.

who is in existence.

This rule is important in its bearing on the liabilities of companies for contracts made by the promoters on their behalf before they are formed. In *Kelner v. Baxter* the promoters of a company as yet unformed entered into a contract on its behalf, and the company when duly incorporated ratified the contract. It became bankrupt and the defendant who had contracted as its agent was

L R 2 C P. 174.

sued upon the contract. It was argued that the liability had passed, by ratification, to the company and no longer attached to the defendant, but the Court held that this could not be.

'Could the "company,"' said Willes, J, 'become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done,—by a person in existence either actually or in contemplation of law, as in the case of the assignees of bankrupts, or administrators whose title for the protection of the estate vests by relation.' at p 184

The rule was cited with approval and adopted by the Privy Council in the later case of the *Natal Land Co. v. Pauline Colliery Syndicate.* [1904] A C 120

(*d*) The agent must contract for such things as the principal can, and lawfully may do.

A man may adopt the wrongful act of another so as to make himself civilly responsible: but if an agent enter into a contract on behalf of a principal who is incapable of making it, or if he enter into an illegal contract, no ratification is possible. The transaction is void, in the one case from the incapacity of the principal, in the other from the illegality of the act. Bird v Brown, 4 Ex 799 Mann v Edinburgh Northern Tramways Co, [1893] A C 79

On this last ground it has been held that a forged signature cannot be ratified, so as to constitute a defence to criminal proceedings. But is ratification here in question? For one who forges the signature of another is not an agent, actually or in contemplation. The forger does not act for another; he personates the man whose signature he forges. Brook v Hook, L R 6 Ex 89 McKenzie v British Linen Co, 6 A. C 99

(*e*) The principal can only ratify the act of the agent, if at the time when he purports to ratify he could himself do the act in question.

Thus a contract of insurance made by an agent without his principal's authority cannot be ratified by the principal after he has become aware that the event insured against has in fact occurred. The principal could not himself insure in such circumstances and he is not permitted to take advantage of the agent's unauthorized act.

Grover v. Matthews, [1910] 2 K. B. 401.

It is, however, to be noted that contracts of marine insurance form a singular exception to this rule; but the Courts have stated that the exception is an anomalous one and is not to be extended.

Principal may ratify by words or conduct.

The principal who accepts the contract made on his behalf by one whom he thereby undertakes to regard as his agent, may, as in the acceptance of any other simple contract, signify his assent by words or by conduct. He may avow his responsibility for the act of his agent, or he may take the benefit of it, or otherwise by acquiescence in what is done create a presumption of authority given. Where conduct is relied upon as constituting ratification the relations of the parties and their ordinary course of dealing may create a greater or less presumption that the principal is liable.

CHAPTER XX

Effect of the Relation of Principal and Agent

THE effects of the relation of Principal and Agent when created as described above may be thus arranged.

1. The rights and liabilities of principal and agent *inter se*.

2. The rights and liabilities of the parties where an agent contracts as agent for a named principal.

3. The rights and liabilities of the parties where an agent contracts for a principal whose name he does not disclose.

4. The rights and liabilities of the parties where an agent contracts in his own name but in reality for a principal whose existence he does not disclose.

I. THE RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT *inter se*.

Relations of principal and agent.

The relations of principal and agent *inter se* are made up of the ordinary relations of employer and employed, and of those which spring from the special business of an agent to bring two parties together for the purpose of making a contract—to establish privity of contract between his principal and third parties.

Duty of principal to indemnify or reward,

Adamson v. Jarvis, 4 Bing 66.

The principal must pay the agent such commission, or reward for the employment, as may be agreed upon between them. He must also indemnify the agent for acts lawfully done and liabilities incurred in the execution of his authority.

of agent to use diligence;

Jenkins v. Bentham, 15 C. B. 168.

The agent is bound, like every person who enters into a contract of employment, to account for such property of his principal as comes into his hands in the course of the employment; to use ordinary diligence in the discharge of his duties; to display any special skill or capacity which he may profess for the work in hand.

There are besides these ordinary relations of employer and employed certain duties, owing by the agent to the principal, which arise from the confidential character of the relations between them.

(1) Agent may make no profit other than commission:

(1) The agent must make no profit out of transactions into which he may enter on behalf of his principal in the course of the employment beyond the commission or remuneration agreed upon between them.

Where an agent is promised a reward or payment which might induce him to act disloyally to his principal, or might diminish his interest in the affairs of his principal, he cannot recover the money promised to him. If he obtains money by a transaction of this nature, he is bound to account for it to his principal, or pay it over to him. If he does not do so the money can be recovered by the principal as a debt due to the principal.

cannot recover promised reward, Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549

An engineer in the employment of a railway company was promised by the defendant company a commission the consideration for which was, partly the superintendence of work to be done by them for the railway company, partly the use of his influence with the railway company to obtain an acceptance by them of a tender made by the defendant company. He did not appear in fact to have advised the railway company to its prejudice, but it was held that he could not recover in an action brought for this commission. 'It needs no authority to show that, even though the employers are not actually injured and the bribe fails to have the intended effect, a contract such as this is a corrupt one and cannot be enforced.'

[1903] 2 K. B. 635 must account for it if received, to principal or his representatives:

In *Andrews v. Ramsay* the plaintiff, a builder, engaged the defendant, an auctioneer, to sell some property on the terms that he should receive £50 commission. Ramsay sold the property and received £20 commission from the purchaser. It was held that he was not only bound to pay over this £20 to his employer, but that he was not entitled to the £50 commission promised, and that though this

sum had already been paid it could be recovered. It would be easy to multiply illustrations of this principle.

But the agent is his principal's debtor, not his trustee for money so received. If the money is invested in land or securities, these cannot be claimed by the principal, any more than he can claim profits made out of the money the agent has had. The money constitutes a debt due to the principal, and it is this that he can recover.

Lister & Co v. Stubbs, 45 Ch. D. 15.

It is open to the principal who discovers that his agent has been paid or promised, by the other party, a reward for bringing about the contract, to repudiate the transaction, and to recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by entering into the contract, without allowing any deduction for the amount of the bribe which he is entitled to recover from the agent. Nor is it material to inquire what was the effect of the payment or promise on the mind of the agent; no man can be allowed to have an interest which conflicts with his duty.

offer of reward makes contract voidable, Mayor of Salford v Lever, [1891] 1 Q. B. 168

Shipway v Broadwood, [1899] 1 Q. B. 373

The Prevention of Corruption Act, 1906, now makes corrupt transactions of all kinds by or with agents criminal offences also and punishable by fine and imprisonment.

6 Edw. 7 c. 34.

(2) The agent may not depart from his character as agent and become a principal party to the transaction, even though this change of attitude do not result in injury to his employer. If a man is employed to buy or sell on behalf of another he may not himself sell to his employer or buy of him.

(2) May not become principal as against his employer. Armstrong v Jackson, [1917] 2 K. B. 822.

Nor, if he is employed to bring his principal into contractual relations with others, may he assume the position of the other contracting party.

In illustrating these propositions we may usefully distinguish employment to buy upon commission, from employment to represent a buyer or seller: the one is commission agency, which is not agency in the strict sense of the word, the other is genuine agency.

Compare (*a*) sale,

(*a*) *A* may agree with *X* to purchase goods of *X* at a price fixed upon. This is a simple contract of sale and each party makes the best bargain for himself that he can.

(*b*) commission agency,

(*b*) Or *A* may agree with *X* that *X* shall endeavour to procure certain goods and when procured sell them to *A*, receiving not only the price at which the goods were purchased but a commission or reward for his exertions in procuring them.

Here we have a contract of sale with a contract of employment added to it, such as is usually entered into by a commission agent or merchant, who supplies goods to a foreign correspondent. In such a case the seller procures and sells the goods not at the highest but at the lowest price at which they are obtainable: what he gains by the transaction is not a profit on the price of the goods but a payment by way of commission, which binds him to supply them according to the terms of the order or as cheaply as he can.

Ireland v Livingston, L. R. 5 H. L. 407.

If a seller of goods warrants them to be of a certain quality he is liable to the buyer, on the non-fulfilment of the warranty, for the difference in value between the goods promised and those actually supplied. If a commission agent promises to procure goods of a certain quality and fails to do so the measure of damages is the loss which his employer has actually sustained, not the profit which he might have made. A seller of goods with a warranty promises that they shall possess a certain quality. A commission agent only promises to do his best to obtain goods of such a quality for his employer.

See Salvesen v. Rederi, &c., [1905] A. C. 302.

Cassaboglou v. Gibb, 11 Q. B. D. 797.

And here the person employed has no authority to pledge his employer's credit to other parties, but undertakes simply to obtain and supply the goods ordered on the best terms. Yet it would seem that he might not, without his employer's assent, supply the goods himself, even though they were the best obtainable and supplied at the lowest market price. This is an implied term in his contract of employment.

Rothschild v Brookman, 2 Dow & Cl. 188.

(c) Or thirdly, *A* may agree with *X* that in consideration of a commission paid to *X* he shall make a bargain for *A* with some third party. *X* is then an agent in the true sense of the word, a medium of communication to establish privity of contract between two parties. (c) and brokerage.

Under these circumstances it is imperative upon *X* that he should not divest himself of his character of agent and become a principal party to the transaction. This may be said to arise from the fiduciary relation of agent and principal: the agent is bound to do the best he can for his principal; if he put himself in a position in which he has an interest in direct antagonism to this duty, it is difficult to suppose that the special knowledge, on the strength of which he was employed, is not exercised to the disadvantage of his employer. Thus if a solicitor employed to effect a sale of property purchase it, nominally for another, but really for himself, the purchase cannot be enforced. Agent to make a contract must remain agent. McPherson v Watt, 3 App Ca 254

Not merely does the agent under such circumstances create for himself an interest antagonistic to his duty: he fails to do that which he is employed to do, namely, to establish a contractual relation between his employer and some other party. The employer may sustain no loss, but he has not got what he bargained for.

Robinson gave an order to Mollett, a broker in the tallow trade, for the purchase of a quantity of tallow. In accordance with a custom of the market unknown to Robinson, the broker did not establish privity of contract between his client and a seller, but simply appropriated to him an amount of tallow, corresponding to the order, which he had purchased from a selling broker. Robinson v Mollett, L R 7 H L 802

It was held that Robinson could not be required to accept goods on these terms, and that he was not bound by a custom of which he was not aware and which altered the 'intrinsic character' of the contract.

In *Johnson v. Kearley* the law on this subject was thus stated by Fletcher Moulton, L. J.:— [1908] 2 K B. 514

'To add on to the price of the article bought an arbitrary sum is at p. 528.

a taking of profit and not a commission and is compatible only with a sale and resale. It is absolutely inconsistent with the duty of an agent for purchase, inasmuch as it is the essential idea of a purchase through a broker or any other agent of the kind that the whole benefit of the purchase should go to the principal and that the sole interest of the agent should be in the commission allowed him by his principal. The office of a broker is to make privity of contract between two principals and this is utterly incompatible with making a contract at one price with the one and a corresponding contract at another price with the other.'

(3) May not delegate authority.

(3) The agent may not, as a rule, depute another person to do that which he has undertaken to do.

The reason of this rule, and its limitations, are thus stated by Thesiger, L. J., in *De Bussche v. Alt*:— 8 Ch D 310

'As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analysed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfil; and that inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident to the contract.'

The Lord Justice points out that there are occasions when such an authority must needs be implied, occasions springing from the conduct of the parties, the usage of a trade, the nature of a business, or an unforeseen emergency, 'and that when such implied authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts on him, as if he had been appointed agent by the principal himself.' The establishment of the fiduciary relation between principal and sub-agent follows where privity of contract exists between the two, as is shown in *Powell & Thomas v. Evan Jones & Co.* [1905] 1 K. B. 11.

The rule is really an illustration of the more general rule that liabilities under a contract may not be assigned without the consent of the promisee.

But where there is no such implied authority and the agent employs a sub-agent for his own convenience, no privity of contract arises between the principal and the sub-agent. On default of the agent the principal cannot intervene as an undisclosed principal to the contract between agent and sub-agent. Nor can he treat the sub-agent as one employed by him, and follow and reclaim property which has passed into the sub-agent's hands.

New Zealand Co v. Watson, 7 Q B. D. 374.

II. Rights and Liabilities of the Parties where an Agent contracts for a named Principal.

Where an agent contracts, as agent, for a named principal, so that the other party to the contract looks through the agent to a principal whose name is disclosed, it may be laid down, as a general rule, that the agent drops out of the transaction so soon as the contract is made.

Agent for named principal

drops out when contract made,

Where the transaction takes this form only two matters arise for discussion: the nature and extent of the agent's authority; and the rights of the parties where an agent enters into contracts, either without authority, or in excess of an authority given to him.

An idle distinction has been drawn between general and special agents, as though they possessed two sorts of authority different in kind from one another. There is no such difference.

If John Styles, having authority to act on behalf of Richard Roe and describing himself as agent for Richard Roe, makes a contract on Roe's behalf with John Doe, he brings Roe and Doe into the relation of two contracting parties, and himself drops out. The authority may have been wide or narrow, general or special, but the difference is only one of degree.

whether authority is general or special.

It should be observed that *X* cannot by private communications with *A* limit the authority which he has allowed *A* to assume.

'There are two cases in which a principal becomes liable for the acts of his agent: one where the agents acts within the limits of his authority,

Maddick v Marshall, 16 C. B , N. S 393

the other where he transgresses the actual limits but acts within the apparent limits, where those apparent limits have been sanctioned by the principal.'

Edmunds v. Bushell and Jones, L R. 1 Q. B. 97.

Jones employed Bushell as manager of his business, and it was incidental to the business that bills should be drawn and accepted from time to time by the manager. Jones, however, forbade Bushell to draw and accept bills. Bushell accepted some bills, Jones was sued upon them and was held liable. 'If a man employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority.'

Howard v Sheward, L R 2 C P. 148.

Sheward employed his brother to sell a horse to Howard, expressly desiring him not to warrant the horse. The brother nevertheless gave a warranty, and when it appeared that the horse was not in fact sound, Howard sued Sheward, and obtained damages for the breach of warranty. The brother's authority 'was an ostensible authority, which could not be negatived by showing a secret understanding between the horse-dealer and his servant that the latter was not to warrant.'

We may note the authority with which certain kinds of agents are invested in the ordinary course of their employment.

Auctioneer.

(*a*) An auctioneer is an agent to sell goods at a public auction. He is primarily an agent for the seller, but, upon the goods being knocked down, he becomes also the agent of the buyer, but only for the purpose of recording the bidding '*at the time and as part of the transaction*,' so as to provide a memorandum within the meaning of the 4th section of the Statute of Frauds and of the Sale of Goods Act. He has not merely an authority to sell, but actual possession of the goods, and a lien upon them for his charges. He may sue the purchaser in his own name, and even where he contracts avowedly as agent, and for a known principal, he may introduce such terms into the

Bell v Balls, [1897] 1 Ch. 671

Chaney v. Maclow, 45 T.L.R. 135.

contract made with the buyer as to render himself personally liable. Woolfe v Horne, 2 Q B D 355

But the principal will be bound if the auctioneer act within his apparent authority, though he disobey instructions privately given. An auctioneer through inadvertence and contrary to instructions put up an article for sale without reserve. His principal was bound by the terms of sale. But where there is a sale by auction with notice that it is subject to a reserve, the auctioneer has no authority to accept a bid less than the reserve fixed, and cannot bind his principal by doing so. Rainbow v. Howkins, [1904] 2 K B 326 McManus v. Fortescue, [1907] 2 K B 1.

(*b*) A factor by the rules of Common Law and of mercantile usage is an agent to whom goods are consigned for the purpose of sale, and he has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale. He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer. Factor.

He further has a lien upon the goods for the balance of account as between himself and his principal, and an insurable interest in them. Such is the authority of a factor at Common Law, an authority which the principal cannot restrict, as against third parties, by instructions privately given to his agent. Pickering v. Busk, 15 East 38

At Common Law, says Blackburn, J., Cole v. N.W. Bank, L R. 10 C P. at p. 363

'the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited.'

The Common Law regarded the owner of goods as having so acted as to clothe a factor with apparent authority to *sell*, but not to *pledge*, goods placed in his possession; but his presumed authority has been extended

by a series of Factors Acts now consolidated in the Factors Act, 1889. Speaking of the general intention of the earlier Acts, Blackburn, J., says:—

'The general rule of law is, that, where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The
Ibid. at p. 372. legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who bona fide deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance.'

s. 1. The Act of 1889 applies not only to factors, but to any 'mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods,
s 2 or to raise money on the security of goods;' and in effect it provides that where a 'mercantile agent' is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition made by him to a person acting in good faith and without notice of the agent's want of authority, in the ordinary course of his business as a mercantile agent, is as valid as if expressly authorized by the owner of the goods.

Persons therefore who, in good faith, advance money on the security of goods or documents of title are thereby entitled to assume that the possession of the goods, or of the documents of title to them, carries with it an
Weiner v. Harris, [1910] 1 K.B 285 authority to pledge them; and this is so even though as between the factor and his principal the authority is expressly withheld.

And so long as the agent is left in possession of the goods, revocation of authority by the principal does not prejudice the right of the buyer or pledgee if the latter has not notice of the revocation at the time of the sale or pledge.

It should, perhaps, be added that the mere possession

of the goods of another, with the consent of the owner, does not of itself confer an apparent authority to sell or pledge them, where the possessor is not a 'mercantile agent'. For example, if goods are delivered into the possession of another with an option to buy or return them or on a hire purchase agreement, the owner is not precluded from denying the validity of a disposition made by the possessor without his consent. The effect of the Factors Act, 1889, ss. 8 & 9, and of the Sale of Goods Act, 1893, s. 25, is however to place the seller of goods who remains in possession of the goods or the documents of title to them, and the buyer who obtains possession with the consent of the seller, in the position of a 'mercantile agent' in this respect.

Helby v Matthews, [1895] A C 471

(*c*) A broker is an agent primarily to establish privity of contract between two parties. Where he is a broker for sale he has not possession of the goods, and so he has not the authority thence arising which a factor enjoys. Nor has he authority to sue in his own name on contracts made by him.

Broker.

The forms of a broker's notes of sale may be useful as illustrating what has hereafter to be said with reference to the liabilities of parties where an agent contracts for a principal whose name or whose existence he does not disclose.

When a broker makes a contract he puts the terms into writing and delivers to each party a copy signed by him. The copy delivered to the seller is called the sold note, that delivered to the buyer is called the bought note. The sold note begins 'Sold for *A* to *X*' and is signed '*M* broker,' the bought note begins 'Bought for *X* of *A*' and is signed '*M* broker.' But the forms may vary and with them the broker's liability. We will follow these in the sold note.

Forms of bought and sold notes.

(i) 'Sold for *A* to *X*' (signed) '*M* broker.' Here the broker cannot be made liable or acquire rights upon the contract: he acts as agent for a named principal.

Fairlie v. Fenton, L R 5 Ex 169.

(ii) 'Sold for you to our principals' (signed) '*M* broker.' Here the broker acts as agent, but for a principal whom he does not name. He can only be made liable by the usage of the trade if such can be proved to exist.

Fleet v. Murton, L. R 7 Q. B 126.

Southwell v Bowditch, 1 C P D 374

(iii) 'Sold by you to me' (signed) '*M*.' Here we suppose that the broker has a principal, though his existence is not disclosed, nor does the broker sign as agent. He is personally liable, though the seller may prefer to take, and may take, the liability of the principal when disclosed; and the principal may intervene and take the benefit of the contract.

Higgins v. Senior, 8 M & W. 834

Commission agent.

(*d*) A commission agent is, as was described above, a person employed, not to establish privity of contract between his employer and other parties, but to buy or sell goods for him on the best possible terms, receiving a commission as the reward of his exertions.

Ireland v Livingston, L R 5 H L 407.

Del credere agent.

(*e*) A *del credere* agent is an agent for the purpose of sale, and one who also gives (in consideration of a higher remuneration) an undertaking to his employer that the parties with whom he is brought into contractual relations will pay the money which may become due under the contract into which they enter.

Ante, p 71.

He does therefore promise to 'answer for the default' of another, and his contract would at first sight appear to require evidence in writing, by reason of s. 4 of the Statute of Frauds. The Courts have held, however, that where the obligation to answer for another's default is only an incident in a larger contract (e.g. of *del credere* agency), then s. 4 has no application, and no note or memorandum in writing is necessary.

Harburg India Rubber Co v. Martin, [1902] 1 K. B. 778, 786.

Gabriel v Churchill & Sim, [1914] 3 K.B 1272.

But the *del credere* agent does not guarantee the performance of the contract otherwise than as regards *payment*; and thus cannot be sued by a vendor of goods whom he has brought into contractual relations with a purchaser, because the purchaser refuses to take delivery.

We have said that as a rule the agent contracting within

his authority for a named principal drops out of the transaction, and therefore acquires neither rights nor liabilities on a contract so made.

Agent cannot sue or be sued.

But this matter is always one of the proper construction to be put upon the conduct of the parties where the contract is verbal, or upon the wording of the document and the surrounding circumstances where it is in writing. There is nothing to prevent both principal and agent being severally liable on, and entitled to enforce, a contract which the agent has made on behalf of his principal, if that was the intention of the parties. The rules which follow are, therefore, liable to be displaced by evidence of a contrary intention of the parties.

Calder v Dobell, L R 6 C P at p 494
Gadd v Houghton, 1 Ex D 357.

Generally the agent cannot sue; for the party with whom he contracted has been induced by him to look to the named principal, and cannot, unless he so choose, be made liable to one with whom he dealt merely as the mouthpiece of another.

Bickerton v Burrell, 5 M & S 383
Repetto v Millar's Karri & Jarrah Forests, [1901] 2 K B. 306

With a few exceptions he cannot be sued.

Exceptions.

An agent who makes himself a party to a deed is bound thereby, though he is described as agent. This arises from the formal character of the contract, and the technical rule that 'those only can sue or be sued upon an indenture who are named or described in it as parties.'

Deed.
Beckham v Drake, 9 M & W 95.

It is said that an agent who contracts on behalf of a foreign principal has, by the custom of merchants, no authority to pledge his employer's credit and becomes personally liable on the contract. Recent decisions make it doubtful if this rule still exists. There may have been good reasons for it in former days before the development of modern means of communication with foreign countries; but to-day these no longer hold good. At most there may be a presumption that an agent acting for a foreign principal has no authority to pledge his principal's credit, but this presumption may be rebutted by evidence of facts showing that the agent assumed no personal liability. And in any case the custom, if it exists, is one which

Foreign principal.
Armstrong v Stokes, L R 7 Q B 605.
Miller, Gibb & Co v. Smith & Tyrer, [1917] 2 K. B. 141.

makes the agent liable to the exclusion of the principal, and cannot prevail if inconsistent with the actual terms of the contract.

Non-existent principal.

If an agent contracts on behalf of a principal who does not exist or cannot contract, he is personally liable on a contract so made.

L R 2 C P 175

The case of *Kelner v. Baxter* was cited above to show that a company cannot ratify contracts made on its behalf before it was incorporated: the same case establishes the rule that the agent so contracting incurs the liabilities which the company cannot by ratification assume. 'Both upon principle and upon authority,' said Willes, J., 'it seems to me that the company never could be liable upon this contract, and construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the persons signing it would be personally liable.'

Remedies against agent who contracts without authority.

If a man contracts as agent, but without authority real or ostensible, for a principal whom he names, he cannot bind his alleged principal or himself by the contract: but the party whom he induced to contract with him has one of two remedies.

Warranty of authority.

(*a*) If the alleged agent honestly believed that he had an authority which he did not possess he may be sued upon a *warranty of authority*.

This is an implied promise to the other party that in consideration of his making the contract the professed agent undertakes that he is acting with the authority of a principal.

Starkey v Bank of England, [1903] A C 114

This rule does not apply only to transactions or representations which would result in contract; it extends to any representation of authority whereby one induces another to act to his detriment.

Richardson v. Williamson, L R 6 Q B 276

8 E. & B. 647.

'Persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for damages *for the breach of an implied warranty of authority*. This was decided in *Collen v. Wright* and other cases.'

The liability may be treated—as it has been by the Court of Appeal—as an exception to the general rule of law that 'an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another.' But if that were so the right of action, being no longer based on contract but on wrong, would not survive to the representatives of the injured party.

Firbank's Exors. v Humphreys, 18 Q B D

The relation is really one of contract; 'the true principle,' says Buckley, L. J., in *Yonge v. Toynbee*, 'as deduced from the authorities, rests, I think, not upon wrong or omission of right on the part of the agent, but upon implied contract.' This same case lays down that the warranty is a continuing warranty and therefore the agent is liable even though his authority be determined without his knowledge, as by the death or insanity of the principal.

[1910] 1 K B at p 228

(*b*) If the professed agent knew that he had not the authority which he assumed to possess, he may be sued by the injured party in an action of deceit.

Action of deceit.

The case of *Polhill v. Walter* is an illustration of this. The defendant accepted a bill as agent for another who had not given him authority to do so. He knew that he had not the authority but expected that his act would be ratified. It was not ratified, the bill was dishonoured, and the defendant was held liable to an indorsee of the bill as having made a representation of authority false to his knowledge, and falling under the definition of Fraud given in a previous chapter.

3 B & A 114

The reason why the alleged agent should not be made personally liable on such a contract is plain. The man whom he induced to enter into the contract did not contemplate him as the other party to it, or look to any one but the alleged principal. His remedy should be, as it is, for misrepresentation, innocent or fraudulent.

III. Rights and Liabilities of the Parties where the name of the Principal is undisclosed.

Where principal is unnamed, agent not liable if he contract as agent.

An agent who contracts as agent but does not disclose the name of his principal is, as a rule, not personally liable on the contract which he makes; but here too, as where the name of the principal is disclosed, the matter is one of construction.

Gadd v. Houghton, 1 Ex. D 357. L R 7 Q B. 126.

'There is no doubt at all in principle,' said Blackburn, J., in *Fleet v. Murton*, 'that a broker as such, merely dealing as broker and not as purchaser, makes a contract, from the very nature of things, between the buyer and seller, and is not himself either buyer or seller, and that consequently where the contract says "sold to *AB*" or "sold to my principals" and the broker signs himself simply as broker he does not make himself by that either the purchaser or seller of the goods.'

And see Southwell v. Bowditch, 1 C. P D 374.

Exceptions.

On the other hand an agent who contracts for an unnamed principal, without expressly contracting as agent, will be personally liable; and it may be noted that in the absence of words indicating agency, the word 'broker' attached to a signature is merely descriptive, and does not limit liability, so that if the agent do not by words exclude himself from liability, it may be assumed that one who deals with an agent for an unnamed principal expects and is entitled to the alternative liability of the principal and the agent.

Hutcheson v Eaton, 13 Q B D. 861.

Thomson v Davenport, 9 B. & C. 78

Even where the agent is distinctly described as such, the usage of a trade, as in *Fleet v. Murton*, may make him liable.

L. R. 7 Q. B. 126.

But 'in the absence of such a custom, and where a principal exists, the general rule applies, although the principal be not named or be a foreigner.'

Universal Steam Navigation Co. v James McKelvie & Co., [1923] A C. per Cave, L. C. at p. 406.

Where a man has purported to contract as agent for an unnamed principal, he may declare himself to be the real principal. For if the other party to the contract was willing to take the liability of an unknown person, it is hard to suppose that the agent was the one man in the world with whom he was unwilling to contract; and at any rate the

character or solvency of the unnamed principal could not have induced the contract.

Thus in *Schmaltz v. Avery*, Schmaltz sued on a contract of charter-party into which he had entered 'on behalf of another party' with Avery. He had named no principal and it was held that he might repudiate the character of agent and adopt that of principal; and this decision has been followed in a later case. 16 Q. B. 655. Harper v Vigers, [1909] 2 K. B. 549

IV. Rights and Liabilities of the Parties where the Existence of the Principal is undisclosed.

If the agent acts on behalf of a principal whose existence he does not at the time disclose, the other contracting party, when he discovers the true facts, is entitled to elect whether he will treat principal or agent as the party with whom he dealt. The reason of this rule is plain. If *A* enters into a contract with *X* he is entitled at all events to the liability of the party with whom he supposes himself to be contracting. If he subsequently discovers that *X* is in fact the representative of *M* he is entitled to choose whether he will accept the actual state of things, and sue *M* as principal, or whether he will adhere to the supposed state of things upon which he entered into the contract, and continue to treat *X* as the principal party to it. In the special case, however, of a married woman contracting as agent for her husband the latter of these alternatives is, as we have seen, not open to the party with whom she contracts, owing to the construction which the House of Lords has put upon s. 1 of the Married Women's Property Act, 1893. Alternative liability where principal is undisclosed. Scarf v Jardine, 7 App. Cas. 345 Paquin v Beauclerk, [1906] A. C. 141 *Ante*, *p.* 147

The rule of evidence has already been explained by which a man who has contracted as principal may be shown to be an agent. Where a contract is ostensibly made between *A* and *X*, *A* may prove that *X* is agent for *M* with a view of fixing *M* with the liabilities of the contract. But *X* cannot, by proving that *M* is his principal, escape the liabilities of a contract into which he Higgins v Senior, 8 M. & W. 834 Trueman v Loder, 11 Ad. & E. 589.

induced A to enter under the supposition that he (X) was the real contracting party, for such evidence would contradict the written agreement. Neither party may escape any liability which he assumed under the contract, but A is permitted to prove that his rights are wider than the words of the contract would indicate.

Watteau v Fenwick, [1893] 1 Q B 346
Kinahan v Parry, [1910] 2 K B 389

It has even been held that in such a case M will be bound not only by acts which X had actual authority from him to perform, but by all acts which fall within the authority usually conferred upon an agent of the character in question. But these cases raise a difficulty. No doubt a principal cannot by a secret reservation limit the apparent authority of his agent, but this is because he is estopped from denying that the agent does in fact possess an authority which he has held him out to the other party as possessing. But when the very existence of the principal is unknown to the other party this reasoning cannot apply.

Defence against agent available against principal.

The real principal, M, may intervene and sue upon the contract; but A may set up against him any set-off which would have been good against X the agent, and which accrued while A still supposed that he was dealing with X as principal.

Montagu v. Forwood, [1893] 2 Q.B. 350.

This rule rests upon the doctrine of estoppel, for

Cooke v. Eshelby, 12 App Cas *per* Lord Watson, at p 278

'It would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon a right of set-off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection.'

This being the basis of the rule it was held that it had no application in a case where the other contracting party dealt with brokers whom he knew to be in the habit of selling, sometimes as brokers for principals, and sometimes as principals on their own account. In such circumstances,

'if he chooses to purchase without inquiry, he does so with notice that there may be a principal for whom the broker is acting as agent; and should that ultimately prove to be the fact, he has, in my opinion, no

right to set off his indebtedness to the principal against debts owing to him by the agent.'

Alternative liability, how concluded.

The right of the other contracting party to sue agent or principal—to avail himself of an alternative liability—may, in various ways, be so determined, that he is limited to one of the two and has no longer the choice of either liability.

(*a*) The agent may contract in such terms that the idea of agency is incompatible with the construction of the contract.

Humble v Hunter, 12 Q B. 310.

Thus where an agent in making a charter-party described himself therein as owner of the ship it was held that evidence was not admissible to prove that another person was the real owner and the agent's principal, for this would have contradicted the written contract. It was therefore held that his principal could not intervene, nor, by parity of reasoning, could he be sued. But where the agent merely described himself as 'charterer', evidence was admitted to show who the real principal was, and he was allowed to intervene and sue on the charter. 'Charterer' is an equivocal description, 'owner' is not.

Drughorn v Red Transatlantic, [1919] A C 203

(*b*) If the other party to the contract after having discovered the existence of the undisclosed principal do anything which unequivocally indicates the adoption of either principal or agent as the party liable to him, his election is determined and he cannot afterwards sue the other.

Curtis v Williamson L R 10 Q B 57

(*c*) If, before he ascertain the fact of agency, he sue the agent and obtain judgment, he cannot afterwards recover against the principal. But merely to bring an action under these circumstances would not determine his rights. 'For it may be that an action against one might be discontinued and fresh proceedings be well taken against the other.'

Per Lord Cairns, Hamilton v. Kendall, 4 App Ca 514

Priestly v Fernie, 3 H & C 984.

(*d*) Again, if, while exclusive credit is given to the agent, the undisclosed principal pays the agent for the price of goods sold to him, he cannot be sued when he is discovered to be the purchaser.

L R. 7 Q. B 598

In *Armstrong v. Stokes* the defendants employed Messrs. Ryder, a firm of commission merchants, who carried on business sometimes for themselves and sometimes as agents, to buy goods for them. Messrs. Ryder bought the goods in their own names from Armstrong, who gave credit to them and to no one else. The defendants paid their agents for the goods in the ordinary course of business, and a fortnight later the Messrs. Ryder stopped payment, not having paid Armstrong. When it appeared from their books that they had been acting as agents for the defendants, Armstrong claimed to demand payment from the undisclosed principal. It was held that the demand could not be made from 'those who were only discovered to be principals *after they had fairly paid the price to those whom the vendor believed to be principals, and to whom alone the vendor gave credit.*'

It is important to note the difference between such a case as this and one in which the existence of the principal is known, though his name is not disclosed, as, for instance, if the agent is known to be a mere broker. There the other contracting party presumably looks beyond the agent to the credit of the principal. 'The essence of such a transaction,' said Bowen, J., in *Irvine v. Watson*, 'is that the seller as an ultimate resource looks to the credit of some one to pay him if the agent does not.' If, in such a case, the principal settles accounts with his agent before the ordinary period of credit has expired, he is not thereby discharged; if he were, the seller would be deprived of the liability to which he was induced to look when he entered into the contract.

5 Q. B D 107. 414

Liability of Principal for Fraud of Agent.

Is that of an employer for tort of his servant.

A principal is liable to an action for Deceit for the fraud of his agent, if the fraud was committed in the ordinary course of his employment. The liability of the principal is in no wise different from that of an employer who is responsible for wrongful acts done by those in his service,

within the scope of their employment. A man is equally liable for the negligence of his coachman who runs over a foot passenger in driving his master's carriage from the house to the stables, and for the fraud of his agent who, being instructed to obtain a purchaser for certain goods, obtains one by false statements as to the quality of the goods.

Lloyd v. Grace, [1912] A C 716.

It was at one time thought that the principal was not liable unless the agent's fraud was committed for the principal's benefit, and that therefore no action lay against the principal if the agent, though acting within the scope of his authority, intended by his fraud to benefit himself alone. This view, which arose from a misapprehension of the judgment of the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank*, was emphatically repudiated by the House of Lords in *Lloyd v. Grace*. The principal is liable for his agent's fraud committed in the course of and within the scope of his employment, whether it is committed for the benefit of the principal or for the benefit of the agent.

L R 2 Ex 259

[1912] A C 716.

Where a principal allows his agent to make a statement which he knows, but which the agent does not know, to be false, it might seem difficult to sue either principal or agent for deceit; for the one did not make the statement, and the other honestly believed it to be true. But the contract could be set aside or resisted on the ground of material misrepresentation if not on the ground of fraud: and it would be strange also if the consequences of fraud did not attach to a principal who knowingly employed an ignorant agent in order to profit by his misrepresentations. This view is expressed by the House of Lords in *Pearson v. Dublin Corporation*:—

National Exchange Co v Drew, 2 Macq H L C 146.

'The principal and the agent are one and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.'

[1907] A C. 351, 354, 359; *and see* Lloyd v. Grace, [1912] A C. 716.

'If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation, or which is the person who had the guilty knowledge.'

When knowledge of agent is knowledge of principal.

In general it is true to say that the law regards the knowledge of an agent as the knowledge of the principal. Thus a contract *uberrimae fidei* can be avoided for non-disclosure of a material fact if the fact in question, though not known to the principal, was known to his agent.

Bawden v London & Cy Assurance Co., [1892] 2 Q B 534

An agent of an insurance company obtained a proposal for insurance from a one-eyed man, who, being unable to read, signed at the request of the agent a form stating among other things that he was free from any physical infirmity. The agent knew that the insured had but one eye. The insurance was against partial or total disablement; after a while, the insured lost his second eye, and claimed the amount due under a policy for a total disablement. The company resisted the claim, on the ground of the falsehood contained in the proposal; but it was held that the knowledge of the agent was their knowledge and that they were liable. But it has been pointed out in subsequent cases that the facts in *Bawden's* Case were peculiar. The insured could not read, and the Court regarded the agent as acting throughout the transaction in the course of his employment as agent of the company. But it is not a part of the ordinary duty of an insurance agent to his employers to fill in the answers of the proposer; and so where a proposer allowed the agent of a company to fill in answers which were false in material respects, and signed the proposal form without troubling to read it, he could not impute the agent's knowledge of the falsity of the answers to the insurance company. On the contrary in filling in the answers the agent had acted as the agent of the proposer; his knowledge of their falsity was the proposer's, and the contract could not stand.

Biggar v Rock Life Assurance Co., [1902] 1 K B. 516.

Newsholme v. Road Transport Co., 45 T.L.R. 123

Still less can the knowledge of the agent be imputed to the principal where the agent is himself a party to a fraud on his principal by the other party to the contract. So in *Wells v. Smith*, where the defendant made a statement to the agent of the plaintiff which they both knew to be false and intended to be acted on by the plaintiff, Scrutton, J.,

[1914] 3 K.B. 722.

held that he could not protect himself by proving that the agent knew of the untruth of the statement.

Further the formula that the knowledge of the agent is the knowledge of the principal is correct only 'where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal.'

Blackburn v. Vigors, 12 App Cas. *per* Lord Halsbury, at p 538

A principal effected a policy on a ship through a broker, neither of them being aware of any material fact not disclosed to the insurers. But the principal had previously employed another broker to negotiate a policy on the same ship, and this broker, from the accident that he was also agent for another person, had acquired information of a material fact which he had not disclosed to the principal. The House of Lords refused to allow the former policy to be avoided by imputing knowledge of this fact to the principal.

'It is sought,' said Lord Watson, 'to extend the imputed knowledge of the insured to all facts which during the period of his employment became known to any agent, other than the agent effecting the policy in question, who was employed at any time, successfully or unsuccessfully, to insure the whole or part of the same risk with that covered by the policy.' p 540

CHAPTER XXI

Determination of Agent's Authority

An agent's authority may be determined in any one of three ways: by agreement; by change of status; or by death.

§ 1. *Agreement.*

Agreement.

The relation of principal and agent is founded on mutual consent, and may be brought to a close by the same process which originated it, the agreement of the parties.

Where this agreement is expressed by both parties, or where, at the time the authority was given, its duration was fixed, the matter is obvious and needs no discussion.

Revocation a condition subsequent.

Where authority is determined by revocation it must be borne in mind that the right of either party to bring the relation to an end by notice given to the other is a term in the original contract of employment.

Limits of right to revoke.

But the principal's right to revoke is affected by the interests (1) of third parties, (2) of the agent.

Ante, p 420.

(1) A principal may not privately limit or revoke an authority which he has allowed his agent publicly to assume. He will be bound by the acts of the agent which he has given other persons reason to suppose are done by his authority.

5 Q. B D 394. 6 App. Ca 24.

The case of *Debenham v. Mellon* is a good illustration of the nature and limits of this right of revocation.

Illustration from case of husband and wife.

A husband who supplied his wife with such things as might be considered necessaries for her forbade her to pledge his credit; any authority she might ever have enjoyed for that purpose was thereby determined. She dealt with a tradesman who had not before supplied her with goods on her husband's credit and had no notice of his refusal to authorize her dealings. He supplied these goods on the husband's credit and sued him for their price. It was held that the husband was not liable.

But it was pointed out that where a husband has habitually ratified the acts of his wife in pledging his credit, he cannot, as regards those whom he has thus induced to look to him for payment, revoke her authority without notice.

'If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, *in the absence of notice to the contrary*, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume.' Debenham v Mellon, 5 Q B D 403

The case of husband and wife is perhaps the best, as it is the strongest, illustration of the limits within which the principal may revoke an authority consistently with the rights of third parties.

(2) The right of revocation may be expressly or impliedly limited by the liability of the employer to indemnify the agent from loss occurring in consequence of the employment. Cases where agent acquires interest

The rule laid down that 'an authority coupled with an interest is irrevocable' is explained by Wilde, C. J., in *Smart v. Sandars*, to mean that 'where an agreement is entered into on sufficient consideration, whereby an authority is given for the purpose of conferring some benefit on the donee of that authority, such an authority is irrevocable. That is what is usually meant by an authority coupled with an interest.' An illustration of the application of this principle is to be found in *Carmichael's case*. But the rule has a somewhat wider application, as appears from the language of Bowen, L. J., in *Read v. Anderson*, where the revocation of authority to carry out a contract would have involved an injury to the agent which must have been in contemplation of the parties when the contract of employment was made. 5 C. B. 917 [1896] 2 Ch 648. 13 Q B D 779 or incurs liability.

'There is a contract of employment between the principal and the agent which expressly or by implication regulates their relations; and if as part of this contract the principal has expressly or impliedly at p 782.

bargained not to revoke the authority and to indemnify the agent for acting in the ordinary course of his trade and business he cannot be allowed to break his contract.'

§ 2. *Change of Status.*

Bankruptcy.

Minett v Forester, 4 Taunt, 541 Charnley v Winstanley, 5 East 266.

Bankruptcy of the principal determines, and before 1883 marriage of the principal, if a woman, determined, an authority given while the principal was solvent, or sole.

Insanity.

[1910] 1 K. B 215.

Yonge v. Toynbee must apparently be taken to have decided that insanity annuls an authority properly created while the principal was sane. In that case the defendant, after instructing his solicitors to defend on his behalf a threatened action, became insane. The solicitors, in ignorance of this, duly entered an appearance to the writ, and took all necessary steps on their client's behalf. When the defendant's insanity became known to the plaintiff, he sought to have the appearance and all subsequent proceedings struck out, and to make the solicitors personally liable for costs incurred, on the ground that their authority to act had been determined by the defendant's insanity; and the Court of Appeal decided in his favour, holding that the solicitors had warranted an authority which they had ceased to possess.

The rule which appears to be thus established, namely that the insanity of the principal determines the authority of an agent whether the agent is aware of it or not, leads to a curious result. For if X makes a contract directly with Y, who is insane, the contract, as we have seen, is binding unless X knew of Y's condition; yet if he attempts to make the same contract through an agent whom Y, while sane, has duly appointed to represent him, no contract will come into existence, though neither X himself nor Y's agent knew of Y's insanity. Further, if X and Y make a binding contract, and X subsequently, unknown to Y, becomes insane, the contract is not in general avoided by that event. *Yonge v. Toynbee* however obliges us to say that if the contract is one of agency it will be an exception to this general principle.

Ante, p 142.

The case is also not easy to reconcile with the earlier decision of the Court of Appeal in *Drew v. Nunn*, which, although cited in *Yonge v. Toynbee*, was not referred to in the judgments of the Court. The defendant there, being at the time sane, gave authority to his wife to deal with the plaintiff and afterwards became insane. The wife continued to deal with the plaintiff and gave no notice of her husband's insanity; the defendant recovered and resisted payment for goods supplied while he was insane. The Court of Appeal did not expressly decide how far insanity affected the continuance of authority, but held that 'the defendant, by holding out his wife as agent, entered into a contract with the plaintiff that she had authority to act on his behalf, and that until the plaintiff had notice that this authority was revoked he was entitled to act on the defendant's representations.' 4 Q. B. D. 661.

No doubt the points at issue in these two cases were different, for in the one the liability of the agent, in the other that of the principal, was in question. But if the two cases are to stand together we must say that when a principal becomes insane, the third party who has made a contract with his agent has a choice of remedies. He may either enforce the contract against the principal, or he may sue the agent for having warranted that he could bind the principal by the contract and having broken his warranty. But there are at least two difficulties in such a method of reconciliation. In the first place, it may be reasonable that the law should secure that the position of the third party should not be prejudiced by the insanity of the person with whom he imagines himself to be contracting; and this is exactly what *Drew v. Nunn* does. But it surely cannot be reasonable that the principal's insanity should place the third party in a position which is actually more favourable than he would have been in if the principal had remained sane, in which case he would have been limited to his remedy against the principal. In the second place, if the principal is bound by the contract

Rainbow v. Howkins, [1904] 2 K. B 322.

which the agent purported to make for him, it is hard to see how the agent has broken his warranty at all, or if he has technically broken it, what damage the third party has suffered, since his rights against the principal are exactly what the agent professed to be able to create for him.

[1917] 2 Ch. 144

Enemy status.

The question was raised in *Tingley v. Müller* whether an agent's authority is determined on his principal becoming an alien enemy. The full Court of Appeal (Scrutton, L. J., dissenting) held that it was not necessarily determined, though, as in the case of other contracts with alien enemies, this would happen, if the agency involved intercourse with the principal (as it usually would) or was otherwise against public policy. In *Tingley v. Müller*, a German, resident in England by the licence of the Crown and for the time being therefore technically an alien friend, gave an irrevocable power of attorney to an agent and afterwards returned to Germany, thereby becoming in the full legal sense an alien enemy. The agent, acting under the power of attorney, entered into a contract for the sale of land, and it was held that there were no circumstances which entitled the purchaser, when he discovered the facts, to refuse to complete. The decision in part was based on the exceptional incidents of an agency created by an irrevocable power of attorney, but the Court was clear that enemy alien status had no such effect in general on the contract of agency as marriage or insanity. Nevertheless the dissenting judgment of Scrutton, L. J., is perhaps more in harmony with later decisions of the House of Lords on the effect of war upon an alien enemy's contracts.

Ante, p 125.

Ante, p 124

§ 3. *Death of Principal.*

Death.

The death (or if the principal is a corporation the dissolution) of the principal determines at once the authority of the agent [1], leaving the third party to his remedy against

[1] This statement should be qualified in respect of powers of attorney. By s. 124 of the Law of Property Act, 1925, a person making or doing any

the agent for breach of warranty of authority in the case of contracts entered into by him in ignorance of the principal's death. It was once thought that in such cases an agent would only be liable if his ignorance of the principal's death was due to some default or omission of his own. But in so far as *Smout v. Ilbery* was an authority for this proposition, it has now been expressly overruled by *Yonge v. Toynbee*, cited above. The agent is liable whether he represents himself as having an authority which he has never possessed, or as having an authority which has determined without his knowledge, even though he had no means of finding it out [1].

Campanari v Woodburn, 15 C. B. 400.

10 M & W. 1

[1910] 1 K B 215

Blades v Lee, 9 B & C 167, *but see* Drew v Nunn, 4 Q B D *per* Brett, L J, at p 668

payment or act in good faith, in pursuance of a power of attorney, is not liable in respect thereof by reason of the death, lunacy, or bankruptcy of the donor of the power or by reason of its revocation, if the circumstances were unknown to him at the time. By ss. 126 and 127 of the same Act, a power of attorney may under certain conditions be expressed to be irrevocable, in which case the authority of the donee of the power is not affected even by notice of the death, &c., of the donor.

[1] The judgment of Stirling, J., in *Salton v. New Beeston Cycle Co.*, is also overruled on this point, it was held there that an innocent agent of a company whose authority had determined by the company's dissolution was not liable.

[1900] 1 Ch 43

PART VIII

CONTRACT AND QUASI CONTRACT

CHAPTER XXII

Meaning and Nature of Quasi Contract

It is necessary to touch on some forms of obligation called Quasi Contract for want of a better name, because they acquired, for purposes of pleading, the form of agreement.

In early notions of Contract we must not look for an analysis of Agreement, as emanating from Offer and Acceptance. The fact that one man had benefited at the expense of another under circumstances which called for a readjustment of rights might give rise to the action of Debt. And this was the remedy, not only for breaches of contract based on executed consideration where such breach resulted in an ascertained money claim, but for any case where statute, common law, or custom laid a duty upon one to pay an ascertained sum to another.

Assumpsit.

The action of Assumpsit, on the other hand, was primarily an action to recover an unliquidated sum, or such damages as the breach of a promise had occasioned to the promisee.

Blackstone, Comm iii 341.

Wager of law.

But there were certain inconveniences attaching to the action of Debt. The defendant might 'wage his law,' and the action was then determined, not upon the merits, but by a process of compurgation, in which the defendant came into Court and declared upon oath that he did not owe the debt, and eleven respectable neighbours also declared upon oath that they believed him to speak the truth.

Again, the technical rules of pleading forbade the inclusion in the same suit of causes of action arising from

debt and from assumpsit, of actions for liquidated and for unliquidated damages; for the one was based upon contract real or feigned [1], the other upon a form of wrong, the *non-feasance* of an undertaking.

Assumpsit therefore was preferred to *Debt* as a form of action, and, after a while, by the pleader's art, a money debt was stated in the form of an *assumpsit*, or undertaking to pay it. First it was decided in *Slade's Case* that an action might be maintained in *assumpsit*, though the contract was a bargain for goods to be sold, resulting in a liquidated claim or *Debt*. Then, where the breach of a contract resulted in such a claim, the plaintiff was enabled to declare in the form of a short statement of a debt, based upon a request by the defendant for work to be done or goods to be supplied, and a promise to pay for them. This was settled in the last twenty-five years of the seventeenth century. Thenceforth a man might state claims arising from contract variously in the same suit—as a special agreement which had been broken—and as a debt arising from agreement and hence importing a promise to pay it.

4 Co Rep 92.

Indebitatus counts.

See expressions of Holt, C J, quoted in Hayes v Warren, 2 Str 932.

Such a mode of pleading was called an *indebitatus* count [2], or count in *indebitatus assumpsit*; the remedy upon a special contract which resulted in a liquidated claim was now capable of being stated as a debt with the addition of a promise to pay it. In this form it was applied to the kinds of liability which, though devoid of the element of

[1] Exception has been taken to this statement on the ground that the cause of action in Debt was 'the creditor's supposed property in the debt' (L.Q.R., vol. 23, p. 125). But the learning of the thirteenth century is not always applicable to the practice of the eighteenth. The liability arising from Debt is treated as contractual by Fitzherbert (de Natura Brevium, 262) and the reason for non-joinder of Debt and Assumpsit is given, as I have stated it, in Bacon's Abridgment, i. 30, and Chitty on Pleading, vol. i. 223.—W. R. A.

[2] The form of an *indebitatus* count was as follows:—'For that whereas the defendant on the — day of — in the year of our Lord — was indebted to the plaintiff in £— for [e.g. goods sold], and being so indebted, the defendant, in consideration thereof, afterwards, on the day and year aforesaid, promised the plaintiff to pay the said sum of money to him on request.' Cf. Chitty on Pleading, ed. 6, vol. ii, p. 34.

Moses v. Macferlan, 2 Burr 1105

agreement, gave rise to the action of Debt, and thence in all cases where *A* was liable to make good to *X* a sum gained at *X*'s expense.

Thus for the convenience of the remedy certain liabilities have been made to figure as though they sprang from contract, and have appropriated the form of Agreement. The distinction between Assumpsit and Debt was practically abolished by the Common Law Procedure Act, 1852. The plaintiff was no longer required to specify the form in which his action was brought; he was allowed to join various forms of action in the same suit, and might omit the feigned promise from the statement of the cause of action. The form of pleading, in such cases as resolved themselves into a simple money claim, was reduced to a short statement of a debt due for money paid or received; and the Judicature Act, 1873, abolished formal pleadings, and substituted for the *indebitatus* counts a simple indorsement upon the writ of summons.

15 & 16 Vict c 76. s 3.

s 41.

s. 49

In deference to their historical connexion with contract, certain legal relations may be noticed which once, in the pleader's hands, wore the semblance of a promise.

Such relations may arise from the judgment of a court of competent jurisdiction, or from the acts of the parties.

Judgment.

As to the former, it is enough to say that the judgment of a court of competent jurisdiction, ordering a sum of money to be paid by one of two parties to another, is not merely enforceable by the process of the Court, but can be sued upon as creating a debt between the parties, whether or no the Court be a Court of Record.

Williams v. Jones, 13 M & W. 628

Acts of parties.

The acts of the parties may bring about this obligation either (1) from the admission by *A* of a claim due to *X* upon an account stated, or (2) from the payment by *A* of a sum which *X* ought to have paid, or (3) from the acquisition by *A* of money which should belong to *X*.

Account stated.

(1) An account stated is an admission of a sum of money due, as, for example, an I.O.U., or an admission by one

who is in account with another that there is a balance due from him. Such an admission constitutes a new and distinct cause of action on a promise implied by law to pay the debt.

Irving v. Veitch, 3 M & W. 90, 107. Lubbock v. Tribe, 3 M & W. 607.

(2) It is a rule of English Law that no man 'can make himself the creditor of another by paying that other's debt against his will or without his consent;' nor, if a man does work or spends money for the preservation of another's property, does he without more acquire a lien on the property or any right to repayment.

Per Willes, J., in Johnson v Royal Mail Steam Packet Co., L R 3 C P 43

Falcke v. Scottish Imperial Insurance Co., 34 Ch D at p 248

But if A requests or allows X to take up a position in which he is compelled by law to discharge A's legal liabilities, the law imports a request and promise made by A to X, a request to make the payment, and a promise to repay.

Money paid by X for the use of A.

If one of several co-debtors pays the entirety of the debt he may recover from each of the others his proportionate share. In such a case a request to pay and a promise to repay were feigned in order to bring plaintiff within the remedy of *assumpsit*, and he could recover his payment from his co-debtors as money paid to their use.

Kemp v. Finden, 12 M & W 421

So, too, a man who in the course of business leaves his goods on another's premises and has to pay that other's rent to prevent a distress upon his goods, may in like manner recover his money.

Exall v Partridge, 8 T R 308.

We might multiply instances of this kind of liability, but we must not forget that legal liability incurred by X on behalf of A without any concurrence or privity on the part of A, will not entitle X to recover for money which under such circumstances he may pay to A's use. The liability must have been in some manner cast upon X by A. Otherwise the mere fact that X has paid under compulsion of law what A might have been compelled to pay, will give to X no right of action against A. X may have been acting for his own benefit and not by reason of any request or act of A.

Re Leslie, 23 Ch D. 552.

England v. Marsden, L R 1 C. P. 529

(3) There are many cases in which A may be required

Money received by *X* for the use of *A*.

to repay to *X* money which has come into his possession under circumstances which disentitle him to retain it.

This class of cases, though at one time in the hands of Lord Mansfield it threatened to expand into the vagueness of 'moral obligation,' is reducible to certain groups of circumstances now pretty clearly defined. Amongst these may be mentioned cases of money obtained by wrong, such as payments under contracts induced by fraud, or duress; cases of money paid under such mistake of fact as creates a belief in the payer that a legal liability rests on him to make the payment; and cases of liability to repay money paid for a consideration which has wholly failed. Such cases lie outside the limits of our subject.

Moses v Macferlan, 2 Burr 1010.

Kelly v Solari, 9 M & W 54.

Jones Ltd v Waring & Gillow Ltd., [1926] A C 670

Rowland v Divall, [1923] 2 K B 500

APPENDIX A

FORM OF CHARTER-PARTY

Charter-Party, 19

IT IS THIS DAY MUTUALLY AGREED, between

of the good Ship or Vessel called the

of the measurement of

Tons Register, or thereabouts, and

Merchant,

that the said ship being tight, staunch, and strong, and in every way fitted for the Voyage, shall with all convenient speed, sail and proceed to

or as near thereunto as she may safely get, and there load from the factors of the said Merchant a full and complete cargo

which is to be brought to and taken from alongside at Merchant's Risk and Expense, and not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to

or as near thereunto as she may safely get, and deliver the same on being paid freight.

Restraint of Princes and Rulers, the Act of God, the King's Enemies, Fire, and all and every other Dangers and Accidents of the Seas, Rivers, and Navigation of whatever Nature and Kind soever, during the said Voyage, always excepted.

Freight to be paid on the right delivery of the cargo.

days to be allowed the said Merchant (if the Ship be not sooner despatched), for

and days on Demurrage [1] over and above the said laying days at £ per day.

Penalty for non-performance of this agreement, estimated amount of freight.[2]

Witness to the signature of }

Witness to the signature of }

[1] It is usual to fix a certain number of days, called 'lay days,' for the loading and unloading of the ship. Beyond these the merchant may be allowed to detain the ship, if need be, on payment of a fixed sum *per diem*, such additional days being in fact lay days that have to be paid for: *Wilson v. Thoresen*, [1910] 2 K. B. 405. Both the detention and the payment are called *Demurrage*. 'Demurrage' is really agreed or liquidated damages for each day's detention. If no rate of demurrage is agreed, the shipowner has a claim for unliquidated damages (called 'damages for detention'), i.e. what he can prove he has in fact lost by the delay: *Inverkip SS. Co. v. Bunge*, [1917] 2 K. B. 193.

[2] The inveterate conservatism of merchants appears to be the only reason for the retention of this clause in charter-parties; for the 'penalty' is of course unenforceable as such (*supra*, p. 324), only the actual damage suffered being recoverable.

APPENDIX B

FORM OF BILL OF LADING FOR GOODS SHIPPED ON SAILING VESSEL[1]

Shipped in good Order and well conditioned by
in and upon the good Ship called the
whereof is Master for this present Voyage
and now riding at Anchor in the and bound for
to say

being marked and numbered as in the Margin, and are to be delivered in the like good order and well conditioned at the aforesaid Port of
(the Act of God, the King's Enemies, Fire, and all and every other Dangers, and Accidents of the Seas, Rivers, and Navigation of whatever nature and kind soever excepted) unto

or to Assigns he or they paying Freight for the said Goods

with Primage and Average accustomed.[2] In Witness whereof the Master or Purser of the said Ship hath affirmed to Bills of Lading all of this Tenor and Date the one of which Bills being accomplished the other to stand void.
Dated in

[1] It would be difficult at the present day to find in actual use a bill of lading in so simple a form as the above. Those now used are very much more complicated, and in particular the list of 'excepted perils' is very greatly increased.

[2] *Primage* was a small customary payment to the master, and *Average* (sometimes called 'petty average') here means small necessary payments made by the master and repaid him by the merchant. Both are practically obsolete, though the clause is still sometimes printed as in the above form.

Particular average means the incidence of loss from damage to any part of ship or cargo upon the individual owner or his insurer, and is equivalent to partial, as opposed to total, loss.

General average means the apportionment of the loss among all the parties interested in ship or cargo in proportion to their interest where the loss is caused intentionally and for the common safety, as by cutting away masts or throwing cargo overboard.

APPENDIX C

LLOYD'S POLICY OF MARINE INSURANCE

[Now scheduled to Marine Insurance Act, 1906]

S. G.[1] Be it known that

—— as well in own Name, as for and in the Name and Names of all and
£ every other Person or Persons to whom the same doth, may, or shall appertain
—— in part or in all, doth make assurance, and cause and them and every of them, to be insured, lost or not lost, at and from

upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present voyage,

or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the said Ship, or the Master thereof is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship

upon the said Ship, &c.

and shall so continue and endure, during her Abode there, upon the said Ship, &c. and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at

upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good Safety, and upon the Goods and Merchandises, until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured, by Agreement between the Assured and Assurers in this Policy, are and shall be valued at

Touching the Adventures and Perils which we the Assurers are contented to bear and to take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, 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; and in case of any loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour and travel for, in, and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the assured at and after the rate of

IN WITNESS whereof, we the Assurers have subscribed our Names and Sums assured in

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent.; unless general, or the Ship be stranded.

[1] These letters always appear on a Lloyd's policy, but their original significance is uncertain. 'Ship and Goods', 'Salutis Gratia' have been suggested.

APPENDIX D

FORM OF INLAND BILL OF EXCHANGE

£100. OXFORD, 1st *January*, 1923

Three months after date pay to Mr. JOHN STYLES or order the sum of one hundred pounds for value received.

Accepted payable at the Old Bank, Oxford, Richard Roe.

To RICHARD ROE, Esq. JOHN DOE.

INDORSEMENT IN BLANK OF ABOVE BILL

John Styles

(1) SPECIAL INDORSEMENT AND (2) INDORSEMENT IN BLANK BY INDORSEE

Pay William Smith or order
John Styles
William Smith

FORM OF PROMISSORY NOTE

OXFORD, 1st *January*, 1923.

£100.

I promise to pay to RICHARD ROE or order at the Old Bank, Oxford, six months after date the sum of one hundred pounds, for value received.

JOHN DOE.

NOTE.—These instruments require an *ad valorem* stamp.

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