PRINCIPLES

OF THE

LAW OF CONTRACTS,

AS APPLIED BY COURTS OF LAW.

BY

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NOTICE.

The first manuscript of the following work was prepared, in the years 1827 and 1828, for the sole purpose of being communicated to students in the writer's office, and was thus used for a few years. Afterwards, at the request of the editors of the American Jurist, it was published in that journal, in ten successive numbers, beginning in November 1839 and ending in January 1841. That publication has recently been revised and enlarged by references to reports and treatises published since 1828; but no change has been made in the original arrangement. The work is now submitted to the members of the bar, with the writer's grateful sense of their kind consideration of his other labors.

August, 1867.

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LAW OF CONTRACTS.

CHAPTER I.

OF THE DEFINITION AND DIVISION OF CONTRACTS; AND OF THE ASSENT OF THE PARTIES THERETO.

The most concise definition of a contract, to be found in the books, is that given by the late Chief Justice Marshall, in the case of Sturges *v.* Crowninshield, 4 Wheat. 197: "A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing." Blackstone's definition is, "an agreement, upon sufficient consideration, to do, or not to do, a particular thing." 2 Bl. Com. 446. Most other writers not only include the consideration of a contract in its definition, but also term it a covenant or bargain between two or more parties. Termes de la Ley. Powell on Con. (Introd.) vi. 1 Burn's Law Dict. As, however, the word contract, agreement, or bargain, *ex vi termini*, imports more than one party, it is tautology, in a professed definition, to speak of an agreement "between two or more parties."

The word "covenant," used in many definitions given of a contract, is objectionable. Strictly and technically taken, as all words, employed in a definition of a subject of science, should be, a covenant is a contract under seal, and is therefore improperly adopted in reference to contracts generically; because it embraces only one specific class of contracts.

The word "agreement" is most generally used, in the older books, to denote what is now more usually termed a contract. The introduction of Contract into the titles of the common law is of modern date. Agreement is "the union of two or

more minds in a thing done or to be done."(*a*) In the language of some of the old writers, it is called "a coupling or knitting together of minds."(*b*)

It is provided by the English and American statutes of frauds, that no person shall be charged on certain enumerated promises, unless the agreement, on which the action is brought, shall be in writing. In England, it is held that the word "agreement" signifies a contract on consideration, and therefore that the consideration of the promise must be shown in writing. Wain *v.* Warlters, 5 East, 10, and subsequent cases. If this be correct, Blackstone's definition of a contract is tautological, and Marshall's should be preferred. More of our state courts have adopted, than have rejected, this technical import of "agreement." See Browne on St. of Frauds, § 391. In Massachusetts, it is provided by statute that the consideration of the promise needs not to be set forth or expressed in writing. Rev. Sts. *c.* 74, § 2, and Gen. Sts. *c.* 105, § 2. The supreme court had previously so held. Packard *v.* Richardson, 17 Mass. 122.

If the word agreement does not import a contract on consideration, is Blackstone's definition, or Marshall's, the most accurate? Both these definitions, as well as those of the other writers just cited, include all contracts, the whole genus, whether of record, under seal, or by parol, recognizances, grants of land, bonds, promissory notes, or mere oral promises. To the validity of a simple contract, one not under seal, a legal and sufficient consideration is, by the common law, indispensable. But a contract by specialty (under seal) is valid without consideration, except an obligation in partial restraint of trade; or, which for the present purpose amounts to the same thing, it imports a consideration, which the party is estopped to deny.(*c*) *A fortiori* is this true of

(*a*) Plowd. 17. Com. Dig. Agreement, A. (*b*) Shep. Epit. 89.

(*c*) "A consideration is necessary to the validity of all contracts and agreements not under seal," &c.; 2 Kent Com. (1st ed.) 365; 1 Comyn on Contracts, (1st ed.) 13. See also Plowd. 308. "A mere voluntary bond, given without any consideration, is good." "A mere want of consideration is not sufficient to avoid a bond." By Parker and Sewall, Js. 2 Mass. 161, 163. By Lord Kenyon, 7 T. R. 477. By Sir J. Jekyll, 3 P. W. 222.

contracts of record. Blackstone's definition, therefore, embraces all simple contracts, and, as to them, is accurate. But as to those contracts which are valid without a consideration, or import a consideration not to be denied, it is not accurate. Marshall's definition covers this latter class of contracts, and would seem to be sufficiently correct as to the former. For in defining a contract, or any thing else, generically, it is not merely unnecessary, but is improper, to include all the incidents and qualities that appertain to the subject.

Some contracts are required to be written; others need not to be reduced to writing. Some require a consideration, or a seal, to support them; others do not. In a general definition, therefore, it is not perceived why a consideration which forms a constituent part of only one species of contracts should be included, in order to render it complete. Why should not writing and sealing, which are essential to the validity of certain species of contracts, be also included, with equal reason?

The genus not only admits, but requires, a different definition from that which is proper for the several species. A simple contract has its appropriate definition; and, in that definition, a consideration is to be included. Blackstone has defined it with brevity and clearness, in his attempt to define contracts generally. A contract by specialty requires a different definition. And a contract, in its broad generic sense, is to be defined differently from either of its species; and this has been done, with singular precision and exactness, in the words first quoted from the late chief justice of the United States.

Contracts may be divided into three classes, namely: 1. Simple, or parol contracts; 2. Specialties, or contracts under seal; and, 3. Contracts of record.

All contracts, not of record, are distinguished by the common law into agreements by specialty, and agreements by parol. There is no such third class as contracts in writing. If they be merely written and not specialties, they are parol.(*a*) The rules of evidence are not the same, when applied to

(*a*) Rann *v.* Hughes, 7 T. R. 351, *note*. Ballard *v.* Walker, 3 Johns. Cas. 65. Perrine *v.* Cheeseman, 6 Halst. 174. 9 Mees. & Welsb. 92.

written and unwritten contracts; and, in the discussion of a question of evidence, the late Chief Justice Parker (of Massachusetts) says, "there are three classes of contracts, viz.: specialties, written contracts not under seal, and parol or verbal contracts." (*a*) So far as this remark relates to the immediate point before the court, it is doubtless correct; but as it regards the artificial classification of contracts, it is at variance with the authorities.

Attention will here be directed chiefly to contracts not under seal, which, embracing as they do a great part of the business of every man's life, and furnishing a large proportion of all the cases litigated in our courts, constitute a very important branch of the law. Many of the principles, however, which govern this division of contracts, are equally applicable to the others. But before proceeding to state the principles of the law of contracts, it will be useful to take notice of the distinctions constantly recurring in the books, between express and implied contracts, and executory and executed contracts.

The first of these distinctions obtains chiefly, though not exclusively, in simple contracts. An express contract is one which is actually and formally made, wherein the parties stipulate in positive terms what is to be done or omitted. An implied contract is not thus actually and formally made, but is inferred from the conduct, situation, or mutual relations of the parties, and enforced by the law on the ground of justice; to compel the performance of a legal and moral duty: (*b*) as, where one man sends to the shop of another for articles of food or clothing, or employs another to labor for him or to render him other services, or where a guest enters an inn and takes refreshment or lodging. In these and numberless similar cases, though nothing is stipulated concerning price or

(*a*) Stackpole *v.* Arnold, 11 Mass. 30.

(*b*) "A great mass of human transactions depends upon implied contracts, upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations which, as honest, fair, and just men, they ought to have made." By Marshall, C. J., 12 Wheat. 341.

payment, the law is said to imply a contract and a promise to pay a reasonable sum for the articles, refreshments, or services received. Finch's Law, 181. So, if one has another's money, which in equity and good conscience he ought to restore, the law is said to imply a promise to restore it. So, too, if a man undertakes any trust, office, or employment, the law raises a promise on his part, to perform his undertaking with integrity, diligence, and skill; and, if he injures his employer by a want of either of these qualities, he is liable to an action on his implied contract, for reparation.(*a*) And in England it was recently held, (Chief Justice Cockburn dissenting,) that when one contracts as agent, in the name of a principal, he impliedly contracts that he has the authority of the alleged principal, and that, if he has not, he is liable to an action on such implied contract.(*b*)

There are also certain positive obligations imposed by law, where there is no antecedent moral duty; and here, in many instances, a contract or promise is inferred to fulfil those obligations. Thus, in some of the states, taxes may be collected by suit, on a promise implied by law to pay the collector. In Massachusetts, and in some of the other states, towns are under an obligation imposed by statute, to relieve and support poor persons, and to reimburse expenses incurred by other towns, in furnishing such relief to those who have fallen into distress, where they have not a legal settlement; and may be compelled, in an action on an implied promise, to reimburse such expenses to other towns, and to individuals of their own body.(*c*)

In sound sense, divested of fiction and technicality, the only true ground, on which an action upon what is called an implied contract can be maintained, is that of justice, duty,

(*a*) 1 Comyn on Contracts, (1st ed.) 6.

(*b*) Wright *v.* Follen, 7 El. & Bl. 301 and 8 El. & Bl. 647.

(*c*) In the civil law, those contracts which correspond to the implied contracts of the common law, are denominated *obligationes quasi ex contractu*, and Heineccius denies that they are founded on contract. El. Jur. sec. ord. Inst. lib. iii. tit. 14, 28. Dictata, ib.; Recitationes, ib. Most civilians, however, like the common lawyers, derive them *ex consensu ficto vel præsumpto*. Vinnius, in his commentary on the Institutes, denies it. Lib. iii. tit. 28.

and legal obligation. But, if the substance be secured, the form of obtaining it is of little comparative importance, provided it be, as in this instance, simple and direct, and not complicated, circuitous, and troublesome.

It is a general rule, that a contract shall not be implied, where an express one is made: *Expressum facit cessare tacitum.*(*a*) Thus, where one became surety for his neighbor for money borrowed of a third person, and took a bond of indemnity from the principal debtor, and, on being compelled to pay the money, brought an action against the principal on the implied promise, which the law raises in such cases, to reimburse the surety, it was held, that as he had taken a bond, which was an express contract, he must resort to that alone for indemnity.(*b*) So, where the hirer of a vessel, under a charter-party, in which the owner covenanted that the vessel should be tight, strong, &c., sued the owner, on an implied contract, for reimbursement of expenses incurred for necessary repairs made during the voyage, it was held, that the only remedy was on the covenant expressed in the charter-party.(*c*)

In both these cases, the express contract was under seal, and the remedy thereon was an action of debt or covenant; whereas the remedy usually adopted, in cases of implied contract, is the action of assumpsit; and it is a legal maxim, that the law will not raise an assumpsit where the party resorts to a higher security. This, however, is not the ground on which the first mentioned case was decided. The court proceeded on the principle (as expressed by Buller, J.), that "promises in law exist only where there is no express stipulation between the parties."

In other cases, where the express promise was of the same and not a higher nature than an implied one, the same doctrine has been constantly applied. Thus, a plaintiff cannot recover on an implied contract for goods delivered, when there

(*a*) Toussaint *v.* Martinnant, 2 T. R. 105. Whiting *v.* Sullivan, 7 Mass. 107. Trask *v.* Duvall, 4 Wash. C. C. Rep. 185.

(*b*) 2 T. R. 100.

(*c*) Kimball *v.* Tucker, 10 Mass. 196.

is an existing express contract, in part performance of which the goods were delivered.(*a*) Indeed, it is a familiar rule, that while an express contract is still open, a party cannot resort to an implied contract.(*b*)

To this rule, that promises in law (as implied promises are often called) do not exist where there are express stipulations, there are some exceptions. For example, if the terms of an express agreement have been performed, so as to leave a mere simple debt or duty between the parties, the plaintiff may recover on the implied contract; (*c*) so, where an express promise contains nothing more than the law will imply, an action may be sustained on the implied promise; (*d*) when both parties have departed from the special agreement, the law will raise an implied one; (*e*) where an express contract is void, on account of illegal consideration, a promise may be implied to pay what was justly due before the illegal agreement was made.(*f*) And when a party has failed to perform his express contract, according to its terms, but has performed it defectively, and cannot maintain an action thereon, yet if he has acted in good faith he may recover of the other party, on an implied contract, the amount of the benefit, if any, which that party has received.(*g*) But if the failure to

(*a*) Wood *v.* Edwards, 19 Johns. 205. See also Duncan *v.* Kieffer, 3 Binney, 126. Robertson *v.* Lynch, 18 Johns. 456.

(*b*) Bul. N. P. 139. 1 Doug. 23. 2 East, 145.

(*c*) Gordon *v.* Martin, Fitzgibbon, 303. This is one of the earliest cases on the subject, and was thus: The defendant wrote to the plaintiff, requesting him to perform certain services, and promising to pay him therefor, on performance. Instead of suing the defendant on the special promise, and setting it forth in the declaration, the plaintiff sued him in general indebitatus assumpsit, for services rendered at his request, and the action was sustained. This is now a very usual course. Guy *v.* Gower, 2 Marsh. 275. Bank *v.* Patterson, 7 Cranch, 299. Maynard *v.* Tidball, 2 Wis. 34.

(*d*) Gibbs *v.* Bryant, 1 Pick. 119. This was the case of a surety, who had a written (not sealed) promise of indemnity from the principal, and sued on the implied promise. See also Cornwall *v.* Gould, 4 Pick. 444.

(*e*) Goodrich *v.* Lafflin, 1 Pick. 57. 12 Mod. 509, by Powell, J.

(*f*) Thurston *v.* Percival, 1 Pick. 415.

(*g*) Farnsworth *v.* Garrard, 1 Campb. 38. Chapel *v.* Hickes, 2 Crompt. & Mees. 214 and 4 Tyrw. 43. Baillie *v.* Kell, 6 Scott, 398 and 4 Bing. N.

perform the express contract be intentional, it is such bad faith that he can recover nothing.(*a*) Hence, when one engages to perform service for another for a year or other definite time, for a gross sum for the whole time, and he leaves the service without the other's consent or any justifiable cause, he can recover nothing for the service which he rendered. Such are all the known decisions, except that of the court of New Hampshire, in Britton *v.* Turner, 6 N. Hamp. 481.(*b*)

"As the law will not generally imply a promise, where there is an express promise, so the law will not imply a promise of any person, against his own express declaration; because such declaration is repugnant to any implication of a promise." (*c*) This, however, can be true only where there is no legal duty paramount to the will of the party making the negative declaration. For where such duty exists, a promise will be implied, even against the party's strongest protestations; as in the cases of taxes, and claims for relieving paupers, before mentioned; so if a husband wrongfully expel his wife from his house, and forbid all persons to trust her on his account, declaring that he will not pay for any thing that is furnished to her, the law, notwithstanding these express declarations, implies a promise, on his part, to pay for the supplies which any other person provides for her necessary

R. 652. 1 Archb. N. P. (Amer. ed.) 255. Hayward *v.* Leonard, 7 Pick. 181. Snow *v.* Inhabitants of Ware, 13 Met. 42. Gleason *v.* Smith, 9 Cush. 486. Veazie *v.* Hosmer, 11 Gray, 396. Cardell *v.* Bridge, 9 Allen, 355. Norris *v.* School District, 3 Fairf. 293. Wadleigh *v.* Sutton, 6 N. Hamp. 15. Gilman *v.* Hall, 11 Verm. 510. Gazzam *v.* Kirby, 8 Porter, 256.

(*a*) Wade *v.* Haycock, 25 Penn. State Rep. 382. See Davy *v.* Cracknell, 1 Fost. & Finl. 59.

(*b*) Lilley *v.* Elwin, 11 Ad. & El. N. S. 752. Roscoe on Ev. (10th ed.) 350. Stark *v.* Parker, 2 Pick. 267. Olmstead *v.* Beale, 19 Pick. 528. Davis *v.* Maxwell, 12 Met. 286. Miller *v.* Goddard, 34 Maine, 102. Mullen *v.* Gilkinson, 19 Verm. 503. Reab *v.* Moor, 19 Johns. 337. Lantry *v.* Parks, 8 Cowen, 63. Monell *v.* Burns, 4 Denio, 121. Eldridge *v.* Rowe, 2 Gilman, 92. Schnerr *v.* Lemp, 19 Missouri, 40. Wright *v.* Turner, 1 Stew. 29. Hutchinson *v.* Wetmore, 2 Cal. 310. It will be seen hereafter that infants are exempted from this rule.

(*c*) By Parsons, C. J. 7 Mass. 109.

support; (*a*) and so (in this country) of a father, who wrongfully discards a minor child. (*b*)

In these instances, it is manifestly only by a fiction, that a contract or promise is implied. And, indeed, the whole doctrine of implied contracts, in all their varieties, seems to be merely artificial and imaginary. But in the present state of the law, it is necessary, for the sake of legal conformity, to adopt this phraseology. In a great majority of cases, which occur under this head, there is, in England, no safe legal remedy, except the action of assumpsit, in which a promise and the breach thereof are required to be alleged, although the defendant in fact never made any promise, but always denied his liability, and expressly refused either to pay, or to promise payment.

There are, indeed, some cases, in which a party may, at his election, regard his injury as a breach of contract, or as a tort, and may adopt the remedy appropriate to the alternative which he selects. Such cases, however, are not numerous; and when they occur, there is no necessity to resort to an implied contract, as there is another more apt course, which the party may pursue, with assurance of obtaining legal redress.

The action of debt, in which it is not necessary to aver a promise, is often concurrent with that of assumpsit on implied promises. But in England the defendant was formerly permitted to wage his law, in an action of debt on simple contract, and it was to avoid this evil that assumpsit was there substituted, and the doctrine of implied promises, if not first introduced, was greatly extended. (*c*) And though in most parts, if not the whole of this country, wager of law has never been allowed, yet we have adopted the English remedy of assumpsit, and the English doctrine of implied contracts.

If a new Registrum Brevium were now to be compiled, and new forms of setting forth causes of action were devised, we

(*a*) Robison *v.* Gosnold, 6 Mod. 171. Harris *v.* Morris, 4 Esp. R. 41. 4 Bur. 2178. 4 Cush. 475.

(*b*) 13 Johns. 480. See also 16 Mass. 31. 3 Day, 37. 2 Cush. 352.

(*c*) 3 Reeves' Hist. of English Law, (3d ed.) 245.

should probably adapt them to the truth of the case, and forego the fictions, that, at present, so extensively prevail.

Indeed, it was not without hesitation and resistance, that this doctrine of implied promises found admittance into the English law. The courts were slow and loath to sanction it. As late as the 11th year of William III., Lord Holt asserted from the bench, that the notion of promises in law was a metaphysical notion; that the law made no promises but where there was a promise of the party; (*a*) and in the third of Anne, he said, "there is no such thing as a promise in law." (*b*) The same great judge also pronounced him to be a bold man, who first ventured on a general count in indebitatus assumpsit. (*c*)

It was not until the latter part of the last century (long after implied promises had been recognized in divers other instances), that a surety, who had paid the debt of his principal, was allowed to maintain an action at law against the latter, on the implied contract of indemnity. He was compelled to resort to the court of chancery for reimbursement. (*d*) And it was not till 1800, that one of two sureties, who had paid the whole of the principal's debt, was held in England to be entitled at law to recover contribution from his co-surety. (*e*) Thirteen years earlier (1787), Lord Chief Baron Eyre, in the case of a bill in equity by a surety, demanding contribution of a co-surety, asserted that contribution was not founded in contract, but on a principle of justice and equity. (*f*) The late Chancellor Kent affirmed the same doctrine. (*g*) The courts of North Carolina refused to sustain an action at law, in such case, until jurisdiction was conferred by statute. (*h*)

(*a*) 1 Ld. Raym. 538.

(*b*) 6 Mod. 131.

(*c*) 2 Strange, 933. See also Vaugh. 101. 3 Wooddeson, 169, 170.

(*d*) 2 T. R. 105.

(*e*) Cowell *v.* Edwards, 2 Bos. & Pul. 268. Co-sureties must be joint undertakers, or the law of contribution does not hold. 3 Peters, 470. 13 Wend. 400.

(*f*) 1 Cox, 318 and 2 Bos. & Pul. 272.

(*g*) 4 Johns. Ch. 338.

(*h*) Cam. & Norw. 216. 2 Car. Law Repos. 624.

One who becomes co-surety at the other surety's request, is not liable to him for contribution. (*a*)

It is often announced as a rule, that the law does not imply a promise of contribution, or of indemnity, among wrong-doers. If two are sued for a joint tort, and judgment is recovered against both, and execution is levied upon one of them only, or if only one of them is sued, and has judgment against him, which he satisfies, he cannot recover a moiety of the other. (*b*) It is settled, however, by numerous decisions, that this rule is restricted to cases in which the party seeking contribution or indemnity knew, or must be presumed to have known, when he did the act for which he was held responsible, that it was unlawful, and that the rule is not applicable to cases in which he acted in good faith in apparent furtherance of justice, and in the exercise of his own or of other's rights; although he thereby subjects himself to a third person's action that sounds in tort. Hence, if an auctioneer sells goods by direction of A., who untruly represents himself as the owner, he and A. are, in law, joint wrong-doers; and if the true owner recovers damages of the auctioneer alone, or of A. and him jointly, and he pays them, he can maintain an action against A. on an implied promise of indemnity. (*c*) The same is true of an officer who, by direction of a judgment creditor, levies an execution on property not the judgment debtor's, and the true owner recovers judgment against him for damages; (*d*) or if such creditor directs an officer to arrest, as

(*a*) 2 Esp. R. 478. 2 El. & Bl. 297. 12 Mass. 102. 2 Dana, 296. 6 Gill & Johns. 250. Pitman on Prin. & Surety, 150.

(*b*) Merryweather *v.* Nixan, 8 T. R. 186. Thwaite *v.* Warren, 6 Petersd. Ab. (Amer. ed.) 149. Lingard *v.* Bromley, 1 Ves. & B. 117. Peck *v.* Ellis, 2 Johns. Ch. 131. Dupuy *v.* Johnson, 1 Bibb, 565. By Jackson, J., 15 Mass. 521. By the civil law, when several persons were condemned *in solido* to pay money to another for an injury committed by them, he who paid the whole had no legal recourse to the others for contribution; but by the French law (as stated by Pothier) he may recover contribution on the same principles that are applied to a surety in recovering from his co-surety. 1 Pothier on Obligations, by Evans, (1st Amer. ed.) 147. 2 ib. 70, (3d Amer. ed.) 245, 246. 2 ib. 69. 2 Johns. Ch. 137, 138.

(*c*) Adamson *v.* Jarvis, 4 Bing. 66 and 12 Moore, 241.

(*d*) Humphrys *v.* Pratt, 2 Dow & Clark, 288 and 5 Bligh N. S. 154.

the judgment debtor, another person, and he does so, and that person recovers damages against him for false imprisonment. (*a*) A like application of this point of law is shown in various other cases cited in the margin. (*b*)

As the law would doubtless have implied a promise of indemnity in those cases in which an express promise was held to be lawful and was enforced by suit, a moment's digression from the subject of implied contracts may here be allowed, for the purpose of referring to those cases, in this connection.

The first two known suits on an express promise were decided in Michaelmas term, 20 Jac. I. One was Fletcher *v.* Harcot, Hutton, 55, and in Winch, 48, under the name of Battersey's case, and the other was Arundel *v.* Gardiner, Cro. Jac. 652. In the first of these cases, Harcot brought Battersey to an inn kept by Fletcher, and affirmed to him that he had arrested Battersey by virtue of a commission of rebellion, and requested Fletcher to keep him safely over night, and promised to save him harmless. Fletcher detained him, as requested. The arrest was unlawful, and Battersey recovered of Fletcher damages in an action for false imprisonment; whereupon Fletcher brought an action against Harcot, on his promise, and recovered judgment against him. The other case, in Cro. Jac., was an action by an officer against a judgment creditor who had promised to indemnify him for levying an execution on goods, as of the judgment debtor, which were the property of another, who recovered damages of the officer for a trespass in seizing them. In this case the plaintiff had

(*a*) See Collins *v.* Evans, 5 Ad. & El. N. S. 829, 830.

(*b*) Betts *v.* Gibbins, 2 Ad. & El. 57 and 4 Nev. & Man. 64. Toplis *v.* Grane, 7 Scott, 643 and 5 Bing. N. R. 636. Childers *v.* Wooler, 2 El. & El. 287. Gower *v.* Emery, 18 Maine, 79. Jacobs *v.* Pollard, 10 Cush. 287. Bailey *v.* Bussing, 28 Conn. 455. St. John *v.* St. John's Church, 15 Barb. 346. Acheson *v.* Miller, 2 Ohio N. S. 203. Thweat's Admin. *v.* Jones, 1 Randolph, 328. Moore *v.* Appleton, 26 Alab. 633. These cases show that Lord Ellenborough's opinion, expressed in Farebrother *v.* Ansley, 1 Campb. 345, and the decision by him in Wilson *v.* Milner, 2 Campb. 452, are not sustained. See Lord Denman's opinion concerning those two cases, in 2 Ad. & El. 74, 75.

judgment. In Coventry *v.* Barton, 17 Johns. 142, a surveyor of highways ordered C., who was working out his highway tax, to remove a turnpike gate, which he (the surveyor) judged to be a nuisance, and promised "to bear him out." C. and others removed the gate, and he was sued by the turnpike company for so doing, and had judgment against him. It was decided that he might maintain an action against the surveyor on his promise. See like decisions in Allaire *v.* Ouland, 2 Johns. Cas. 56. Marsh *v.* Gold, 2 Pick. 285. Train *v.* Gold, 5 Pick. 380. Avery *v.* Halsey, 14 Pick. 174. Ives *v.* Jones, 3 Ired. 538. Stone *v.* Hooker, 9 Cowen, 154.

In all the foregoing cases, whether of express or of implied promises of indemnity, and whether by parol or by specialty, the party suing thereon (as before stated) must have acted *bonâ fide*. He can have no redress for an act that was obviously unlawful. This was distinctly announced by Hutton, J., in Winch, 49; and in Hutton, 56, Lord Hobart said: "He which doth a thing which may be lawful, and the illegality thereof appear not to him, he which employs the party and assumes to save him harmless, shall be charged." See also Leavitt *v.* Parks, 2 Allen, (N. B.) 282.

The other distinction above mentioned as requiring notice, before entering upon an examination of the principles of the law of contracts, is that which is made in the books between executed and executory contracts. An executed contract is one, by which the subject of it is transferred immediately, or by which the right and possession are transferred together; as if a horse is sold, paid for and delivered, or an agreement to exchange horses is immediately performed. (*a*) An executory contract is rather an engagement to do a thing, than the actual doing of it; it is prospective; as an agreement to exchange horses to-morrow, or to build a house in six months.(*b*) An agreement may be executed by one party, and executory by the other; as when one party performs, and the other is trusted; thus, where a loan of money is made, on a promise

(*a*) "A contract executed is one in which the object of the contract is performed." By Marshall, C. J. 6 Cranch, 136.

(*b*) Plowd. 9.

to secure it by bond or mortgage; the lender has executed his part of the contract, but the borrower's contract remains executory until performed. (*a*)

"An agreement, on sufficient consideration, to do or not to do a particular thing," is, as has been before suggested, a sufficiently accurate definition of a simple contract. Agreement implies parties and their mutual assent; and, in speaking of lawful agreements, we necessarily include the legality of the consideration and of the thing to be done or omitted. A more extended definition, or description, was given by Mr. Chitty, in an early edition of his Treatise on the Law of Contracts: "A mutual assent of two or more persons competent to contract, founded on a sufficient legal motive, inducement, or consideration to perform some legal act, or to omit to do any thing, the performance whereof is not enjoined by law." These several particulars, namely, the *assent*, the *parties*, the *consideration* or inducement, and the *legality* of the act or omission, require a separate and distinct examination.

The *assent* must be mutual, reciprocal, concurrent. Overtures or offers, not definitively assented to by both parties, do not constitute a contract. (*b*) There must necessarily be some medium of communication, by which the "union of minds" may be ascertained and manifested. Among men, this medium is language, symbolical, oral, or written. A proposal is made by one party, and is acceded to by the other, in some kind of language mutually intelligible; and this is mutual assent. Persons who are deaf and dumb contract only by symbolical or written language. The language of contracts at auction is often wholly symbolical. A nod or wink by one party, and a blow of a hammer given by the other, evince mutual assent.

An offer, or proposal, may be retracted at any time before

(*a*) 2 Bl. Com. 447. 1 Powell on Cont. 234. 1 Comyn on Cont. (1st ed.) 3.

(*b*) Kingston *v.* Phelps, Peake, 227. Gaunt *v.* Hill, 1 Stark. R. 10. Bruce *v.* Pearson, 3 Johns. 534. Burnet *v.* Bisco, 4 ib. 235. Tucker *v.* Woods, 12 ib. 190. Craig *v.* Harper, 3 Cush. 158. Beckwith *v.* Cheever, 1 Foster, 41. Smith *v.* Gowdy, 8 Allen 566.

it is accepted. A bidder at an auction may retract his bidding before the hammer is down. (*a*) So any other offer, whether written, oral, or symbolical, is subject to be retracted before acceptance. Even where, by the terms of the offer, time is given for the other party to accept or reject it, there is still *locus penitentiæ* until the offer is accepted; and an acceptance, subsequent to the retraction, is of no avail. (*b*)

When by the terms of the offer no time is prescribed within which it is to be acceded to, it will be considered as withdrawn, or rejected, or at an end, if it is not seasonably accepted. What is seasonable acceptance, in other words, how long such unqualified offer shall continue open for acceptance, if not expressly retracted, depends on the circumstances of each case that may arise, and on the ordinary forms of intercourse and business between the parties. If they are together, this question is to be decided, not so much by the time that elapses between the offer and acceptance, as by the conduct of the parties during that time; whether it be such as reasonably to imply that a negotiation is still open; that the offer is neither rejected nor withdrawn. A separation of the parties, without reference to a future meeting, would, probably, in most if not in all cases, be regarded as decisive evidence that the offer no longer existed. When the parties are apart, and an offer is made in writing, or by oral message, a reasonable time is allowed for notice of acceptance to be returned; and this depends on the distance, the means of early communication, the nature of the business, usage, and various other circumstances, which may combine in a given case, but which cannot be fixed beforehand by any determinate rule. Every case of this sort, as well as the former, must be decided on its own circumstances. (*c*)

(*a*) Payne *v.* Cave, 3 T. R. 148.

(*b*) Routledge *v.* Grant, 4 Bing. 653 and 1 Moore & Payne, 717. Craig *v.* Harper, 3 Cush. 158. Boston & Maine Railroad *v.* Bartlett, 3 Cush. 224. Falls *v.* Gaither, 9 Porter, 605. Gravier *v.* Gravier's Heirs, 15 Martin, 206. See also Rutherforth, lib. i. c. 12, §§ 14, 20. Bell on Sales, 32–38.

(*c*) See Loring *v.* City of Boston, 7 Met. 409. Averill *v.* Hedge, 12 Conn. 424. Inhabitants of Peru *v.* Inhabitants of Turner, 1 Fairf. 185. Emmott *v.* Riddel, 2 Fost. & Finl. 142.

In oral and symbolical communications, when the parties are together, the assent is mutual and the contract completed, when the acceptance of one party is announced to the other. But in a case of written communications between parties distant from each other, there is a difference, not only in writers, but also in courts, on the question whether acceptance of an offer operates from the time when it is made, or from the time when it is received. (*a*)

"A scruple," says Puffendorf, "has sometimes been moved, whether the obligation in the promiser begins at the very moment when the offer is accepted by the other party; or whether it is farther necessary, that the acceptance be made known to the promiser? And here it is certain, that a promise may be designed and expounded two ways; either thus: I engage myself to do the thing, if it shall be accepted; or thus: I engage myself to do the thing, if I shall understand that it will be accepted. Now, which of the two senses the promiser intended, is to be gathered and presumed from the nature of the business. If the promise were a matter of pure generosity, without restriction or limitation, we are to believe it was meant in the former sense; because here the promiser hastens, as it were, to bind himself, without staying for any formality in the other party. But those promises are to be understood in the latter sense which express some arbitrary or mixt condition essential to the engagement." (*b*) But Barbeyrac, in his notes on Grotius, (*c*) says this case is to be decided in a quite contrary manner. "If one mentally accedes to an offer, there is in fact an union of minds; but assent must be proved; therefore, a manifestation of assent is necessary, as matter of evidence. It follows, that assent to a proposal operates from the time it is expressed. When parties are together, therefore, the assent to a proposal operates from the time it is

(*a*) There are cases, in which an acceptance of an offer is implied from the conduct and perhaps from the silence of the party to whom it is made, and in which no express notice of acceptance needs to be given. See Train *v.* Gold, 5 Pick. 380.

(*b*) Puffendorf, lib. iii. c. 6, § 15. See also Vitriarius, lib. ii. c. 11, § 30. Hutcheson's Moral Philosophy, lib. ii. c. 9, §§ 6, 7.

(*c*) Lib. ii. c. 11, § 15.

conveyed to the proposer. When they are apart, and communicate by message or letter, the assent operates from the time when the party expresses his assent to the messenger, or puts it on paper in the form of an acceding to the offer made to him."

The court of King's Bench, in 1818, decided that the acceptance of an offer operated from the time when it was made, and not merely from the time when notice of it was received. (*a*) That was a case in which the defendant had by letter offered the plaintiff certain goods at a specified price, on receiving notice of acceptance "in course of post;" but by misdirection of his letter containing the offer, it was not received in the regular course of the post to the place of the plaintiff's residence, and he, on receiving it two days afterwards, returned an answer by the first post, accepting the offer. The court held that the contract was completed; that as the misdirection of the letter was the error of the defendant, it should not affect the plaintiff, who replied by the earliest post after he received the offer, it must be deemed, as against the defendant, to be made by the course of the post, within the terms of the offer. And it is now the established law of England that a contract is completed, when a letter declaring the acceptance of an offer is seasonably posted; and that the party thus accepting is not answerable for casualties occurring at post-offices. (*b*) So a contract is complete, when an offer is made by an agent and an acceptance is communicated to him, although he does not seasonably apprise the principal that the offer is accepted. (*c*)

The supreme court of Massachusetts decided that an acceptance of an offer operates from the time when it is made known, and not from the time when it is made. The case was this: An insurance company, on the first of January, offered by letter to insure a ship on certain terms. On the

(*a*) Adams *v.* Lindsell, 1 B. & Ald. 681.

(*b*) Dunlop *v.* Higgins, 1 House of Lords Cas. 381. Duncan *v.* Topham, 8 C. B. 225. Potter *v.* Sanders, 6 Hare, 1. Stocken *v.* Collin, 7 Mees. & Welsb. 515 and Hurlst. & Walms. 84.

(*c*) Wright *v.* Bigg, 15 Beavan, 592.

next day, they wrote another letter retracting the offer. The first letter was received by the owner of the ship, on the third of January, and he on that day replied to it, accepting the offer, before he received their second letter. All the letters were sent by mail and received by the parties on the second day after they were written. The offer was therefore accepted before the retraction was made known, and the retraction was made before the acceptance was made known. It was decided that there was no agreement to insure. (*a*)

The English doctrine above stated, is sustained by the courts of other States, and by the supreme court of the United States. (*b*)

This doctrine, however, is not applied to the acceptance of a bill of exchange. The drawee is not bound by writing his acceptance on it, if he change his mind and cancel it before it is communicated to the holder. (*c*)

A contract may be made by telegraphic despatches, subject, it is presumed, to the same rules that apply to contracts made by letters transmitted by mail or otherwise. (*d*)

An offer, or proposal, must be accepted or assented to, in the terms on which it is made. Thus, if an offer is made, limiting the time or mode in which it is to be accepted, an acceptance made after the time, or in a different mode, does not constitute a mutual agreement. Such acceptance can be regarded only as a new proposal by him to whom the offer was made, and requires the subsequent assent of the other party to make it a contract. As if a trader orders goods of a specified quantity, or on certain terms of credit, and a less

(*a*) M'Culloch *v.* Eagle Ins. Co. 1 Pick. 278.

(*b*) Tayloe *v.* Merchants' Fire Ins. Co., 9 Howard, 390. Mactier *v.* Frith, 6 Wend. 103. Brisban *v.* Boyd, 4 Paige, 17. Vassar *v.* Camp, 1 Kernan, 441. Averill *v.* Hedge, 12 Conn. 424. Chiles *v.* Nelson, 7 Dana, 282. Falls *v.* Gaither, 9 Porter, 613. Levy *v.* Cohen, 4 Georgia, 13. The Palo Alto, Davcis, 343. Hutcheson *v.* Blakeman, 3 Met. (Ky.) Rep. 80. See also Shaw on Obligations, 12.

(*c*) Cox *v.* Troy, 5 B. & Ald. 474 and 1 Dowl. & Ryl. 38. Wilde *v.* Sheridan, 11 Eng. Law & Eq. Rep. 382.

(*d*) Taylor *v.* Steamboat, 20 Missouri, 254. Durkee *v.* Vermont Central Railroad, 29 Verm. 127.

quantity is forwarded, or on a shorter credit, he is not bound to receive and pay for them. (*a*) So, where an offer, by letter, to purchase goods, required an answer by the return of the wagon by which the letter was sent, and the offer was accepted by a letter sent by mail to a different place from that to which the wagon was to return, it was held that there was no contract. (*b*) By accepting goods sent on different terms, or by waiving the difference in time or place, the party is regarded as acceding to the modified or varied terms proposed by the other, and thus the assent becomes mutual and the contract complete.

It was formerly supposed, from the case of Cooke *v.* Oxley, as reported in 3 T. R. 653, that when time is given by one party for the other to accept the offer, the party making such offer is not bound by the other's acceptance, within the time mentioned. Oxley offered to sell Cooke two hundred and sixty-six hogsheads of tobacco, at a certain price, and gave him, at his request, till four o'clock in the afternoon of the same day, "to agree to, or dissent from the proposal." Before that hour, Cooke gave Oxley notice of his assent to the proposal. But it was held, that Oxley was not bound; that there was no contract. Such appears, from the declaration given in the report and from the marginal abstract of the case, to have been the decision, and so it was long understood and set forth in the books. (*c*) The supreme court of New York so understood it, and inclined to regard it as sound law. (*d*) The supreme court of Massachusetts also considered it in the same light, but questioned the soundness of the decision. (*e*)

If the case were accurately reported, it would be not only

(*a*) Bruce *v.* Pearson, 3 Johns. 534. Tuttle *v.* Love, 7 ib. 470. 1 Campb. 53. 2 Barn. & Cres. 37.

(*b*) Eliason *v.* Henshaw, 4 Wheaton, 225. Routledge *v.* Grant, 4 Bing. 653. Duke *v.* Andrews, 2 Exch. 290.

(*c*) Bac. Ab. Assumpsit, (Guillim's ed.) C. 2 Comyn on Contracts, (1st ed.) 211. 3 Stark. Ev. (4th Amer. ed.) 1634. Chitty on Contracts, (1st ed.) 108. 6 Petersd. Ab. (Amer. ed.) 130, 136.

(*d*) Tucker *v.* Woods, 12 Johns. 190.

(*e*) 1 Pick. 281.

unreasonable and inconsistent with good faith, but at variance with acknowledged principles of law, and with all previous and subsequent decisions, except that of the court of Tennessee, in the case of Gillespie *v.* Edmonston, 11 Humph. 553. Had Oxley retracted his offer before it was accepted by Cooke, the acceptance afterwards would not have bound him. But the offer was not retracted, nor rejected, nor at an end, either expressly or by implication, before it was accepted. If, after the offer was made, the parties had separated, and no time had been given for future acceptance, an acceptance afterwards would have been too late. Whether, in such case, the offer would, in law, be considered as refused, or withdrawn, or as having expired, it is not material to inquire. It would not, at any rate, be considered as obligatory. By the terms of the offer in question, it was to remain open (unless previously retracted, accepted, or rejected), until four o'clock. It was a continuing offer.

Lord Kenyon's summary opinion is in these words: "Nothing can be clearer than at the time of entering into this contract, the engagement was all on one side; the other party was not bound; it was therefore *nudum pactum*." And Buller, J., said: "It is not stated that the defendant did agree, at four o'clock, to the terms of the sale." These expressions are strong evidence that the question was not understood by the court as it has been by others, and that the declaration and the point adjudged are misstated in the report. For in all contracts, the offer is made by one side, and the other is never obliged to accept it. And Lord Kenyon could not mean to say that no acceptance binds the party who makes the offer; and yet his assertion would involve this consequence, and prevent the completion of any contract whatever. If he who makes an offer is not bound by its acceptance, because the other party is not obliged to accept it, it follows, by parity of reason, that he who accepts the offer is not bound by the acceptance, because the other party is not obliged to receive it; and, thus on this ground, no binding agreement could ever be made. 5 Barr, 343.

There is further and conclusive evidence that the case is

misreported. In Humphries *v.* Carvalho, 16 East, 47, Bayley, J., said: "The question in Cooke *v.* Oxley arose upon the record, and a writ of error was afterwards brought on the judgment of this court," (King's Bench), "by which it appears that the objection made was, that there was only a proposal of sale by the one party, and no allegation that the other party had acceded to the contract of sale." See also 4 Bing. 660 and 1 Moore & Payne, 732.

It was argued, in defence of the supposed doctrine of Cooke *v.* Oxley, that it is a principle of contracts, that both parties must be bound, in order to bind either. This means, however, nothing more than that the assent of both parties is necessary to constitute an agreement; but both parties may as well consent that the one shall be bound, and the other retain, for a specified time, his option to be bound or not, as that any other arrangement shall be made. And in common business it often happens that contracts are made, optional with one party and obligatory on the other. (*a*) Where one buys a horse under an agreement that it may be returned in a limited time, if it prove restive or do not suit the purchaser's family, the seller is bound to receive the horse, if returned within the time, but the buyer is not bound to return it. (*b*) So if one engages to take and pay for grain, from five hundred to one thousand bushels, he is bound to take one thousand bushels, or five hundred, or any intermediate quantity; but the other is not obliged to deliver more than the smallest quantity mentioned. (*c*)

It was further argued, in support of said supposed decision, that mutual promises, where one is the consideration of the other, must be made at the same time, or they are not binding. (*d*) But no proposal and acceptance can be strictly simultaneous. The medium of communication among men does

(*a*) 7 Ad. & El. 23, by Patteson, J. 5 Mees. & Welsb. 501, by Parke, B. 5 Pick. 385. 8 Gray, 213.

(*b*) See Clarke's case, Clayton, 118.

(*c*) 3 Johns. Cases, 81. 2 ib. 253. 16 East, 45. 1 T. R. 135. 4 Greenl. 497.

(*d*) "The promises must be at one instant." Nichols *v.* Raynbred, Hobart, 88.

not allow it. One must precede the other. And if the party making the proposal is bound by the acceptance, when tendered immediately (as is universally admitted), it is not easy to perceive why he is less bound, when it is tendered within the time specified by the proposal itself. The offer, in the latter case, is a continuing offer, and may be regarded in law as made at the last moment of time preceding the acceptance; and the acceptance and offer are, in legal contemplation, "at one instant." (*a*)

This rule concerning mutual promises, when examined, will be found to import nothing more than that there must be reciprocal assent (as it has already been explained) to constitute a contract. The rule has been well discussed on a question of pleading. In setting forth such promises in a declaration, it is necessary that they should be alleged to be concurrent. According to the precedents and decisions, the party suing, when he has stated the offer on the one part, must aver, that thereupon, or then, an acceptance thereof was made on the other part. (*b*) Alleging the acceptance or promise, on the other part, to have been made "afterwards on the same day," has been held to be bad. (*c*)

Though this may at first appear to be hypercritical, it will be found, on consideration, to be sound and reasonable. It is a most salutary rule of pleading, that a party must set forth his cause of action or defence, with reasonable certainty. It must, to say the least, not appear, from his own showing and statement, that he has no cause of action, or no ground of defence; nor that he may have none, although his statement be taken as wholly true. But in setting forth an offer on a given day, and averring an acceptance afterwards, though on the same day, a party does not show necessarily that there was any mutual assent. The offer, as has before been stated, may have been retracted, or rejected, or have expired, within an hour from the time it was made. And as this depends on

(*a*) See 1 B. & Ald. 683. 6 Wend. 115. 3 Meriv. 454, 455.

(*b*) In point of form the offer and acceptance, usually, are both described as promises.

(*c*) See 1 Caines, 584. 12 Johns. 400.

such a variety of circumstances, peculiar to every case, it would be a great stretch of credulity, as well as of legal presumption, to assume that an acceptance of an offer, on the same day it is made, does of course evince a mutual concurrent assent of the parties, according to the principles before suggested.

Strict, however, as this doctrine of alleging mutual promises undoubtedly is, it does not help to support the decision in Cooke *v.* Oxley, as formerly understood. For by alleging the offer on a certain day, according to its terms, and averring an acceptance at or before the hour allowed therefor, a concurrent assent is shown, and mutual promises at the same instant. For there was, as has been repeatedly suggested, a continuing offer in that case, as well as in those which have been cited, where an offer was sent and an acceptance returned by mail. In the case of Adams *v.* Lindsell, (*a*) the court say, "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 plaintiff; and then the contract is completed by the acceptance of it by the latter." That case directly impugns the doctrine of Cooke *v.* Oxley (which was pressed upon the court), and may be considered as having overruled it, if indeed it ever was decided on the ground so generally supposed.

Assent must not only be mutual but free. Hence agreements extorted by violence or terror (called duress) are invalid. Duress, that avoids a contract, is of two kinds; duress of imprisonment, and duress *per minas*. Such duress of imprisonment is the illegal restraint of personal liberty, whether in a prison or elsewhere; or illegal force or privation imposed upon a person lawfully imprisoned, for the purpose of extorting some promise or contract from the person thus restrained. (*b*)

It seems to have been formerly held, that imprisonment

(*a*) 1 B. & Ald. 683.

(*b*) 2 Inst. 482. Bac. Ab. Duress, A. Shep. Touch. 61. Perkins, § 17. Finch, 102. Shaw on Obligations, 43–48.

under regular and formal legal process, though malicious and without probable cause, did not constitute such duress. (*a*) *Executio juris non habet injuriam.* But great injuries are sometimes inflicted under color of legal process. And it has been decided in Massachusetts, New Hampshire and New York, that process, though in form regular and legal, sued out maliciously and without probable cause, to arrest and imprison a man, is such duress as will avoid a deed given by him to procure his deliverance. (*b*)

So though a person is arrested on a lawful warrant, by a proper officer, yet if one of the purposes of the arrest is thereby to extort money or enforce the settlement of a civil claim, such arrest is false imprisonment, and a release or conveyance of property by means of the arrest is void. (*c*)

As a general rule, imprisonment by order of law is not duress that will avoid a contract; and therefore, if a man, supposing that he has cause of action against another, cause him to be arrested and imprisoned by lawful process, and the defendant voluntarily execute a deed or note, or make any other promise, to obtain his deliverance, he cannot avoid such contract by duress of imprisonment, although the plaintiff had no cause of action: (*d*) *a fortiori*, if a man, under arrest or imprisoned for a just cause, make an agreement voluntarily for the purpose of procuring his liberty, he cannot avoid it on the ground of duress. (*e*) If the process, under which a party is arrested or imprisoned, be void; as if the court have no jurisdiction of the cause, or no authority to issue such process; the arrest or imprisonment is, of course, unlawful, and an obligation given by the prisoner (as a bail

(*a*) 1 Lev. 68, 69.

(*b*) Watkins *v.* Baird, 6 Mass. 506. Richardson *v.* Duncan, 3 N. Hamp. 508. Severance *v.* Kimball, 8 ib. 386. Strong *v.* Grannis, 26 Barb. 122. See also Aleyn, 92. Bul. N. P. 172.

(*c*) Hackett *v.* King, 6 Allen, 58.

(*d*) 6 Mass. 511. Hobart, 266, 267. But see Bul. N. P. 172. Termes de la Ley, Duress, 1 Lil. Ab. 494. In these books it is laid down that, if the cause of action is not good, a bond so given is voidable for duress.

(*e*) 3 Caines, 168. 2 Inst. 482. 3 Leon. 239. Perk. § 18. 1 Fairf. 325. 1 Bailey, 84. 4 Harrington, 311.

bond, &c.), for his enlargement, is voidable for duress. (*a*) Duress *per minas* is, 1. for fear of loss of life; 2. of loss of member; 3. of mayhem; 4. of imprisonment. (*b*) And this fear must be upon sufficient reasons: *Non suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem.* Menace of a mere battery, or to destroy property, even to burn one's house, seems, by the preponderance of authority, not to amount to duress. (*c*) A firm man, *vir constans*, it is said, may withstand such menaces; and if they are executed, the party injured may recover damages in proportion to the injury done him. "This, however," as Mr. Starkie observes, "is clearly a very inadequate reason for the distinction, and may be frequently false in fact." (*d*) And Mr. Chitty doubts whether, at the present day, the threat to commit so serious an injury as the burning of a house would not be considered such duress as will avoid a contract. (*e*)

In South Carolina, the courts have holden that there may be cases in which a man's necessities are so urgent and pressing, that duress of his goods may avoid his acts; (*f*) and where the party is unable to make satisfaction, or where there is no speedy tribunal to enforce it, it is there said, as the reason of the law ceases, the law itself does not apply. The contrary, however, is the present law of England, as declared by Lord Denman, in 11 Ad. & El. 990 and 3 P. & Dav. 600, 601, and by Baron Parke, in 3 Mees. & Welsb. 650, and in 6 Exch. 348. The old case in the Year Book, (20 Ass. pl. 14), cited in 1 Bro. Ab. 258 b. and 1 Rol. Ab. 687, in which a

(*a*) Cro. Eliz. 647. 4 Inst. 97. S. P. 15 Johns. 256. See also 7 T. R. 376, where Lord Kenyon says that a bail bond, executed by a person under arrest, where the affidavit to hold to bail is insufficient, may be avoided on the ground of duress. See also 8 Greenl. 426. 21 Conn. 598. 17 Pick. 252. 11 Cush. 247. 5 Cranch C. C. Rep. 124.

(*b*) 2 Inst. 483. Bac. Ab. Duress, A. 5 Hill, 154. 10 Allen, 76. 1 Daly, 71.

(*c*) Co. Litt. 253, b. 2 Inst. 483. Perkins, § 18. 1 Bl. Com. 130. 6 East, 126, 140. 11 Mod. 203. 2 Strange, 917. Hardin's Rep. 605. 2 Gallison, 337. 2 Met. (Ky.) 447.

(*d*) 2 Stark. Ev. (4th Amer. ed.) 482.

(*e*) Chit. on Con. (1st ed.) 56, (10th Amer. ed.) 219.

(*f*) 1 Bay, 470. 2 Bay, 211.

deed obtained by duress of the grantor's cattle, and not of his person, was avoided, is not regarded as law. Yet if one's goods or other property be wrongfully detained, and he pay money simply to obtain possession, and not by way of adjusting the matter, he may recover it back. See Shaw *v.* Woodcock, 7 Barn. & Cres. 84, 85. 3 Mees. & Welsb. *ubi sup.* Close *v.* Phipps, 7 Mann. & Grang. 586 and 8 Scott N. R. 381. Elliott *v.* Swartwout, 10 Peters, 137. Cobb *v.* Charter, 32 Conn. 358. Chase *v.* Dwinal, 7 Greenl. 134, and numerous other cases. But in England such recovery is had on the ground that the money was not paid voluntarily but under compulsion, and not on the ground that it was paid under duress, as technically understood. In this class of cases, the question always is, whether the payment was voluntary or involuntary. See cases, in which payments were held to be voluntary, collected in Chit. on Con. (10th Amer. ed.) 698 *&c. seq.*

This doctrine of duress may be summarily stated thus, viz.: Any agreement made by a person under coercion by illegal imprisonment, or under illegal force or privation imposed on him while legally restrained, or under threats which induce a reasonable fear of loss of life, or of mayhem, or of unlawful imprisonment, are not binding and may be avoided.

Those contracts only that are made under fear of unlawful imprisonment, and not those made under fear of imprisonment which would be legally justifiable, can be avoided for duress. (*a*)

This limited sphere for the operation of the doctrine is characteristic of the age in which it was thus limited; an age in which personal valor was deemed to be in a great measure its own reward, and when he who chose to resort to the law for redress of minor injuries was regarded as *homo vanus et meticulosus.* A high regard, however, for personal liberty is evinced by the effect which is allowed to fear of restraint, while it is denied to fear of the most serious injury to property. Lord Coke says (2 Inst. 483) "it is observable

(*a*) Wilcox *v.* Howland, 23 Pick. 167. Eddy *v.* Herrin, 17 Maine, 338. Alexander *v.* Pierce, 10 N. Hamp. 494. Nealley *v.* Greenough, 5 Foster, 332.

how fear of imprisonment is more grievous and odious in law, than the fear of battery."(*a*)

There are numerous instances in which a court of chancery relieves against contracts entered into by a compulsion that is not sufficient to avoid them at law. These cases, however, are decided, each on its peculiar circumstances, and are not properly within the scope of the present examination. So a will (which is not strictly a contract) may be avoided on the ground of undue influence and restraint exercised upon the testator, though not amounting to duress that would avoid his bond or note. It is said in an old case, (*b*) that if a man makes a will in his sickness, by the over importunity of his wife, to the end he may be quiet, it shall be set aside as made by restraint. This is not now regarded as law; but importunity (legally taken) "must be in such a degree as to take away from the testator free agency." It must be such as he is too weak to resist, "such as will render the act no longer the act of the deceased." (*c*)

The duress that will avoid a contract must be done to the party himself. If, therefore, two or more make an obligation by reason of duress to one of them only, it can be avoided only by him upon whom the duress was practised. A surety is held to perform the engagement made by himself and principal, though it was made solely to relieve the principal from duress. (*d*) This rule of law, however, was held, in Thompson *v.* Lockwood, 15 Johns. 256, not to be applicable to a surety who had executed a bond to a sheriff, which the sheriff had no authority to require of the principal, and which a statute had declared should be void. The decision was rested

(*a*) In Foshay *v.* Ferguson, 5 Hill, 158, Bronson, J., said he entertained no doubt that a contract procured by threats and fear of battery, or the destruction of property, might be avoided on the ground of duress.

(*b*) Hacker *v.* Newborn, Style, 427.

(*c*) By Sir John Nicholl, in Kinleside *v.* Harrison, 2 Phillimore, 551.

(*d*) Shep. Touch. 62. Mantel *v.* Gibbs, 1 Brownlow, 64. Huscombe *v.* Standing, Cro. Jac. 187. Wayne *v.* Sands, 1 Freeman, 351. Simms *v.* Barefoot's Ex'ors, 2 Haywood, 402. Jones *v.* Turner, 5 Littell, 147. Robinson *v.* Gould, 11 Cush. 55. M'Clintick *v.* Cummins, 3 M'Lean, 158. The contrary was held in Evans *v.* Huey, 1 Bay, 13.

on the statute and not on the common law. But in United States *v.* Tingey, 5 Peters, 115, and Boston *v.* Capen, 7 Cush. 146, it was decided that, at common law, a bond exacted by a public officer, who had no authority to require it, was void both as to principal and surety. See also Newcomb *v.* Worster, 7 Allen, 198. Commonwealth *v.* Field, 9 Allen, 584. Commonwealth *v.* Collins, 11 Gray, 465. The State *v.* Buffum, 2 Foster, 267. Billings *v.* Avery, 7 Conn. 236.

Husband and wife are regarded in law, for most purposes, as one person. An obligation, therefore, made by the husband, to relieve the wife from duress, may be avoided, as if the duress had been done to himself. (*a*) But in no other case can a man avoid his deed by duress to another, let him be related how he will. (*b*)

It is said in some of the old books, that duress by a stranger to the deed, unless practised at the instance of the obligee, will not avoid the deed. (*c*) But the better opinion is, that a deed so procured is void as to the party to whom it is made. "If one threaten a man to kill him, unless he will seal a deed to him and three others, and he do so, this is void as to all the four. For if one threaten another to kill or maim him, if he will not seal a deed to a stranger, and thereupon he

(*a*) 1 Sid. 123. Shep. Touch. 61. 2 Brownlow, 276. Bac. Ab. Duress, B. In Eadie *v.* Slimmon, 26 N. Y. Rep. 9, the New York court of appeals decided that greatly terrifying a woman, by threats of prosecuting her husband for alleged embezzlement, is such coercion as to avoid a transfer of her separate property thus obtained. And see 10 Min. 448.

(*b*) So says Twisden, J. (1 Freeman, 351), and so it is expressly laid down in Shep. Touch. 61. Such, doubtless, is the weight of authority. In a case in North Carolina (2 Haywood, 402), a bond executed by a mother, to procure the enlargement of her son, who was under duress, was held to be binding on her. There are authorities, however, which countenance a more liberal extension of the doctrine of duress. Wylde, J., says (1 Freeman, 351) "If the duress be to a father or brother, and a son enter into bond, this is a duress to the son, and he may plead it." So it is said (2 Brownlow, 276) that a father may avoid his deed that he hath sealed by the duress of the imprisonment of his son, but not of his servant; and that mayor and commonalty may avoid a deed sealed by duress of imprisonment of the mayor. See also 1 Rol. Ab. 687. Bac. Ab. Duress, B.

(*c*) Keilwey, 154 a.

do so, this is void as if it were to the party himself." (*a*) And such is the rule of the civil law. (*b*) It has been held, from the earliest times, that duress imposed by a stranger to the contract, if by the procurement of the party to be benefited, will vitiate it. (*c*)

A party who has made a contract while under duress may, by his subsequent conduct, render it valid or estop himself to deny its validity. As if one makes an obligation by duress, and afterwards, when he is at liberty, takes a defeasance upon it. (*d*) So if a man acknowledges a bargain and sale of lands, &c. (in England), in the court where the deed is to be enrolled, or before the officer who makes the enrollment, and it is enrolled, he cannot afterwards plead duress. (*e*) And where a feme covert acknowledges a deed executed by her, on a private examination before a magistrate, it cannot be avoided for duress. (*f*) In these instances, an actual inquiry is instituted concerning the will of the party. But in Massachusetts, acknowledging a deed is regarded as of such trivial importance, that it does not estop the party nor his heirs to avoid it for duress. (*g*) It was always held, however, that if a party under duress promises, for the purpose of regaining his liberty, to execute a bond or other instrument, and afterwards, while at large, performs his promise, it is nevertheless avoidable. (*h*)

A marriage contract obtained by duress may also be avoided, though celebrated by religious rites *in facie ecclesiæ*. Indeed, the marriage contract, as it is governed in many respects by the ecclesiastical and statute law in England, is often annulled for causes which, though analogous to duress by the common law, do not range under that head.

By the civil law, the party who entered into a contract while under duress was compelled to institute a process of

(*a*) Shep. Touch. 61. Jacob's Law Dict. Duress.
(*b*) Heinec. Elem. s. o. Pand. lib. iv. tit. 2. (*c*) 1 Rol. Ab. 688.
(*d*) Shep. Touch. 62, 288.
(*e*) 1 Rol. Ab. 862. Bac. Ab. Duress, C.
(*f*) Bissett *v.* Bissett, 1 Harr. & M'Hen. 211. But see 18 Maryl. 319.
(*g*) Worcester *v.* Eaton, 13 Mass. 371.
(*h*) Keilwey, 52 b. Shep. Touch. 61. Finch, 10.

rescission within ten years, or he would have been held to perform it. (*a*) By the common law, the party may avoid such contract by pleading duress, or giving it in evidence, when sued for breach of the contract.

On a retrospect of the common law doctrine of duress, it will occur to every mind, that its operation is confined within narrow and somewhat arbitrary limits, and is by no means co-extensive with the principles of natural law, as expounded by the most approved writers. (*b*)

Assent must be not only mutual and free, but must also be without error respecting the subject of agreement. By the civil law, "error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject which the parties have principally in contemplation, and which makes the substance of it." (*c*) This, which is called error by the civilians, is in the common law usually denominated mistake; the word error having a technical meaning of a very different kind, and being therefore seldom used in its popular sense by legal writers. In both systems, the integrity of the contracting parties is assumed; for, if intentional deception be practised by either party, it is termed fraud, *dolus malus*. The rule of the civil and common law is the same, so far as it regards the identity of the subject of the agreement.

Where the subject of the agreement is the person, or where a consideration of the person with whom an agreement is made forms an ingredient of the agreement, a mistake respecting the person destroys assent and annuls the agreement. (*d*)

(*a*) This process is somewhat analogous to an application to a court of equity for relief.

(*b*) See Grotius, lib. ii. c. 11, 12. Grebner, Jus Nat. Pars ii. § 1, c. 7. Puffendorf, lib. iii. c. 4–9. Heinec. Jus Nat. et Gent. lib. i. c. 14, 15. Hutcheson's Mor. Philos. lib. ii. c. 9. Rutherforth, lib. i. c. 12, § 16.

(*c*) 1 Poth. on Obl. by Evans, (1st Amer. ed.) 11; (3d Amer. ed). 113. Error consensui obstat. Si enim in re erro, non in illam sane consentio, sed in aliam, quæ tum menti mea obversabatur. Heinec. Recit. 475. Elem. s. o. Inst. lib. iii. tit. 24. Ea non *liberè* velle possumus, circa quæ errore ducimur. Grebner, *supra*.

(*d*) 1 Poth. on Obl. by Evans, (1st Amer. ed.) 12, (3d Amer. ed.) 114.

As if a man, intending to make a gift or loan to one, gives or lends to another, mistaking him for the first, the gift or loan is void for want of assent. So of a sale on credit, or an agreement to sell on credit to one person, mistaking him for another. So also of a promise of marriage. Such cases, however, can seldom occur; and the rule is of little practical importance. In almost all instances of misapprehension of the person, there is fraud, which is a distinct ground of avoiding contracts.

Where a mistake occurs respecting the identity of the subject of the agreement, assent is not given, and the contract of course is void; as where a contract was for lime in casks, and the casks were found to contain sand and stones. (*a*) So where counterfeit coins or notes are taken and passed as genuine. (*b*) If, however, certain coins or notes are specifically agreed to be received, it is not regarded as a bargain for cash; and if they prove to be spurious, the loss falls on the holder. The party receiving them is understood to take the risk, and there is no mistake as to the identity of the subject. (*c*) And in some cases, negligence in the party receiving worthless coin or notes will fix the loss on him; (*d*) as if a party do not seasonably return them, or if he pay a note forged against himself. (*e*)

Pothier gives, as an instance of error in the identity of the subject of the contract, which renders it void for want of assent, the purchase of candlesticks as silver which are only plated. But in the case of Chandelor *v.* Lopus, (*f*) the contrary was held by all the judges of England, except one, in

(*a*) Conner *v.* Henderson, 15 Mass. 319. Gardner *v.* Lane, 9 Allen, 492.

(*b*) Young *v.* Adams, 6 Mass. 182. Ellis *v.* Wild, ib. 321. Markle *v.* Hatfield, 2 Johns. 455. Jones *v.* Ryde, 5 Taunt. 488. Eagle Bank *v.* Smith, 5 Conn. 71. Thomas *v.* Todd, 6 Hill, 340. Pindall's Ex'ors *v.* N. Western Bank, 7 Leigh, 617. Gurney *v.* Womersley, 4 El. & Bl. 133.

(*c*) Alexander *v.* Owen, 1 T. R. 225. Ellis *v.* Wild, *ubi sup.* Merriam *v.* Wolcott, 3 Allen, 258, where one point decided in 6 Mass. 321, was denied to be law.

(*d*) 17 Mass. 1, 33. 10 Wheaton, 333.

(*e*) Price *v.* Neal, 3 Bur. 1354. Levy *v.* Bank of United States, 4 Dallas, 234.

(*f*) Cro. Jac. 4.

the case of a stone bought and sold as a bezoar-stone, which proved to be of some other species less valuable. Parker, C. J., says, (*a*) that this case "would not now be received as law in England, certainly not in our country." Probably, however, he questioned the case on different grounds from that which we are now considering; and the current of decisions at common law, both here and in England, runs very strongly against Pothier's doctrine, as applied in the instance just mentioned. By those decisions, that instance ranges under the head of mistakes that affect the quality of the subject of agreement, as to which the civil and common law are totally different. Mr. Evans, in a note to his edition of Pothier, (1st Amer. ed.) 13, mentions, as a case of error in the subject of the contract, that a painting was sold as an original of Poussin, but it appearing afterwards to be the work of some other person, it was held that the sale was void, and the purchaser entitled to reclaim his money. This, if (as it seems to have been) a case in the English courts, is directly impugned by the case of Jendwine *v.* Slade, (*b*) and is at variance with the principles of numerous adjudications. (*c*)

As to mistake or error, which affects the quality of the subject of agreement, whether the error be what the civilians term essential, which annuls a contract, or accidental, which only gives a right of action for damages, there is, as before suggested, no similarity in the civil and common law. By the principles of the common law, so far as they apply to contracts of sale, a purchaser has no remedy against the seller for any defect in the quality of the article sold, unless the seller is guilty of fraud, or makes a warranty upon the sale. There is, perhaps, room for doubt whether there is not an exception to this rule, in the case of a sale of provisions. But this point, as well as the whole doctrine, belongs to the subject of the sale of personal property, rather than to that of contracts generally.

Assent must be given without fraud, on the part of him

(*a*) 13 Mass. 143. (*b*) 2 Esp. R. 572.
(*c*) See Hill *v.* Gray, 1 Stark. R. 434. Tucker *v.* Woods, 12 Johns. 190.

who procures it, as well as without mistake respecting the subject of the agreement. Fraud avoids all contracts, *ab initio*, both at law and in equity; the assent essential to a contract not being honestly obtained. The civil law definition of fraud, *dolus*, is "omnis calliditas, fallacia, machinatio, ad decipiendum, fallendum, circumveniendum alterum adhibita." No precise definition is found, in the books of common law, of the term fraud; but it is usually described in nearly the same manner as by the civilians; and is said to involve some artful device, or deceitful practice, contrary to the plain rules of common honesty, whereby a man is cheated and deprived of his right. It will be found, however, that on many subjects of contract, the civil and common law regard the same conduct in a very different light.

There are numerous fraudulent devices and practices, by which one party to a contract deceives and injures the other. In general, such fraud consists of misrepresentation or concealment of material facts, *suggestio falsi aut suppressio veri.* As the question of fraud, or no fraud, depends on the particular facts of each case, the relative situation of the parties, and their capacities and means of information, it is not easy to lay down, with precision, any general, elementary doctrine, which would not tend rather to mislead than to enlighten and direct. Besides; as it is not the moral quality of an act or omission which alone determines its legal quality and effect, there are in the making of contracts certain acts and omissions which writers on ethics pronounce immoral, but which are held to be legally allowable, and not within the cognizance of the law. Most intentional falsehoods are regarded as fraudulent and the subject of legal redress, when they induce the party, to whom they are told, to do or omit to do something which he would not otherwise have done or omitted, whereby his interests are injuriously affected. But the rule of the civil law, *simplex commendatio non obligat*, prevails in our law. And if a seller merely use those expressions which are usual with sellers who praise at random goods which they are desirous to sell, the buyer ought not to rely on those expressions; and though he was thereby induced to buy, and was

deceived, he has no remedy. Such are assertions, by the seller, of the value of the subject of sale, the price which he paid for it, the offers which he has received for it, and the like. This is termed "dealing talk," and is used, more or less, by sellers generally, and seems to have been matter of distrust and not of confidence, long before the existence of our common law. (*a*)

> Multa fidem promissa levant, ubi plenius æquo
> Laudat venales, qui vult extrudere merces.

So of untrue assertions of the buyer as to the highest price which he is authorized to give, and of the value of the property that he buys. (*b*) So if the buyer of personal property has private information of some extrinsic fact or event which materially affects its market value, he is not legally bound to disclose such information to the seller. Thus where a party knew of the peace of 1815, which greatly raised the price of tobacco at New Orleans, and he bought a large quantity of it, concealing his knowledge from the seller, who had not heard the news of peace, the supreme court of the United States decided that he was not legally bound to communicate his knowledge to the seller; that mere silence was not a legal fraud. (*c*) And it was said by Lord Thurlow, that if "A., knowing there to be a mine in the estate of B., of which he knew B. was ignorant, should enter into a contract to purchase

(*a*) Sugd. on Vend. 3. Oliphant on Horses, 83. Addison on Con. (2d ed.) 129. Broom's Maxims, (3d ed.) 701. 6 Met. 259, 260. Harvey *v.* Young, Yelv. 21. Onslow's Nisi Prius, 28. Roberts on Fraudulent Conveyances, 524. Moore *v.* Turbeville, 2 Bibb, 602. Saunders *v.* Hatterman, 2 Ired, 32. Davis *v.* Sims, Hill & Denio, 234. Page *v.* Parker, 43 N. Hamp. 368. Veasey *v.* Doton, 3 Allen, 380, and cases there cited. Hemmer *v.* Cooper, 8 Allen, 334. Geddes *v.* Pennington, 5 Dow, 164. Phipps *v.* Buckman, 30 Penn. State Rep. 401.

(*b*) Vernon *v.* Keys, 12 East, 632. Humphrey *v.* Haskell, 7 Allen, 497. 1 Story on Eq. § 199. Barlow *v.* Wiley, 3 A. K. Marsh. 457.

(*c*) Laidlaw *v.* Organ, 2 Wheat. 178. See Mr. Verplanck's examination of this case, in his Essay on the Doctrine of Contracts and how they are affected by Concealment, &c. See also Frazer *v.* Gervais, Walker, 72, in which the supreme court of Mississippi denied the doctrine in 2 Wheat.; but Gibson, C. J., recognized it in Kintzing *v.* McElrath, 5 Barr, 467.

the estate of B. for the price of the estate, without considering the mine," the court would not set the contract aside. (*a*) "But," says Lord Eldon, "a very little is sufficient to affect the application of that principle. If a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate." (*b*) In cases of the seller's concealment of intrinsic defects in personal property which are known to him but not discoverable by the buyer, with the use of proper diligence, the contract of sale is held to be fraudulent and avoidable. (*c*) "In contracts for the letting and hiring of realty, the lessor is not bound to disclose to the lessee latent defects interfering with the use and enjoyment of the property let to hire." (*d*)

Those kinds of fraud, which avoid contracts, not on the ground of defective assent, or assent fraudulently obtained from one party by the other, but because the contracts themselves injuriously affect third persons or the public, have no bearing on this part of the law of contracts.

There is the same difference between the common and civil law, as to the mode of avoiding contracts made under a fraudulent imposition, which was mentioned under the head of duress, viz.: showing the fraud on a trial by the common law, and a process of rescission by the civil.

(*a*) Fox *v.* Mackreth, 2 Bro. C. C. 420 and 2 Cox, 320. See also 1 Story on Eq. §§ 204–208. 2 Kent Com. (10th ed.) 672. Harris *v.* Tyson, 24 Penn. State Rep. 347.

(*b*) Turner *v.* Harvey, Jacob, 178. See also Prescott *v.* Wright, 4 Gray, 464.

(*c*) Story on Sales (Perkins's ed.) § 179, and authorities there cited. Hammond's Nisi Prius, 294. Addison on Con. (2d ed.) 133. Horsfall *v.* Thomas, 1 Hurlst. & Coltm. 100. 1 Story on Eq. (8th ed.) § 212 *a*. 1 Bell Com. 175. Paddock *v.* Strobridge, 29 Verm. 470. Shaw on Obligations, 51.

(*d*) Addison on Con. (2d ed.) 134. See Foster *v.* Peyser, 9 Cush. 242. 1 Washburn on Real Property, (1st ed.) 349.

CHAPTER II.

OF PARTIES TO CONTRACTS.

Mutual assent presupposes parties capable of assenting. Capacity to contract is of two kinds, natural and legal, and these must, in general, concur in both parties. By natural capacity is meant a competent measure of mental power. Legal capacity includes natural, and also the permission of the law to exercise it.

The subject of the parties to contracts will be considered under the several divisions of, 1, infants; 2, *non compotes mentis;* 3, drunkards; 4, married women; 5, outlaws and persons attainted; 6, persons excommunicated; 7, aliens; 8, spendthrifts; 9, slaves; 10, seamen; 11, attorneys and other agents; 12, partners; 13, executors and administrators; 14, guardians; and, 15, corporations.

1. *Infants.*

Infants are incapable of making contracts; and their incapacity is partly natural and partly legal. In deciding on their agreements, the actual state of their capacities is not considered.

By the common law, every person is, technically, an infant, until he is twenty-one years old; and, in legal presumption, is not of sufficient discretion to contract an obligation at an earlier age. (*a*)

As some acquire maturity of judgment much sooner than others, it is obviously impossible to determine by any universal rule, how long young persons remain incapable of making a binding contract; and it is, therefore, as Puffendorf remarks, a plain direction of natural law, that this subject should be

(*a*) Co. Lit. 171 b.

regulated by the positive institutions of society. Accordingly, it is found that almost all states have fixed a period at which legal capacity commences, and this, earlier or later, according to the character of the people and the nature of the business to be transacted.

By the early Roman law, full age, in matters of contract, was twenty-five years; but by the later law it was twenty-one years. (*a*) The ancient Germans fixed the period of mature age principally with reference to the state of the body, especially its fitness for military service. In process of time a certain number of years was, by divers special laws, made the standard of maturity for various purposes, until at length the age of twenty-one became, generally, "matura Germanorum ætas."(*b*)

Some writers suppose the period of twenty-one years was adopted by the common law from the old Saxon constitutions on the continent, which held youth under tutelage till that age, and then allowed them to be "sui juris." Others resort for its origin to the tenure by knight-service, and the incident of that tenure, called guardianship in chivalry. Under this system, the tenant, when twenty-one years old, was regarded as capable of attending his lord in war, and was therefore no longer in ward. There is in the books much learned discussion of the origin of the incidents of the tenure by knight-service, as recognized in the ancient English law. While some writers derive them from the great feudal system of the continent, others ascribe them to the encroachments of the Norman conqueror and his successors. (*c*) Mr. Hallam, in his View of the Middle Ages, accuses the English lawyers of an imperfect acquaintance with the history of feuds on the con-

(*a*) Hutcheson's Moral Philosophy, lib. ii. c. 9, § 4. In Levi's Manual of Mercantile Law, 44, it is stated that "majority is fixed at twenty-one in the United Kingdom, France, the two Indies, Sardinia, Bavaria, Saxony, Russia, and the United States; at twenty-three in Holland; at twenty-four in Austria and Prussia; at twenty-five in Denmark, Spain, Portugal, and in the Cape of Good Hope."

(*b*) Putteri El. Juris Germ. Priv. Hod. § 198 & nota.

(*c*) See Mr. Butler's note to Co. Lit. 191. 2 Bl. Com. c. 5. Sullivan's Lectures, xi. & xii.

tinent, and denies that wardship, &c., formed any part of the continental system, or sprang from the relation between lord and vassal, as it existed under that system. However this may be, it is very evident that the period of full age, in our law, like many other important parts of our legal system, is of German origin.

As the common law generally makes no fractions of a day, a person is of full age on the day preceding his twenty-first birthday. (*a*) Thus, "it has been adjudged, that if one be born the first of February, at eleven at night, and the last of January, in the twenty-first year of his age, at one of the clock in the morning, he makes his will of land and dies, 't is a good will, for he was then of age." (*b*) This decision was for the benefit of the testator, enabling him to do an act that required full age, before all the hours of twenty-one years had elapsed. But the same rule would doubtless be applied against a defendant, who should attempt to avoid, on the ground of infancy, a contract made by him on the day before the twenty-first anniversary of his birth.

Infancy is a personal privilege, allowed for protection against imposition; and, in general, no person but the infant himself, or his heirs or legal representatives, can take advantage of it. (*c*) Therefore, a person of full age, who makes a contract with an infant, is held to his engagement, if otherwise valid, and if the infant elects to adhere to it, though the latter may, on his part, avoid it. (*d*) Thus, an infant maintained an action against an adult for breach of a promise of marriage, although it was contended that, as the plaintiff was

(*a*) 1 Wooddeson, 398.

(*b*) 1 Keble, 589, pl. 52. 1 Sid. 162. 1 Salk. 44. 2 ib. 625. 1 Ld. Raym. 480. 2 ib. 1096. 2 Mod. 281. 6 Mod. 260. 3 Wilson, 274. 6 Ind. 447. See 1 Redfield on Wills, (1st ed.) 20, 21.

(*c*) 2 Inst. 483. 1 Shower, 171. Rose *v.* Daniel, 2 Const. Rep. (S. C.) 549. Beeler *v.* Bullitt, 3 A. K. Marsh. 281. United States *v.* Bainbridge, 1 Mason, 71. Hartness *v.* Thompson, 5 Johns. 160.

(*d*) 1 Comyn on Cont. (1st ed.) 153, and cases there cited. Bac. Ab. Infancy and Age, I. 4. 1 Sid. 41, 446. But, as the remedy is not mutual, a court of chancery will not decree specific performance at the suit of an infant. Flight *v.* Bolland, 4 Russell, 298.

not bound, there was no reciprocity. (*a*) So, a third person, not a party to the contract, cannot take advantage of the infancy of one of the parties. Thus, in an action for seducing a servant from his master's service, the defendant cannot resist the action, by showing that the servant was an infant, and therefore not by law bound to perform the contract made with the master for service. (*b*) On the same principle (connected with others), the acceptor of a bill of exchange, or the maker of a promissory note, cannot resist payment in a suit by an indorsee, though the indorser be an infant. (*c*)

These and similar decisions proceed on the principle, now well established, that the contracts of infants are generally voidable and not void; by which is meant, that it is at their election, and theirs only, whether they will perform their contracts; and that, on their arriving at full age, they may ratify and render them obligatory, without any new consideration to support them. Any contract, therefore, which is void, and not merely voidable at the infant's election, is not binding on the adult contractor, and may be treated as a nullity by third persons. Nor will the courts, by virtue of their equitable jurisdiction, confirm such a contract, nor prohibit the infant to avoid it. (*d*)

There is confusion in the older books, on the question, what acts of infants shall be regarded as void, and what only voidable. (*e*) There is one result, however, in which most of the older cases agree; that whenever the act done *may be* for the infant's benefit, it shall not be considered as void, but he shall have his election, when he comes of age, to affirm or avoid it. This is perhaps the only clear and intelligible proposition which can be extracted from the earlier authorities;

(*a*) Holt *v.* Ward, 2 Strange, 937 and Fitzg. 175, 275. 1 Salk. 24. See also Warwick *v.* Bruce, 2 M. & S. 205 and 6 Taunton, 118. 5 Cowen, 475.

(*b*) Keane *v.* Boycott, 2 H. Bl. 511. Ashcroft *v.* Bertles, 6 T. R. 652.

(*c*) Taylor *v.* Croker, 4 Esp. R. 187. Grey *v.* Cooper, 3 Doug. 65. Jones *v.* Darch, 4 Price, 300. Nightingale *v.* Withington, 15 Mass. 273. Hardy *v.* Waters, 38 Maine, 450. Frazier *v.* Massey, 14 Ind. 382.

(*d*) Saunderson *v.* Marr, 1 H. Bl. 75.

(*e*) See Perkins, § 12 *et seq.* Shep. Touch. 232. Bac. Ab. Infancy and Age, I. 3; and cases cited in Zouch *v.* Parsons, 3 Bur. 1794.

and, in some cases that may arise, even this is not of easy application. (*a*) And this rule has been questioned and pronounced unsatisfactory by some of the courts of this country. See 1 Amer. Lead. Cas. (4th ed.) 242, 243, 247, 248, 249. It will be seen in the following pages that the strong tendency of the English as well as the American courts is to regard all contracts of infants as voidable only. Bing. on Infancy (Bennett's ed.) 11, *note*. In the Amer. Lead. Cas. *supra*, the editors express the opinion that an infant's appointment of an attorney may well be deemed void. See Cummings *v.* Powell, 8 Texas, 87.

It is held that an infant may purchase land; for, says Lord Coke, "it is intended for his benefit, and at his full age he may either agree thereunto and perfect it, or, without any cause to be alleged, wave or disagree to the purchase." (*b*) For the same reason (among others) his feoffment, or other conveyance of land, is not void, but voidable only. (*c*) An infant's bond with a penalty, and for the payment of interest, is held by the English courts to be void on the ground that it cannot be for his benefit. (*d*) But in Bradley *v.* Pratt, 23 Verm. 378, it was decided that there is no general rule in this country exempting him from paying interest, as necessarily injurious to him. Yet a bond executed by him as surety has been considered void, (*e*) as not being possibly for his benefit. A release by him to his guardian, as it affords more protection than a receipt, is held to be void. (*f*) Parker, C. J., supposes that all simple contracts made by an infant are

(*a*) See 3 Bur. 1808. 13 Mass. 239. 14 Mass. 462. 1 Story on Eq. §§ 240, 241. 2 Kent Com. (6th ed.) 234, (11th ed.) 256.

(*b*) Co. Lit. 2 b. 11 Johns. 543.

(*c*) Perkins, § 13. 3 Bur. 1805, 1808. 14 Johns. 126. Doctor and Student, (16th ed.) 62. 5 Yerg. 41. 2 Overton, 431. 1 N. Hamp. 73. As to an infant's conveyance by lease and release, see Zouch *v.* Parsons, 3 Bur. 1794; though this decision has been much quarrelled with, it was fully approved by Chancellor Sugden, in Allen *v.* Allen, 2 Dru. & War. 340 and 1 Con. & Law. 452.

(*d*) Fisher *v.* Mowbray, 8 East, 330. Hunter *v.* Agnew, 1 Fox & Smith, 15. Baylis *v.* Dineley, 3 M. & S. 477.

(*e*) See 2 Call, (1st ed.) 70. 3 Desaus. 482. 6 Mich. 220.

(*f*) Fridge *v.* The State, 3 Gill & Johns. 115.

voidable only. (*a*) But it has been decided, that his parol promise (promissory note), as surety, is void. (*b*) Eyre, C. J., says, such contracts as the court can pronounce to be to the infant's prejudice are merely void; those that are of an uncertain nature, as to the benefit or prejudice, are voidable only. (*c*) This doctrine is recognized by the supreme court of Tennessee and by Story, J., (*d*) by Hosmer, C. J., (*e*) by Chancellor Kent, (*f*) by Lord Ellenborough; (*g*) and was the ground of the decisions just cited, respecting an infant's bond for payment of interest, his release, and his contracts as surety. (*h*)

An exception to the rule, that an infant's deed is voidable only where the court cannot pronounce it to be to his prejudice, is made in the case of a power of attorney executed by him. Such an instrument is treated as utterly void. Hence any contract, made in his name and for his benefit, under an authority thus attempted to be delegated, is of no validity and may be regarded as void, not only by the other contracting party, but also by third persons; and cannot be made valid by a subsequent ratification. (*i*) Indeed, no void contract can be ratified; there is, in legal estimation, no subject of ratification. (*j*)

A power of attorney, to authorize another to receive seizin of land for an infant, in order to complete his title to an estate conveyed to him by feoffment, is voidable only; it being an

(*a*) 14 Mass. 462.

(*b*) Rogers *v.* Hurd, 4 Day, 57. Maples *v.* Wightman, 4 Conn. 376. Curtin *v.* Patton, 11 Serg. & R. 305.

(*c*) 2 H. Bl. 515.

(*d*) 6 Yerg. 9. 5 ib. 41. 1 Mason, 82.

(*e*) 6 Conn. 503.

(*f*) 2 Kent Com. 193, 1st ed.

(*g*) 3 M. & S. 481.

(*h*) Finch, (103) says, "grants of his, where himself hath benefit, are only voidable." See Pennington, (2d ed.) 764.

(*i*) 2 Lil. Ab. 69. 4 Littell, 18. Bac. Ab. Infancy and Age, I. 3. Saunderson *v.* Marr, 1 H. Bl. 75. Finch, 102. 1 Amer. Lead. Cas. (4th ed.) 248, 249.

(*j*) Dalison, 64, pl. 25. Cro. Eliz. 126. Co. Lit. 295 b. 2 T. R. 766. 4 Conn. 376.

authority to do an act for his benefit. (*a*) And the good sense of the thing seems to be, that an authority delegated by an infant for a purpose which may be beneficial to him, or which the court cannot pronounce to be to his prejudice, should be considered as rendering the contract made, or act done, by virtue of it, as voidable only, in the same manner as his personal acts and contracts are considered.

And it is held, that this anomaly is confined to cases of authority delegated under a sealed instrument. The old decisions are all of that kind; and, being somewhat inconsistent with the general principles affecting infant's contracts, the doctrine is not extended to implied or oral authority. Therefore, where an adult and an infant were partners in trade, and the adult signed a promissory note in the name of the firm, for a partnership debt, it was held to be voidable only by the infant, and that he was bound by his ratification of it after he came of age. (*b*)

In any new case that may arise, if it should be necessary to an infant's protection that his deed or other contract should be considered void, the reason of the privilege would doubtless warrant an exception, in such case, to the general rule. (*c*)

It is said by Lord Mansfield (*d*) that the privilege of avoiding their contracts is given to infants as a shield and not as a sword. Yet cases are not unfrequent, where equitable and honorable claims are resisted and avoided, on the mere legal right of the infant. Perhaps, however, this privilege is not oftener abused to purposes of injustice, than most other rules of law, which, from necessity, must be general, and cannot be made to bend to the circumstances of particular cases.

In contracts, where the infant engages to do some future act, as to pay money, perform covenants, or fulfil any other promises, (*i. e.* in cases of *executory* contracts,) he may, in general, not only refuse to perform them during his infancy, but may disaffirm them after he comes of age, and leave the

(*a*) Bro. Ab. Faites, 31. 1 Rol. Ab. 730. 3 Bur. 1808. 1 Wooddeson, 400.
(*b*) Whitney *v.* Dutch, 14 Mass. 457.
(*c*) 3 Bur. 1807, 1808. Reeve Dom. Rel. 250, 252.
(*d*) 3 Bur. 1802.

other party without remedy. Thus, he may refuse to pay his bond or note, to perform any covenant he has made, or to fulfil any oral promise, though he has received a full consideration for such bond, covenant, or promise. If he has borrowed money, or purchased goods, and spent the one and used or sold the other, he cannot be compelled to pay; and, if sued, whether during minority or after he is of full age, he may successfully resist, on the ground of his infancy at the time of the borrowing or the purchase; and his executor or administrator is entitled to the same defence.

When an infant has disposed of his own property, (*i. e.* in cases of *executed* contracts) he may, in general, disaffirm the contract, either during infancy or after he comes of age. (*a*) Thus, if he lease his lands, reserving rent, he may allow the lessee to be his tenant, and may receive the rent; or he may rescind the contract, and treat the lessee as a trespasser. (*b*) In Co. Lit. 248 a. it is said, "if an infant make a feoffment, &c., he may enter, either within age, or at any time after his full age." And in 2 Inst. 673, it is said, "if an infant bargain and sell lands which are in the realty, by deed indented and enrolled, he may avoid it when he will." But the law of England seems now to be, that though an infant grantor of lands may enter upon them during minority, and vest them in himself, "for the sake of the profits," yet that he cannot maintain an action to recover them, and thus avoid his grant, until he has attained full age. 3 Bur. 1808, by Lord Mansfield. 1 Roscoe on Real Actions, 93. Jackson on Real Actions, 263. The law of this country is similar. 9 Cowen, 628. 5 Min. 61. 16 N. Hamp. 390. 17 Conn. 483. 8 Texas, 92. Willard on Real Estate, 446. 1 Washburn on Real Property, 305, 306. 1 Amer. Lead. Cas. (4th ed.) 257.

There are certain contracts of record, as fines, recoveries, recognizances, statutes, &c., which must, by the common law of England, be avoided during minority, or they will be binding forever. (*c*) This exception rests upon a reason that never

(*a*) Bac. Ab. Infancy and Age, I. 5.

(*b*) Blunden *v.* Baugh, Cro. Car. 302, 306.

(*c*) 2 Inst. 483. Co. Lit. 380 b. Bac. Ab. Infancy and Age, I. 5. Newland on Con. 13.

operated in New England, probably in none of the United States, and is not a part of our law, viz.: trying infancy by inspection. (*a*)

In order to avoid a feoffment made by an infant, it is required that he should enter upon the land to regain seizin. Conveyance by feoffment is not practised here, and is in a great measure, if not wholly, superseded in England by other modes of tranferring real property.

Where the conveyance of an infant's land is by deed of bargain and sale, the common mode of assurance in New England and most of the other states, there are cases in which it has been held that it is not necessary that an entry should be made in order to avoid it.

In Jackson *v.* Carpenter, 11 Johns. 539, and Jackson *v.* Burchin, 14 Johns. 124, where an infant had sold and conveyed wild lands by deed of bargain and sale, and, several years after he came of age, conveyed, by a similar deed, the same lands to another person, it was held, that the first conveyance was legally avoided, and the last purchaser entitled to the property. And so it was held in Tucker *v.* Moreland, 10 Peters, 58, in the case of a deed of real estate in the city of Washington. In that case it is to be observed that the infant had continued in possession, after making his first deed, until he made the second.

Since these three cases were published, several of the state courts have recognized the proposition as general, if not universal, that an infant's deed of his real estate may be disaffirmed by his second deed, though to another grantee, after coming of age, without a previous entry. See 2 Dev. & Bat. 326. 7 Humph. 126. 15 Ohio, 192. 7 Ind. 401. 24 Missouri, 544. But in Bool *v.* Mix, 17 Wend. 133, Bronson, J., said that in 11th and 14th Johnson, (*supra*) stress was laid on the fact that the land was vacant and uncultivated, and that an entry would have been useless; that if in those cases the land had been held adversely to the infant, the second deed would, in his opinion, have been void, and that this was admitted in Jackson *v.* Burchin. And in Dominick *v.* Michael,

(*a*) See 3 Bl. Com. 331, 332.

4 Sandf. 421, Duer, J., referred to Bool *v.* Mix as satisfactorily showing that to enable an infant to pass title by a second conveyance, his previous actual entry on the land is an indispensable requisite; and that this rule is applicable in all cases, except where the infant has retained possession of the lands, or, at the time of the execution of the second deed, they are wholly vacant.

It is not known that any court in New England has adjudged this point. But in 1 N. Hamp. 75, Woodbury, J., said that an infant, in order to avoid his deed, was generally bound to reënter, but that if he be already in possession, or if the land be all wild, a mere sale of it might sufficiently disaffirm his first conveyance. And Parker, C. J., in 13 Mass. 375, said that an infant grantor could disaffirm his deed of land and convey title "only by entry." Since this was said, the statutes of Massachusetts and of Maine have enabled parties to recover land by a writ of entry, without first making an entry thereon; proof of title and of a right of entry being made sufficient to maintain such writ. And in Chadbourne *v.* Rackliffe, 30 Maine, 354, the bringing of that writ, after coming of age, was held equivalent to an entry, and to be a disaffirmance of a deed made during minority.

No reason is perceived, and none is known to have been anywhere suggested, judicially or otherwise, for a difference in the mode of disaffirming a deed voidable for infancy and a deed voidable for insanity or for duress. In the two latter it is adjudged, and nowhere denied in New England, that a valid deed to a second grantee cannot be made until after entry on the land, or after action brought to recover it. In all cases, a first deed, duly executed and recorded, conveys a seizin to the grantee, and his possession under the deed is adverse to the grantor. That the grantor may not be thereby technically disseized is immaterial. He has parted with his own seizin, and his grantee's seizin and possession have the same legal effect as a technical disseizin would. Until the grantor somehow regains a seizin, he is disabled by the grantee's adverse possession to pass a title. See 4 Mass. 68. 5 Mass. 352. 7 Mass. 384. 13 Met. 4. 9 Allen, 88, 166. 6 Met. 339, 444.

4 Gray, 200. 19 Verm. 161. Where such is the law, it is not supposable that a court would sanction a disaffirmance of an infant's deed by his second deed to another grantee, without a previous entry, further than it was sanctioned by the judges whose opinions in Bool *v.* Mix and Dominick *v.* Michael are above stated. 1 Washburn on Real Property, 304. And why should not the grantor of wild and uncultivated land be required to make entry thereon, or bring a writ of entry, before conveying it a second time, wherever the ownership of such land is held (unless possession adverse to the owner is clearly shown) to be equivalent to a seizin and possession thereof? See 15 Pick. 189. 24 Pick. 78, 79. 8 Johns. 270. Stearns on Real Actions, 33. 4 Kent Com. (11th ed.) 28, (6th ed.) 30, 31. 1 Washburn on Real Property, 136.

As no deed is necessary to the transfer of personal property, an infant's contract respecting the disposition of such property may be disaffirmed by his verbal declarations to the other party, and by retaking or demanding the restoration of it. And this he may do, although the contract was made with the express approbation of his guardian. (*a*)

An absolute gift made by an infant may be revoked by him or by his administrator. Person *v.* Chase, 37 Verm. 647.

The effect of the disaffirmance of an infant's contract, upon the rights and interest of the other party, is different in the cases of executory and of executed agreements.

Where the agreement is executory on the part of the adult, a disaffirmance by the infant discharges the adult from his obligation to performance. As if an infant leases land, reserving rent payable *in futuro*, and afterwards avoids the lease, the lessee is not bound by his agreement or covenant to pay the rent, at least, for no longer time than he occupies under the lease. So, if an infant sells a horse or any other chattel on credit, taking the purchaser's oral promise or note, and rescinds the contract and reclaims the property, the purchaser may refuse to pay for it; and, if sued, may defend with success against the infant's claim. (*b*)

(*a*) 10 Johns. 132.
(*b*) Reeve Dom. Rel. 243, 244.

But if the contract is executed by the adult, he cannot compel the infant to restore what he has paid him. Thus, in the cases above supposed, if the rent had been paid in advance, or the horse or other property been paid for before delivery, the law would give no redress, though the infant disaffirmed the lease, or refused to deliver the property sold by him; that is, no redress in an action on a contract. And it is not clear that in such cases there is any legal remedy. (*a*)

Where, however, the infant receives payment on the sale and delivery of his goods, it has been made a question, whether he can rescind the contract and reclaim possession, without refunding the price. That he may, on the mere ground of his minority, disaffirm the sale, does not admit of question; and, for causes which it is unnecessary to state here, contracts between persons of full age may sometimes be rescinded; but, in such cases, the party rescinding must place the other party *in statu quo*. In Badger *v.* Phinney, 15 Mass. 363, it was said by Mr. Justice Putnam, that this principle would be applied to an infant who had received payment and should afterwards seek to reclaim his property. And such seems now to be the American doctrine, (*b*) and to be deducible from the English decision in Holmes *v.* Blogg, hereafter to be considered.

But where the infant refuses to pay for articles sold to him, the other party cannot retake the articles. Where he has received money for property which he engaged to deliver to the purchaser, and afterwards refuses to deliver, his privilege (as it is termed) is his defence. This is manifestly inequitable, and Judge Reeve (*c*) therefore denies that such is the law. But the principles of the law of infancy seem to lead to this result, and so do the authorities. (*d*)

(*a*) In Shaw *v.* Boyd, 5 Serg. & R. 309, an infant received $500 for giving a bond to release dower, and yet recovered dower without refunding the money. Gibson, C. J., there said "a court of common law can impose no conditions on a party pursuing a legal right."

(*b*) 2 Kent Com. (11th ed.) 264. Chit. on Con. (10th Amer. ed.) 164, *note*. 17 Texas, 341. 1 Amer. Lead. Cas. (4th ed.) 259, 260.

(*c*) Dom. Rel. 244.

(*d*) See Cresinger *v.* Lessee of Welch, 15 Ohio, 156. Pitcher *v.* Laycock,

Nor is there anything less equitable in this result of legal principles, than in that already mentioned, which Judge Reeve does not controvert, viz.: that an infant may safely refuse to pay for articles bought, or to repay money borrowed by him. In the one case, the party loses his goods or money lent; in the other, he loses money paid by him without an equivalent.

In 2 Eden, 72, and Wilmot, 226, *note*, Lord Mansfield is reported to have said that "if an infant pays money with his own hands, without a valuable consideration, he cannot get it back." And this *dictum* was formerly supposed to have been sanctioned by the decision of Lord Kenyon, at nisi prius, in Wilson *v.* Kearse, Peake Add. Cas. 196, and by the court of common pleas, in Holmes *v.* Blogg, 8 Taunt. 508 and 2 Moore, 552. But in Corpe *v.* Overton, 10 Bing. 252 and 3 Moore & Scott, 738, where an infant made an agreement with an adult to enter into partnership with him on a future day, and deposited money with him, as security for the performance of that agreement, which he disaffirmed on coming of age, it was decided that he might recover back the money so deposited. The ground of the decision was, that he had derived no advantage from his agreement, and received no consideration for it. Whereas in Holmes *v.* Blogg, an infant and his partner took a lease of premises in which they carried on business, and the infant paid £157 as his part of the sum advanced for the lease. The partners entered upon the premises and held possession jointly for three months, when the infant attained full age, dissolved the partnership, relinquished the business, and brought an action against the lessor to recover the money which he had paid. The ground on which it was decided that he could not recover was, that he had received some value for the money which he had paid, and that he

7 Ind. 398. Gibson *v.* Soper, 6 Gray, 279. In Doe *v.* Abernathy, 7 Blackf. 442. ejectment was maintained after coming of age without any suggestion of a return of the money received for the first deed.

By statute in Iowa, "a minor is bound not only by contracts for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority." 12 Iowa, 198.

could not put the lessor in *statu quo*. See also Stone *v.* Dennison, 13 Pick. 1. Breed *v.* Judd, 1 Gray, 455. Wilhelm *v.* Hardman, 13 Maryl. 140. Aldrich *v.* Abrahams, Hill & Denio, 423.

The case of Wilson *v.* Kearse, in which Lord Kenyon held that when an infant had contracted to purchase the good will and stock of a public house and had made a deposit, he could not, on refusing to complete the contract, recover back the sum deposited, must be considered as overruled by Corpe *v.* Overton, unless (which does not appear) there was, in the former case, some enjoyment under the contract. 2 Macpherson on Infants, 478, 479. But see Ex parte Taylor, 8 De Gex, Mac. & Gord. 254.

Though an adult, when he engages to perform service for another for a year or other definite time, for a gross sum for the whole time, and leaves the service without the other's consent, or any justifiable cause, can recover nothing for the service which he performed, (as seen *ante*, page 8), yet an infant, in such case may recover pay for the service rendered by him. (*a*)

An infant is entitled to reclaim money paid on a consideration that has failed, and may have a remedy against those who defraud him. As to these rights, he stands upon the same ground as an adult. In addition to his power to disaffirm his contracts without cause, he has all the legal rights of a person of full age to rescind them for cause. His privilege is merely cumulative, and neither diminishes nor varies any rights to which he would be entitled without it. (*b*)

It is true that minors are liable, generally, for their torts, as for slander, trespass, &c. (*c*) But in the case before mentioned, of a minor's refusing to pay for goods which he has

(*a*) Moses *v.* Stevens, 2 Pick. 332. Vent *v.* Osgood, 19 Pick. 572. Judkins *v.* Walker, 17 Maine, 38. Lufkin *v.* Mayall, 5 Foster, 82. Thomas *v.* Dike, 11 Verm. 273. Medbury *v.* Watrous, 7 Hill, 110. Whitmarsh *v.* Hall, 3 Denio, 375. Voorhees *v.* Wait, 3 Green (N. J.) 343. Dallas *v.* Hollingsworth, 3 Ind. 537. Wheatly *v.* Miscal, 5 Ind. 142.

(*b*) See 6 Taunt. 120.

(*c*) Noy, 129. 8 T. R. 337. 3 Pick. 492. 6 Cranch, 226. 3 Wend. 391. 17 Wis. 230.

bought, there is no principle of law by which he can be made liable, in an action *ex delicto*, or by which the vendor can rescind the sale and retake the goods. He would be liable only on his contract, and from this liability the minor is protected by his privilege. It would be a violation of principle, to regard and treat as fraudulent and tortious, in an infant, those acts which are not so in an adult, merely because the infant is not liable, like the adult, in an action *ex contractu*.

In the case, also before mentioned, of a minor's refusing to deliver goods which he has sold, and for which he has received payment, it is probably true, that if he were an adult, he might be sued in an action of trover for the unlawful detention (technically, conversion), and made to pay the full value to the purchaser. But an adult cannot avoid his fair contract, like an infant; and therefore the goods, upon his paying for them, become his (as between him and the seller), and the subsequent detention, against his will, is a conversion of *his* property. When, however, an infant avoids his contract in such case, the property in the goods reverts to him, and, by refusing to deliver them, he cannot be said to convert the goods of the purchaser.

Though this reasoning is technical, yet it is legal, and we must defer to its results.

But if, in this case, an adult would likewise be liable in an action on the case, for tortiously refusing to deliver the goods, yet, says Chief Justice Gibbs, (2 Marsh. 486) the cases clearly show that where the substantial ground of action rests on promises, the plaintiff cannot, by declaring in tort, render an infant liable, who would not have been liable on his promise.

The first case on this point is Grove *v.* Nevill, (*a*) where it was decided, that infancy is a good defence against an action of deceit, for affirming, on the sale of goods, that they were the vendor's property, when they were, in fact, the property of another person.

(*a*) 1 Keble, 778. Mr. Justice Windham doubted. In 1 Keble, 914, it is stated that, in addition to the false affirmation as to ownership, the infant deceived the purchaser, by asserting that the article was of a different kind from what it proved to be.

The next case is that of Johnson *v.* Pie, (*a*) where an infant was sued, in an action *ex delicto*, for deceit in affirming himself to be of age, and thereby obtaining money, on giving a mortgage as security for payment thereof, which he afterwards avoided for infancy; and judgment was arrested after verdict for the plaintiff.

On the authority of these cases, it was held, in Jennings *v.* Rundall, 8 T. R. 335, that infancy was a bar to an action *ex delicto*, in which the plaintiff declared, that he let a horse to the defendant to be moderately ridden, but that he injured the horse by immoderate riding and want of care.

In Green *v.* Greenbank, (*b*) it was decided, that an infant is not liable for a false warranty on an exchange of horses. Chief Justice Gibbs there said: "This is a case in which the assumpsit is clearly the foundation of the action; for it is in fact undertaking that the horse was sound." (*c*)

In Conroe *v.* Birdsall, 1 Johns. Cas. 127, Brown *v.* McCune, 5 Sandf. 224, Burley *v.* Russell, 10 N. Hamp. 184, and Merriam *v.* Cunningham, 11 Cush. 40, it was held that a defendant is not answerable *ex contractu* on an agreement made by him when an infant, though he then fraudulently alleged that he was of full age. See opinion of Tilghman, C. J., in Stoolfoos *v.* Jenkins, 12 Serg. & R. 403. But in Fitts *v.* Hall, 9 N. Hamp. 441, it was decided (contrary to Johnson *v.* Pie, *supra*,) that a defendant is answerable, in such case in an action *ex delicto*. Parker, C. J., said: "The representation that the defendant was of full age was not a part of the contract, nor did it grow out of the contract or in any way result from it. No contract was made about the defendant's age." A like decision of the court of common pleas for the city and county of New York was made in 1863. Eckstein *v.* Frank, 1 Daly, 334. (*d*) In 1 Amer. Lead. Cas. (4th ed.) 262, this

(*a*) 1 Sid. 258, 1 Lev. 169, and 1 Keble, 905, 913.

(*b*) 2 Marsh. 485.

(*c*) West *v.* Moore, 14 Verm. 449, Morrill *v.* Aden, 19 Verm. 505, and Prescott *v.* Norris, 32 N. Hamp. 101, *acc.* Word *v.* Vance, 1 Nott & McCord, 197, *contra*.

(*d*) In this case the court said that the doctrine of Johnson *v.* Pie had been distinctly repudiated by the supreme court of New York, in Wallace *v.* Morss,

doctrine is pronounced to be "clearly unsound." And in the recent work of Addison on Torts, the decision in Johnson *v.* Pie is repeatedly referred to as the unquestioned law of England. See also Bartlett *v.* Wells, 1 Best & Smith, 836, and De Roo *v.* Foster, 12 C. B. N. S. 272. See further, 10 Peters, 77. 11 Serg. & R. 310. 4 Selden, 440. 25 Wend. 401.

In Norris *v.* Vance, 3 Richardson, 164, it was held that though an infant sells goods, fraudulently representing himself to be of age, yet he may disaffirm the sale and maintain trover against the vendee.

Before the action of assumpsit was brought into its present use and form, the common if not the only way of declaring, in cases like these, was in an action on the case for special damage; and that is yet retained, and often used concurrently with the modern action of assumpsit.

In the case of Vasse *v.* Smith, (*a*) one count in the declaration alleged a consignment of flour to the defendant on commission, to be sold for cash, or drafts payable in sixty days at a specified place; and that the defendant violated his undertaking by such negligence and carelessness that the flour was wasted and lost to the plaintiff. It was decided that infancy was a legal defence, there being no feature of a tort for which an infant is liable, but a mere breach of contract.

So, in Schenck *v.* Strong, (*b*) infancy was held to be a good

5 Hill, 392, and by the courts of other states. But the case in 5 Hill was understood by the court of appeals, in Campbell *v.* Perkins, 4 Selden, 440, to have decided nothing more than that the title to goods obtained by false representations or other frauds of an infant does not pass to him, but that the property in them remains in the vendor, who may reclaim them by replevin, (as in Badger *v.* Phinney, 15 Mass. 359,) or maintain trover for them, as in cases of fraud by an adult buyer, and that the cases cited in support of the decision in 5 Hill decide nothing more. Now between cases of this kind and that of Johnson *v.* Pie there is an intelligible distinction, affecting at least the form of action. When a vendor brings an action against the buyer to recover damages for deceit or fraud in the sale, he makes his election to consider the contract of sale as subsisting, and to seek damages for the breach of it. 4 Mass. 505, 506. Such was the action of Johnson *v.* Pie, and is not overruled by the class of cases to which Badger *v.* Phinney belongs.

(*a*) 6 Cranch, 226.

(*b*) 1 Southard, 87.

bar to an action on the case, alleging that a chair was lent to the defendant for a particular journey, to be used carefully and returned at a specified time, yet that he went with it on a different journey, carelessly broke it, and did not return it at the time agreed, thereby violating his engagement in every particular. Had trover been brought in this case, alleging a conversion of the chair, it probably would have been sustained; for in the case of Homer *v.* Thwing (*a*) trover was supported against an infant who hired a horse to drive to one place, and drove it to another. So, in Vasse *v.* Smith, above cited, a count in trover was sustained against the infant, by proof that he shipped the flour to the West Indies on account of another person. Chief Justice Marshall said: "infancy is no bar to an action of trover, though the goods are possessed in virtue of a previous contract. The conversion is still in its nature a tort, for which infancy cannot afford a protection." (*b*)

So, in the case of Mills *v.* Graham, (*c*) detinue was maintained against a bailee of skins, who, during infancy, took them to finish on contract and to return them to the owner, but who afterwards refused to deliver them, and "declared that he would contest the matter at law, as he was under age." Chief Justice Mansfield said: "there can be no doubt that trover might have been brought on the conversion."

In the case of Badger *v.* Phinney, 15 Mass. 364, it was decided that if an infant represent himself to be of age, and buy goods on credit, for which he afterwards refuses to pay, the seller may take the goods from the infant or his administrator, by writ of replevin; the court saying "the basis of this contract has failed, from the fault if not from the fraud of the infant, and on that ground the property may be considered as never having passed from, or as having revested in, the plaintiff." And in cases of sales to an adult, on credit, upon

(*a*) 3 Pick. 492. See also 16 Verm. 390. 5 Duer, 49.

(*b*) S. P. Furnes *v.* Smith, 1 Rol. Ab. 530. Bac. Ab. Infancy and Age, E. Lewis *v.* Littlefield, 15 Maine, 233. Towne *v.* Wiley, 23 Verm. 355. Campbell *v.* Stakes, 2 Wend. 137. *Contra* in Pennsylvania. Penrose *v.* Curren, 3 Rawle, 351, and Wilt *v.* Welsh, 6 Watts, 9.

(*c*) 1 New Rep. 140.

his false representations the law doubtless is, that the seller may reclaim the property from the buyer, in a suit against him, or against any other person except a *bonâ fide* purchaser from the buyer. 15 Mass. 156. 6 Met. 74. 1 Allen, 483, 484. 19 Maine, 281. 22 Pick. 18. 2 Cush. 48. 12 Pick. 312, 313. 15 Mees. & Welsb. 219. 10 C. B. 926.

This, however, may often be an inadequate remedy. If the property cannot be found and resumed, the adult contractor would be remediless, unless he could maintain an action against the minor for the deceit. But most of the decisions heretofore cited do not allow the maintenance of such action. The difference in principle, between allowing the adult to rescind the contract or treat it as a nullity and retake the goods, and allowing him to maintain an action against the minor for fraud, is not strongly marked.

Even the former course may perhaps be regarded as warranted rather by the principles of natural justice than the rules of legal conformity; for, according to the cases heretofore cited, neither silence nor misrepresentation respecting his age will prevent an infant's avoiding his contract, nor render him liable in an action *ex contractu*. (*a*)

In Forrester's case, 1 Sid. 41, an infant was held entitled to recover against an adult on an executory contract, where he (the infant) had not performed his part of the engagement. If, in this case, the infant had afterwards refused to fulfil his part of the contract, could the adult have recovered back the money which he had paid on judgment and execution? There can be no pretence for it, even if both parties were of full age, and yet the right of the infant to disaffirm would be no defence for the adult.

Where a minor embezzles money, it is reported to have been held by Lord Kenyon, (*b*) at Nisi Prius, that he is liable in an action *ex contractu*, for money had and received; that the act being a tort, the form of action may be the same as against an adult, who may be charged in this manner, if the plaintiff chooses to waive the tort. Judge Reeve advances

(*a*) See opinion of Chief Justice Gibson, in 6 Watts, 12, 13.

(*b*) Bristow *v.* Eastman, 1 Esp. R. 172 and Peake's Cas. 223.

the same doctrine, (Dom. Rel. 246,) and it has been sanctioned by the supreme court of Vermont. (*a*) This is an anomaly, unnecessary to the attainment of justice. (*b*)

Not only the infant himself, but his representatives, privies in blood, may avoid his conveyance of real property. His heir, after his death, may enter and avoid his feoffment made during minority. (*c*) By the law of New York, (*ante*, page 44,) it seems that the heir may convey by deed, and thus avoid the former deed of bargain and sale; or he may enter and take possession, or do some other act of notoriety and disaffirmance equivalent to that of the minor's conveyance. (*d*) His executor or administrator may refuse to pay debts or fulfil other executory engagements which he contracted during infancy. (*e*) But the guardian of a minor, as such, cannot avoid his ward's contracts. (*f*)

A minor's contract cannot be ratified by him during minority in such a manner as to prevent his disaffirming it on his coming of age. Mr. Newland and some other writers suppose there is an exception to this rule, in the case of a minor's suing an adult on a contract not executed by the minor; (*g*) that otherwise there would be no consideration to support the promise of the adult; and, therefore, that the court must, in such case, consider the suit and judgment as a confirmation not to be avoided by the infant. (*h*)

If, on a minor's coming of age, he confirm or ratify a voidable agreement made during nonage, he will thereafter be held to performance, if it be executory on his part, and cannot

(*a*) Elwell *v.* Martin, 32 Verm. 217.

(*b*) It seems, from Peake's report, that this point was not definitively settled by Lord Kenyon; a promise of payment, after the defendant came of age, being proved. See also Jackson *v.* Mayo, 11 Mass. 147.

(*c*) Smalman *v.* Agborrow, Bridgman, 44. Whittingham's case, 8 Co. 42 b.

(*d*) See Bac Ab. Infancy and Age, I. 6. 11 Johns. 539. 14 ib. 124.

(*e*) Cro. Eliz. 126. 9 Mass. 62, 100.

(*f*) Oliver *v.* Houdlet, 13 Mass. 240.

(*g*) As in Forrester's case, 1 Sid. 41.

(*h*) Newland on Contracts, 14. *Sed quære.* See Reeve Dom. Rel. 249, 254, 255. 3 Bur. 1808.

afterwards avoid it, if it be executed. (*a*) It has been before seen, that a void agreement cannot be ratified. But a new agreement may be made, by which the party may be held to do the same thing which he promised during infancy, or by which he may be estopped to avoid his contract made during that period. The whole binding force, however, of the obligation in such case, is in the contract made after the party is of full age. (*b*)

There is a difference in the effect of the same acts or words, when applied to an executory and when applied to an executed or continuing contract of an infant; the latter is held to be ratified by much slighter recognition than is required to ratify the former.

To ratify an executory contract, as to pay money, or do other acts *in futuro*, there must be an express promise, or an explicit confirmation of a former agreement, to make the payment or do the other act; and such express promise or confirmation must be made deliberately and freely. (*c*)

Partial payment of a debt, after the minor comes of age, is not a ratification. (*d*) "In the case of an infant," said Lord Kenyon, "I shall hold an acknowledgment not to be sufficient, and require proof of an express promise to pay, made by the infant after he has attained that age when the law presumes that he has discretion. Payment of money made as in the present case is no such promise." This was a case of an implied acknowledgment that the debt was due.

But an express acknowledgment is not of itself a ratification. An express promise must be superadded. An acknowledgment only rebuts the presumption of payment; whereas an infant is allowed to refuse payment, though he acknowledges

(*a*) Ball *v.* Hesketh, Comb. 381. Wilkinson on Limitations, 116.

(*b*) Baylis *v.* Dineley, 3 M. & S. 477. Rogers *v.* Hurd, 4 Day, 57.

(*c*) 1 Pick. 203. 4 Pick. 49. 1 Bailey 28. 3 Wend. 481, 482. 2 Hawks, 535. 5 Esp. R. 103. When a ratification is relied on to support an action on an infant's voidable contract, is must be proved to have been made *before* the commencement of the suit. 1 Pick. 202. 6 N. Hamp. 432. 8 ib. 374. 2 Barn. & Cres. 824. 16 Maine, 55.

(*d*) Thrupp *v.* Fielder, 2 Esp. R. 628.

the debt to be due. (*a*) Thus, where the defendant, after he was of age, "said he owed the plaintiff but was unable to pay him, but that he would endeavor to get his brother to be bound with him," it was held that the contract made during minority was not ratified. (*b*) So, where a minor made a promissory note and paid a part of the sum due on it, and, on coming of age, made a will, in which he directed his just debts to be paid, it was held not to be a ratification of the note. (*c*) So, where the same minor received money from the plaintiff, promising to pay it over to a third person, and, after he came of age, on being applied to by that person, said he should pay it to the plaintiff when he should arrive at his residence, it was held not to be a ratification of the original promise. (*d*)

It is said by Chief Justice Parker, (*e*) that the terms of ratification need not import a direct promise to pay; that it is sufficient if the party explicitly agree to ratify a contract made during infancy, by language which unequivocally imports a confirmation of it; as if he say, "I do ratify and confirm," &c. Thus, where the party, twice before mentioned, said, after he was of age, "I have not the money now, but when I return from my voyage I will settle with you," he was held to have expressly ratified his contract. (*f*)

So, where the maker of a promissory note, upon being called upon for payment, at full age, said the note was due, and that on his return home he would endeavor to procure

(*a*) Lara *v.* Bird, cited in Peake on Ev. (2d ed.) 260. 14 Mass. 460. 1 Pick. 223.

(*b*) Ford *v.* Phillips, 1 Pick. 202.

(*c*) Smith *v.* Mayo, 9 Mass. 62. Had the note been particularly mentioned in the will, as a just debt, the decision would doubtless have been different. The decision, as made, has been questioned by the Court of New Hampshire, in Wright *v.* Steele, 2 N. Hamp. 51.

(*d*) Jackson *v.* Mayo, 11 Mass. 147. This was a case of embezzlement, where trover would have been the proper action without any ratification.

The dictum of the court, (in Cro. Eliz. 127,) that accepting a defeasance, after coming of age, of a bond made during infancy, is a ratification, and will hold the obligor to payment, cannot now be considered as law.

(*e*) 14 Mass. 460. 4 Pick. 49. 4 Chand. (Wis.) 40, 41.

(*f*) Martin *v.* Mayo, 10 Mass. 137.

the money and send it to the promissee. (*a*) So, where a minor purchased land, for the price of which two other persons gave their note, which he promised to sign and pay after he should attain full age, and, after attaining full age, he wrote on the note, "I acknowledge myself holden as co-surety," he was charged in a suit against him on the note. (*b*)

A ratification may be conditional; but the terms of the condition must have happened, or been complied with, before an action can be sustained; as if, on coming of age, the party promises to pay a debt contracted while he was a minor, "when he is able," his ability to pay must be proved, in order to charge him; (*c*) or, if he promises to pay, if he receives a certain legacy, or if he draws a prize in a certain lottery, or succeeds in collecting a certain debt, &c., he is liable when the event happens, and not before. (*d*) On the same principle, when a party binds himself by a new promise or ratification, he is liable only to the extent of his new promise; as where he promises to pay a certain part of the debt, or the whole by instalments, he is liable according to his agreement, and no further nor otherwise. (*e*)

There probably is an exception to the rule which requires an express ratification of an executory contract, in the case of a promise of marriage made during minority. As it is not necessary to prove an express original promise of this kind *in totidem verbis*, but from the nature of the case and the state of society, it is held to be sufficient to prove the circumstances and conduct usually accompanying an intended marriage connection, from which the promise is inferred, (*f*) so it would

(*a*) Whitney *v.* Dutch, 14 Mass. 457.

(*b*) Thompson *v.* Linscott, 2 Greenl. 186. See also Barnaby *v.* Barnaby, 1 Pick. 221. In Cohen *v.* Armstrong (1 M. & S. 724) it was held, that a replication to a plea of infancy, that the defendant ratified the original promise, was good after verdict, on the ground that ratification imports a new promise, after the party comes of age. See Borthwick *v.* Carruthers, 1 T. R. 648.

(*c*) Cole *v.* Saxby, 3 Esp. R. 159. Thompson *v.* Lay, 4 Pick. 48. Proctor *v.* Sears, 4 Allen, 95.

(*d*) 4 Pick. 49, by Chief Justice Parker.

(*e*) Peake on Ev. (2d ed.) 260.

(*f*) 2 Stark. Ev. (4th Amer. ed.) 941. 3 Salk. 16, 64. 6 Mod. 172. 15 Mass. 1.

seem that if a minor, who was thus proved to have promised marriage, should, after coming of age, continue his addresses, and pursue the course of conduct which usually evinces an existing engagement, he should be held to have ratified his original promise.

It is generally stated in the books that it is necessary to the ratification of a contract made during minority, that the promise to perform it, made after the party is of full age, should be not only express and voluntary, but also be made with knowledge that he is not legally liable on the original contract. The origin of this last alleged requisite of a ratification is a *dictum* of Lord Alvanley in Harmer *v.* Killing, 5 Esp. R. 103, which several judges in this country have repeated, (*a*) and which has been transferred into various legal treatises, English and American. But it was never so adjudged in England, nor in the United States, with the exception of the case of Hinely *v.* Margaritz, 3 Barr, 428, reported without discussion by counsel or reasons assigned by the court. And in Morse *v.* Wheeler, 4 Allen, 570, the *dictum* of Lord Alvanley was held not to be sustained nor sustainable, and it was decided not to be necessary to a ratification, that the new promise should be made with knowledge that the party was not legally liable on the old one; it being a long established legal principle that he who makes an engagement freely and fairly cannot be excused from performing it by reason of his ignorance of the law when he made it.

Where the contract is executed on the part of the infant, or is a continuing contract in the progress of execution, slight acts of affirmance and recognition, after he comes of age, will ratify it and prevent his subsequently avoiding it; whether the contract relates to property, &c., transferred by him to another, or by another to him.

1. Where an infant has transferred property to another.

If an infant make a lease rendering rent, and accept rent after he comes of age, it is a ratification of the lease, and he

(*a*) 9 Mass. 64. 1 Pick. 203. 16 Maine, 57. 11 Serg. & R. 311. 4 Sneed, 118. 3 Richardson, 168.

cannot afterwards avoid it. (*a*) This was a case, where, after accepting rent, as just stated, the lessor ousted the lessee, and the latter supported an action of trespass against him for the interruption.

Where a minor mortgaged his land, and, on coming of age, conveyed it to another person in fee, subject to the mortgage, which he recognized in the second deed, it was held to be a ratification of the mortgage. (*b*) So, if his guardian lease his land for a term beyond his minority, and after coming of age he do any act expressive of his assent, (*c*) it is a ratification. In one case, where, on coming of age, he said to the person to whom he had previously given a lease, "God give you joy of it," it was held by Mr. Justice Mead that he could not afterwards avoid it. (*d*)

On the question whether an infant ratifies his conveyance of real estate, or precludes himself from disaffirming it, by mere omission, after coming of age, to take measures to disaffirm it, there has not been an entire uniformity of opinion. In 1 Amer. Lead. Cas. (4th ed.) 256, is this statement: "Where land has been *sold* by an infant, it was said in Kline *v.* Beebe, 6 Conn. 494, where the acquiescence was for thirty-five years, that the infant ought to declare his disaffirmance within a reasonable time; and similar *dicta* may be found in other cases; but there seems to be no doubt, upon the decided cases, that mere acquiescence is no confirmation of a sale of lands, unless it has been prolonged for the statutory period of limitation; and that an avoidance may be made any time before the statute has barred an entry. Tucker *v.* Moreland, 10 Peters, 58. Drake *v.* Ramsay, 5 Ohio, 251, 255. Cresinger *v.* Lessee of Welch, 15 Ohio, 156, 193. Boody *v.*

(*a*) Ashfeild *v.* Ashfeild, W. Jones, 157, affirmed in the Exchequer Chamber by all the judges. Latch, 199 and Godb. 364.

(*b*) Boston Bank *v.* Chamberlain, 15 Mass. 220. Story *v.* Johnson, 2 Y. & Coll. Exch. 607. Phillips *v.* Green, 5 Monroe, 355.

(*c*) 2 Southard, 460. Smith *v.* Low, 1 Atkins, 489.

(*d*) 4 Leonard, 4. In Dalison, 64, pl. 25, it was decided, that where an infant sold a farm, and at full age received part of the price, he might nevertheless avoid the sale. This is not now law, the ground of the decision being

M'Kenney, 23 Maine, 517, 523, 524. (*a*) That slight or vague declarations will not amount to a ratification. Clamorgan *v.* Lane, 9 Missouri, 447, 473. There may, however, be an acquiescence and assent under such circumstances as to amount to an equitable estoppel upon the vendor. Hartman *v.* Kendall, 4 Ind. 403. Thus, in Wheaton *v.* East, 5 Yerg. 41, 62, it was held, where an infant had sold land, and after coming of age saw the purchaser making large expenditures in valuable improvements, and said nothing in disaffirmance for four years, that the circumstances were such as not to excuse this long silence; and there being evidence that on several occasions the vendor had said, after age, that he had sold the land and been paid for it and was satisfied, and had authorized a proposition to be made for the purchase of it, it was held that the sale was confirmed. And in like manner, in Wallace's Lessee *v.* Lewis, 4 Harrington, 75, 80, it was held that an infant's acquiescing in a conveyance for four years after age and seeing the property extensively improved, would be a confirmation. And see Jones *v.* Phœnix Bank, 4 Selden, 235. Though mere lapse of time will not be a confirmation, unless continued for twenty-one years, yet the lapse of a less period, in connection with other circumstances, may amount to a ratification. 15 Ohio, *ubi sup.* Norris *v.* Vance, 3 Richardson, 64." (*b*) In Ferguson *v.* Bell, 17 Missouri, 347,

that the original contract was void, which would now be regarded as voidable, and the acceptance of part payment as a ratification.

(*a*) To those cases may be added Jackson *v.* Carpenter, 11 Johns. 539. Jackson *v.* Burchin, 14 Johns. 124. Doe *v.* Abernathy, 7 Blackf. 442. Emmons *v.* Murray, 16 N. Hamp. 394, 395. Voorhies *v.* Voorhies, 24 Barb. 153. Urban *v.* Grimes, 2 Grant, 96. Vaughan *v.* Parr, 20 Ark. 600.

(*b*) By statute in Iowa, (before referred to for another purpose,) a minor is bound by all his contracts, unless he disaffirms them within a reasonable time after he attains his majority. In Jenkins *v.* Jenkins, 12 Iowa, 199, in a suit to avoid a deed of real estate made by the complainant while an infant, the court said that what was a reasonable time, within the meaning of the statute, must of course depend upon the circumstances of each case; and that in the case before them, no special equitable circumstances were shown why the complainant should sooner have manifested his disaffirmance, and that his delay was not unreasonable.

By statute in Illinois, a minor, in order to revoke his conveyance of real

where an infant executed a deed, and after coming of age expressed satisfaction with her bargain, received part of the consideration money, and spoke of an intention to make a confirmatory deed, but died suddenly without doing so, it was held that this was a sufficient ratification. See also Bostwick *v.* Atkins, 3 Comst. 53.

2. Where property, &c., is transferred to an infant.

If he takes a conveyance of land during minority, and retains possession after he is of age, he ratifies the conveyance and cannot afterwards avoid it, (*a*) or if he bargains and sells the same land to a stranger. (*b*) Or if he makes an exchange of land, and after he is of age, continues in possession of the land received in exchange. (*c*) So, if he takes a lease rendering rent, and continues in the occupation of the land, after he comes of age. (*d*) In such cases, the disaffirmance must be made in a reasonable time after coming of age ; but where so much must depend on circumstances, it is impossible to fix any period as a reasonable one in all cases. 1 Platt on Leases, 528, 529.

Where an award was made, on a submission by a minor's guardian, that the minor should pay his mother an annuity in lieu of dower in his estate, and he accepted the estate free of dower, and after he was of age enjoyed it thus free, he was held to have ratified the award. (*e*)

If "consentable lines" of real property are run, and agreed upon by a minor, and he acquiesces in them after he comes of age, it seems to be a ratification of the boundaries. (*f*) If an infant makes an agreement, and receives interest under it after he comes of age, chancery will decree that he perform it. (*g*)

estate, must commence proceedings within three years after coming to full age. Cole *v.* Pennoyer, 14 Illin. 158.

(*a*) Lynde *v.* Budd, 2 Paige, 191. Dana *v.* Coombs, 6 Greenl. 89. Armfield *v.* Tate, 7 Ired. 258.

(*b*) Hubbard *v.* Cummings, 1 Greenl. 11.

(*c*) Dalison, 64. 2 Vernon, 225. Co. Lit. 51 b. Shep. Touch. 299.

(*d*) Com. Dig. Enfant, C. 6.

(*e*) Barnaby *v.* Barnaby, 1 Pick. 221.

(*f*) Brown *v.* Caldwell, 10 Serg. & R. 114.

(*g*) Franklin *v.* Thornebury, 1 Vernon, 132.

If, after full age, he occupy and enjoy a copyhold tenement, he is liable to pay the fine due on admittance. (*a*) So, if he make an unequal partition of lands, and, after he is of age, receive the profits of the part allotted to him, he ratifies the partition. (*b*)

In the case of Holmes *v.* Blogg, (*c*) where a lease was taken by an infant and an adult, as partners, though the infant did not continue in possession after he came of age, and dissolved the partnership, yet Mr. Justice Park inclined to hold that unless there were some act of disaffirmance, the party was bound by his original agreement; and Mr. Justice Dallas said, that "in every instance of a contract voidable only by an infant on coming of age, he is bound to give notice of disaffirmance of such contract in a reasonable time." This, however, was not the point adjudged in that case. Yet it has since been repeatedly decided that the omission to disaffirm in a reasonable time after coming of age, and the retaining and use of property bought by him, are effectual evidence of a ratification of a purchase of personal property. (*d*) But where the sellers of goods to an infant sued him for the price, three days before he came of age, and attached them, and they remained in the hands of the attaching officer at the time of the trial of the suit, and the defendant gave no notice, on coming of age, of his intention not to be bound by the contract, it was held that there was not a ratification of it, and that infancy was a defence to the suit. (*e*)

In the case of Goode *v.* Harrison, 5 B. & Ald. 147, where an infant had been in partnership with an adult until within a short period of his coming of age, he was held liable for goods sold to his former partner, after he came of age, because

(*a*) Evelyn *v.* Chichester, 3 Bur. 1717.

(*b*) Lit. § 258. Co. Lit. 171.

(*c*) 8 Taunt. 35.

(*d*) Lawson *v.* Lovejoy, 8 Greenl. 405. Delano *v.* Blake, 11 Wend. 85. Deason *v.* Boyd, 1 Dana, 45. Kline *v.* Beebe, 6 Conn. 494. Boyden *v.* Boyden, 9 Met. 519. Cheshire *v.* Barrett, 4 McCord, 241. Robbins *v.* Eaton, 10 N. Hamp. 561. Richardson *v.* Boright, 9 Verm. 368. Henry *v.* Root, 33 N. Y. Rep. 526, 551.

(*e*) Smith *v.* Kelley, 13 Met. 309.

he had not given notice of a dissolution of the partnership. This case was not decided on grounds peculiar to infancy. Partners who retire are always liable, even after dissolution of copartnership, until notice is given. Had the goods been furnished before the minor came of age, he would not have been chargeable; his infancy would have protected him, as well after the dissolution as before. But, on coming of age, he thereafter incurred the same liabilities, and was held to the same duties, concerning the partnership, as if he had been of full age when it existed. So in Miller *v.* Sims, 2 Hill's (S. C.) Rep. 479, it was held that where one, who was a partner during infancy, concurred in carrying on the partnership, or received profits from it, after coming of age, this amounted to a ratification of the partnership and rendered him liable on a note of the firm given during his minority, without his knowledge. Whether an infant is liable, in such case, on a note of which he has no knowledge, was doubted in Crabtree *v.* May, 1 B. Monroe, 289. In Dana *v.* Stearns, 3 Cush. 372, where a partner, before coming of age, dissolved the partnership and sold his property therein to his copartner, taking his note therefor, secured by mortgage, and his obligation to pay the debts of the firm, and after coming of age proved his note against the estate of his copartner in insolvency, and instituted proceedings to enforce his claim under the mortgage, it was decided that he had not ratified the partnership.

There are some contracts made by infants which are excepted from the general rule. They are neither void nor voidable, but are obligatory *ab initio*, and need no ratification.

1. Where a statute authorizes an infant to make a contract for the public service, (as to enlist into the army or navy) such contract is deemed to be for his benefit, and is neither void nor voidable. (*a*)

2. Contracts of marriage, if executed, are binding, and cannot be avoided on the ground of infancy.

By the common law, the age of consent to a marriage is

(*a*) United States *v.* Bainbridge, 1 Mason, 71. See 11 Mass. 65, 71. Cooke, 143. 4 Binn. 487. 11 Serg. & R. 93. 1 ib. 353.

fourteen years in a male, and twelve in a female infant. This is called the age of discretion, but not full age.

If a boy over fourteen and a girl over twelve years of age are married, the marriage is as valid and indissoluble as if they were of full age. But if, at the time of marriage, either of them be under the age of discretion, such party, on arriving at that age, may disaffirm the marriage, without the interposition of any tribunal, or any process of divorce. The disaffirmance, however, cannot be made before the age of discretion.

If one of the married parties be of years of discretion, and the other not, the elder party, when the other comes to such years (and not before), may disaffirm the marriage.

If, at the age of discretion, they agree to continue together, they need not, by the common law, be married again. Their continued cohabitation is a confirmation of the original contract. So, if a boy under fourteen takes a wife over twelve years of age, and sues a third person for taking her away, and "makes any continuation of the suit" after he is fourteen years old, he ratifies the marriage, and cannot afterwards avoid it. But if the wife, in such case, be under twelve years, the prosecution of the suit, after he is fourteen, would not, it seems, produce this effect; for, on her becoming twelve years old, she would have a right to disaffirm the marriage; and, by a strange anomaly, before mentioned, he would have the same right; "because," says Lord Coke, "in contracts of matrimony, either both must be bound, or equal election of disagreement given to both; and so *e converso*, if the woman be of the age of consent and the man under." Therefore, a man twenty years old may marry a girl of eleven, or a woman of twenty may marry a lad of thirteen, they may live together a year, and yet because the junior party at that time has the power to disaffirm the marriage, the senior shall also have the same power, although the junior may desire to ratify the connection. (*a*)

It has been before seen that an infant's promise of marriage

(*a*) See Co. Lit. 79 and notes 44 and 45. 1 Rol. Ab. 341. Bac. Ab. Infancy and Age, A. 1 Gray, 121. 7 ib. 483. 1 Chip. 254.

is voidable, (*a*) but that an adult's promise to an infant is binding; and, *a fortiori*, it would seem, that an actual marriage by an adult should be binding. If parties are by law allowed to marry before full age, good sense and good morals seem to require that the marriage, if not wholly void for some legal defect, should be obligatory on both the parties.

3. By the custom of London, a minor may bind himself as an apprentice, and his covenants will be obligatory. Infancy is no defence to a suit against him for violation of his indentures. (*b*) But it is otherwise by the common law of England, and also under the statutes of Elizabeth, and the statutes of Massachusetts and New York. (*c*) Still, although he is not liable for breach of his covenants, he cannot avoid and dissolve the indentures. They are so far binding upon him, that the master may enforce his rights under them; and the legal incidents of service as an apprentice attach to the relation thus formed between the parties. (*d*) As this doctrine is adopted for the infant's benefit, on the ground that it is for his advantage to be held to an apprenticeship, it does not apply where his master has run away or deserted him, so that he cannot reap the advantages of the contract. (*e*)

4. The acts of the king, whether private or official, cannot be avoided on the ground of infancy. And, in general, the acts of an infant, that do not touch his interest, but which take effect from an authority which he is by law trusted to exercise, are binding; as if an infant executor receives and acquits debts due to the testator, or an infant officer of a corporation joins in corporate acts, or any other infant does the duties of an office which he may legally hold. (*f*)

5. By special local customs, as gavelkind, &c., infants may

(*a*) *Ante*, pp. 38, 39. 5 Sneed, 659.

(*b*) Horn *v.* Chandler, 1 Mod. 271. Burton *v.* Palmer, 2 Bulstr. 192. Stanton's case, Mo. 135. See also Eden's case, 2 M. & S. 226.

(*c*) Cro. Jac. 494. Cro. Car. 179. Hutton, 63. 7 Mod. 15. 8 Mod. 190. Blunt *v.* Melcher, 2 Mass. 228. M'Dowle's case, 8 Johns. 331.

(*d*) 5 Dowl. & Ryl. 339 and 3 Barn. & Cres. 484. See also 6 T. R. 558, 652.

(*e*) 3 M. & S. 497.

(*f*) Bac. Ab. Infancy & Age, B. 3 Bur. 1802.

make binding contracts respecting their property, after they arrive at years of discretion. So, after that age, they may, by the general common law, do many binding acts, as the election of guardians, the making of a will, disposing of personal property, &c. (*a*)

6. "Generally," says Lord Coke, "whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit at law;" (*b*) as, if he make equal partition of lands, or an equal assignment of dower, or release an estate mortgaged, on payment of the sum for securing which the mortgage was given.

7. It is laid down in Comyns's Digest, Enfant, C. 6, and in some other books, that if an infant take a lease of land, and enter upon and enjoy it, he shall be charged with the rent; and the case of Kirton *v.* Eliott (*c*) is cited in support of this position. The supposed doctrine of that case is recognized by Mr. Justice Yates; (*d*) and Lord Mansfield (*e*) enumerates payment of rent among the acts which an infant is compellable to do; and, in another case, (*f*) he says, "if an infant takes an estate and is to pay rent for it he shall not hold the estate, and defend against payment on the ground of infancy."

If this be law, it rests merely on authority unsupported by analogy. There is no difference in principle between the rent of an estate enjoyed by an infant, and any other property which he has received and used. If he have a family, the rent of a house might fairly be classed among necessaries for which he would be liable to pay. But this does not appear to have been the ground of the decision in the case reported by Bulstrode. It is the same case, under a different name, which is found also reported by Croke, (*g*) and Brownlow. (*h*) According to their reports, the question was discussed on a demurrer to the defendant's plea of infancy, and the court held the lease not to be void, but voidable at the in-

(*a*) 1 Hale P. C. 17. Bac. Ab. Infancy & Age, A. B.
(*b*) Co. Lit. 38 a, 172 a. 3 Burr. 1801. 6 Mass. 80. 13 Met. 372.
(*c*) 2 Bulst. 69. (*d*) 3 Bur. 1719. (*e*) 3 Bur. 1801.
(*f*) 2 Eden. 72. (*g*) Cro. Jac. 320. (*h*) 1 Brownl. 120.

fant's election, and that as he came of age before rent day, he was answerable for the rent; which would seem to have been on the ground of a ratification. (*a*)

Bulstrode states, that the defendant demurred to the declaration which stated that he was an infant, and that he afterwards waived his demurrer, and pleaded to issue. What the issue was does not appear. "The case then appeared," says Bulstrode, "to be: A lease was made to an infant, rendering rent; whether he shall be charged with the payment of this rent, or not, was the question." At the end of the report, he says, "the court were all clear of opinion that the infant lessee was liable to pay the rent." The ground of the decision does not appear. But from the whole case, taken in connection with the other reports of it, it seems most probable that the court considered the continuance in possession, after the lessee came of age, as a ratification, and decided the case on this point; although this report does not mention his having arrived at full age; for Mr. Justice Dodderidge is made by Bulstrode to say, "if a lease be made to husband and wife, rendering rent, the husband dies, the wife may waive this, and so avoid payment of the rent; but if she continue the possession, she shall be charged with the rent." There does not seem to be much pertinency in this illustration, unless the continued possession of the infant, after he came of age, was the ground on which he was held liable to pay the rent.

The loose manner in which this case is stated by all the reporters hardly warrants its being regarded as authority for any anomalous doctrine, or for an exception to any established rule. And it is noticeable that in 1 Rol. Ab. 731, 2 D'Anvers Ab. 774, Vin. Ab. Enfant, K. and Bac. Ab. Infancy and Age, I. 8, the case of Kirton *v.* Eliott is cited to the position that if, after coming of age, he to whom premises were leased during his infancy, continues in the occupation, he is chargeable with the arrears of rent incurred during infancy. And thus Lord Ellenborough, in 3 M. & S. 481, understood the case.

(*a*) How the defendant's coming of age before rent day could appear to the court on a demurrer to his plea of infancy is not readily seen.

See also 2 Kent Com. (11th ed.) 263, 264. 23 Maine, 524. 1 Pick. 224. But see 5 Exch. 126. (*a*)

8. The most important exception to the general rule is that of contracts for necessaries.

It has always been held, that an infant is bound to pay for such necessary things as relate immediately to his person, as his meat, drink, lodgings, apparel, medical attendance, and for such instruction as may profit him in subsequent life. (*b*) He is also liable for such necessaries, if supplied to his wife and lawful children; and, during coverture, for the debts of his wife contracted before marriage. (*c*)

The word "necessaries" is a relative term, and not confined to such things as are positively required for mere personal support; but is to be construed with reference to the estate and degree, the rank, fortune, and age of the infant. 6 Mees. & Welsb. 42. 1 Gray, 458. Thus, a livery for the servant of an infant captain in the English army was considered necessary. Lord Kenyon said he could not say it was not necessary for a gentleman in the defendant's situation to have a servant; and if it were proper for him to have one, it was equally necessary that the servant should have a livery. (*d*) But it is otherwise, of cockades ordered for the soldiers of his company, (*e*) and of a chronometer sold to an

(*a*) This discussion of an infant's liability for rent was first published in the U. S. Law Intelligencer, vol. iii. p. 16.

(*b*) Finch, 103. Co. Lit. 172, a. 1 Wooddeson, 402. Bing. on Infancy, 87. 6 Mass. 80, by Chief Justice Parsons. Concerning instruction given to an infant, little is found in the English reports, and nothing definite. It seems to have been held that instruction in reading and writing (1 Sid. 112) and schooling, (Palm. 528 and W. Jon. 182,) are regarded as necessaries. In Vermont, it was decided that a collegiate education was not among necessaries for him who was there sought to be charged therefor; but Royce, J. in giving the opinion of the court, said that "a good common-school education is now fully recognized as one of the necessaries for an infant." Middlebury College *v.* Chandler, 16 Verm. 686. See 6 Mees. & Welsb. 48. The law of apprenticeship in this country is regulated by the statutes of the several states.

(*c*) Turner *v.* Trisby, 1 Strange, 168. Paris *v.* Stroud, Barnes, (2d ed.) 95. Bul. N. P. 155. Reeve Dom. Rel. 234. 9 Wend. 238. 7 Met. 164.

(*d*) Hands *v.* Slaney, 8 T. R. 578. (*e*) Ib.

infant lieutenant in the royal navy. (*a*) Regimentals for an infant member of a volunteer corps were held to be necessary. (*b*)

The law distinguishes between persons, as to the fitness of necessaries, as between a nobleman's and gentleman's son; so also as to the time and place of education, as at school, Oxford, and the inns of court. (*c*) "Balls and serenades at night must not be accounted necessaries," even in the case of a nobleman. (*d*) Suits of satin and velvet with gold lace were held, in the time of Queen Elizabeth, not to be necessary for an infant, although he were a gentleman of the chamber to the Earl of Essex. But a doublet of fustian and hose of cloth were held to be suitable to his estate and degree. (*e*)

"Horses may be very fit for an infant, as on account of his quality or constitution," says Mr. Justice Chapple; and, if they are suitable to his condition, he is liable for the price of them, and for their keeping and medicines. (*f*)

Lord Mansfield said, (*g*) that a sum advanced for taking an infant out of jail is for necessaries; and Lord Alvanley held, (*h*) that money advanced to release an infant from custody on mesne process, for a debt contracted for necessaries, or from custody on execution, is paying for necessaries. So if money be laid out for necessaries furnished to an infant, he is liable to the person thus advancing the money. (*i*) So if

(*a*) Berolles *v.* Ramsay, Holt N. P. Rep. 77.

(*b*) Coates *v.* Wilson, 5 Esp. R. 152.

(*c*) Rainsford *v.* Fenwick, Carter, 215. See Wharton *v.* Mackenzie, 5 Ad. & El. N. S. 606. Brooker *v.* Scott, 11 Mees. & Welsb. 67.

(*d*) By Chief Justice Vaughan, Carter, 216.

(*e*) Mackerell *v.* Bachelor, Gouldsb. 168 and Cro. Eliz. 583.

(*f*) Brooks *v.* Crowse, Andr. 277 and 2 Strange, 1100, by the name of Clowes *v.* Brooke. Barber *v.* Vincent, 1 Freeman, 531. In Rainwater *v.* Durham, 2 Nott & McCord, 524, three of the judges of South Carolina, against the opinion of the other two, held that a horse was not necessary for an infant, who was married and had a farm. See also 1 McCord, 572. 1 Bibb, 521. 2 Humph. 27. 13 Met. 306. 7 Car. & P. 52.

(*g*) 2 Eden, 72.

(*h*) Clarke *v.* Leslie, 5 Esp. R. 28.

(*i*) Ellis *v.* Ellis, 5 Mod. 368. Earle *v.* Peale, 1 Salk. 387 and 10 Mod. 67. Rearsby & Cuffer's case, Godb. 219. Swift *v.* Bennett, 10 Cush. 436.

one, who is surety on a note, &c., given by an infant for necessaries, pay the money, the infant is liable to him in an action for reimbursement. (*a*)

If an infant lives with his parent, guardian, or other person under whose care he is placed by his parent, guardian or friend, and is properly maintained, he cannot bind himself to a stranger for necessaries. Thus, where an action was brought for ornamental clothes sold to an infant who lived with her mother and was decently provided for by her, the court decided that the plaintiff could not recover; "for no man," said Mr. Justice Gould, "shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom." (*b*) And where a parent, &c., places an infant at board, or at school, as the credit is given to the parent, &c., the infant is not liable. (*c*)

Before a tradesman trusts an infant for apparent necessaries, he ought to inquire whether he is provided for by his parents or friends. And he is bound to ascertain the infant's real situation in life, and not to rely on appearances. If therefore he furnish articles which would be necessary, if the infant were not already supplied by his parents, or if, confiding in false appearances, he furnish articles too expensive or numerous for the infant's real condition, he is not entitled to recover pay for them. (*d*) But where an infant furnished a tailor with cloth for a suit of clothes, and employed him to make them, and provided the trimmings; the tailor recovered pay for his labor, &c., although the clothes were not suitable to the infant's rank and condition. (*e*)

Goods furnished to an infant trader are not necessaries,

(*a*) 7 N. Hamp. 368.

(*b*) Bainbridge *v.* Pickering, 2 W. Bl. 1325. Wailing *v.* Toll, 9 Johns. 141. Kline *v.* L'Amoureux, 2 Paige, 419. Edwards *v.* Higgins, 2 McCord Ch. 16. See also 16 Mass. 31. 4 Watts, 80. 15 Ark. 140.

(*c*) Duncomb *v.* Tickridge, Aleyn, 94. Bac. Ab. Infancy and Age, I. 1.

(*d*) Ford *v.* Fothergill, Peake's Rep. 229 and 1 Esp. R. 211. 2 Paige, 419. Mortara *v.* Hall, 6 Simons, 465. Steedman *v.* Rose, Car. & Marshm. 422. Johnson *v.* Lines, 6 Watts & Serg. 80. Story *v.* Pery, 4 Car. & P. 526.

(*e*) Delaval *v.* Clare, Latch, 156 and Noy, 85.

although he gain his living by trade. (*a*) But for such part of goods thus furnished as he uses as necessaries in his family he is liable. (*b*) Labor, &c., for an infant mechanic, on articles to be furnished to his customers, is not within the law of necessaries. (*c*)

In a case before Mr. Baron Clarke, (*d*) he ruled that an infant was liable for the price of sheep bought to stock a farm in which he had been set up. Such is the Scotch law, but not the law of England, nor of this country. (*e*)

In Tupper *v.* Cadwell, 12 Met. 559, it was held that an infant was not liable for the expense of repairing his house, though the repairs were necessary to prevent immediate and serious injury to it. And in New Hamp. Mut. Fire Ins. Co. *v.* Noyes, 32 N. Hamp. 345, that he was not liable on a contract for insurance of his property against loss or damage by fire. And in Phelps *v.* Worcester, 11 N. Hamp. 51, that he was not liable for counsel fees and expenditures in a suit at law brought to protect his title to an estate.

In the case of Ellis *v.* Ellis, (*f*) it was decided that money lent to an infant, for the purpose of buying necessaries, cannot be recovered of him. In this case, it appears, from some of the reports of it, that the court held that if the money were actually expended for necessaries, the infant would be chargeable. (*g*) But the weight of authority is, that an infant is not liable at law for money lent for thhi purpose and actually thus appropriated. The contract arises upon the lending, and as is said by the court, (*h*) "the law knows of no contracts but what are good or bad at the time of the contract made; and not to be one or the other according to a

(*a*) Whittingham *v.* Hill, Cro. Jac. 494. Whywall *v.* Champion, 2 Strange, 1083. Mason *v.* Wright, 13 Met. 308.

(*b*) Turberville *v.* Whitehouse, 12 Price, 692 and 1 Car. & P. 94.

(*c*) Dilk *v.* Keighley, 2 Esp. R. 480.

(*d*) Mentioned in Bul. N. P. 154 and Onslow's N. P. 150.

(*e*) Reeve Dom. Rel. 234. 2 Nott & M'Cord, 525.

(*f*) 5 Mod. 368. 12 Mod. 197. 1 Ld. Raym. 344.

(*g*) See also Bul. N. P. 154. 3 Salk. 196, 197. And it was decided in Smith *v.* Oliphant, 2 Sandf. 306, that he was liable for money lent in and about the purchase of necessaries for him, and which was applied under his guidance, directly by the lender. (*h*) 10 Mod. 67.

subsequent contingency." (*a*) The lender, however, is entitled to relief in chancery. (*b*)

Whether articles furnished to an infant are of the classes which are necessaries suitable to his condition, is a question of law; whether they are actually necessary, and of reasonable prices, is a question of fact; "our being judges of the necessaries," say the court in Carter, 216, "is to the nature of the thing, not to the particulars; that indeed must be tried by the jury." (*c*) But in this class of cases, as in others, the court will set aside a verdict that is against the evidence. (*d*)

In 10 Mod. 85, it was said, *arguendo*, that an infant cannot, either by a parol contract or a deed, bind himself even for necessaries in a sum certain; for should he promise to give an unreasonable price for them, that would not bind him; and therefore it may be said that his contract for necessaries, *quatenus* a contract, does not bind him any more than his bond would, but only since an infant must live, as well as a man, the law gives a reasonable price to those who furnish him with necessaries. And it is said by Chancellor Kent (2 Com. 6th ed. 240, 11th ed. 263) that an infant is not bound to pay for articles furnished more than they were really worth to him as articles of necessity, and consequently he may not be bound to the extent of his contract; nor can he be precluded, by the form of the contract, from inquiring into the real value of the necessaries furnished. See 2 Nott & M'Cord, 525. 1 Bibb, 520.

Conformably to these views, it is held that an infant is not

(*a*) Earle *v.* Peale, 1 Salk. 386. Darby *v.* Boucher, ib. 279. Proubart *v.* Knouth, 2 Esp. R. 472, n. 1 P. W. 558. 10 Cush. 438. 5 R. I. 347.

(*b*) 2 Evans's Pothier on Obl. (1st Amer. ed.) 26. Marlow *v.* Pitfeild, 1 P. W. 558.

(*c*) Maddox *v.* Miller, 1 M. & S. 738. Lowe *v.* Griffith, 1 Scott, 458 and 1 Hodges, 30. Peters *v.* Fleming, 6 Mees. & Welsb. 42. Beeler *v.* Young, 1 Bibb, 519. Glover *v.* Ott, 1 McCord, 572. Davis *v.* Caldwell, 12 Cush. 512.

(*d*) Harrison *v.* Fane, 1 Man. & Grang. 550 and 1 Scott N. R. 287. Rundel *v.* Keeler, 7 Watts, 239. Johnson *v.* Lines, 6 Watts & Serg. 80. Merriam *v.* Cunningham, 11 Cush. 40, 44.

liable on an account stated; (*a*) nor on a bill of exchange accepted; (*b*) nor on a negotiable note, (*c*) nor on a cognovit, (*d*) given for necessaries.

In an action on an account stated, it was said in an early case (Latch, 169) "evidence shall not be upon the value of the things, but upon the account only." All that was then required to maintain such action was proof that the defenddant had voluntarily stated the account, and had made a promise, express or implied, to pay it. This was conclusive. But, at a later day, (as said by Lord Mansfield, 1 T. R. 42,) greater latitude prevailed, and surcharged items in the account were allowed to be corrected. (*e*) It was still held, however, that an infant is incompetent to state an account. But an account stated by him is not now deemed to be void, but voidable only, and a proper subject of ratification on his coming of age. (*f*) So it was decided in Reed *v.* Batchelder, 1 Met. 559, in case of an infant's negotiable note; and also that upon his having ratified it, he was answerable thereon to him to whom the promisee subsequently transferred it. See a like decision by the supreme court of New Brunswick, in the case of Fisher *v.* Jewett, Berton, 23.

On the question whether an infant is bound by a note not negotiable, given for necessaries, there is a difference of opinion in the English books. But it is said in Story on Notes, § 78, (citing English and American books) that the weight of authorities greatly preponderates in favor of holding such

(*a*) Pickering *v.* Gunning, Palmer, 528. Wood *v.* Witherick, Latch, 169 and Noy, 87. Trueman *v.* Hurst, 1 T. R. 40. Bartlett *v.* Emery, 1 T. R. 42, *note.* Ingledew *v.* Douglass, 2 Stark. R. 36.

(*b*) Williamson *v.* Watts, 1 Campb. 552.

(*c*) Swasey *v.* Vanderheyden's Adm'r, 10 Johns. 33. Fenton *v.* White, 1 Southard, 100. Hanks *v.* Deal, 3 McCord, 257. Bouchell *v.* Clary, 3 Brevard, 194. McCrillis *v.* How, 3 N. Hamp. 348. McMinn *v.* Richmonds, 6 Yerg. 9. In these cases, such notes were held to be void.

(*d*) Oliver *v.* Woodroffe, 4 Mees. & Welsb. 650 and 1 Horn & Hurlst. 474.

(*e*) See Tucker *v.* Barrow, 7 Barn. & Cres. 623. Thomas *v.* Hawkes, 8 Mees. & Welsb. 140. Perkins *v.* Hart, 11 Wheat. 256. Holmes *v.* D'Camp, 1 Johns. 36.

(*f*) Williams *v.* Moor, 11 Mees. & Welsb. 256.

notes voidable only. It was so held in Dubose *v.* Wheddon, 4 McCord, 221. See also 2 Kent Com. (6th ed.) 235, (11th ed.) 257. Kyd on Bills, (3d ed.) 29. Bayley on Bills, (6th ed.) 46.

A bond with a penalty, given by an infant for necessaries, was early decided to be void. Ayliffe *v.* Archdale, Cro. Eliz. 920 and Mo. 679. See *ante*, page 40, that any bond with a penalty, given by him, is void.

It was said in Cro. Eliz. 920, and decided in Russel *v.* Lee, 1 Lev. 86, that an infant is bound by his single bill given for necessaries. And this has been repeatedly stated in later books. Kyd on Bills, (3d ed.) 29. Hurlstone on Bonds, 3. Bingham on Infancy, 89. Judge Reeve supposes (Dom. Rel. 231) that when this was decided the consideration of a single bill might be inquired into, and that since the contrary has been held, an infant should not be bound by such bill. And in all the editions of Chitty on Contracts, it is doubted whether he can now be so bound. But this is a matter of no practical importance; in England, a single bill "being now as rare as a statute staple." 1 Campb. 553, *note*. 2 Macpherson on Infants, 498, 499. The case of Beeler *v.* Young, 1 Bibb, 509, was an action against an infant on a single bill. The plaintiff failed to prove that it was given for necessaries. But the court expressed no doubt that the true value of necessaries might be recovered in such action; though the bill did not bind the infant as a contract, and had no obligatory force as such, and that to charge him, it was necessary to show that the articles furnished as the consideration of the bill were necessaries.

In Reeve's Domestic Relations, 229, 230, and in 2 Dane Ab. 364, 365, the law is thus stated: That an infant is not bound by any express contract for necessaries to the extent of such contract, but is bound only on an implied contract to pay the amount of their value to him. That when the instrument given by him as security for payment is such that, by the rules of law, the consideration cannot be inquired into, it is void and not merely voidable. That whenever the instrument is such that the consideration thereof may be inquired into, he is liable thereon for the true value of the articles for which it

was given. This last proposition was also advanced by Chief Justice Shaw in Stone *v.* Dennison, 13 Pick. 6, 7. And in Earle *v.* Reed, 10 Met. 387, it was decided that a negotiable note given by an infant was not void in the promisee's hands, but that he might recover thereon of the infant as much as the necessariee for which it was given were reasonably worth; the consideration of a negotiable note being open to inquiry when sued by the promisee. A like decision was made in Bradley *v.* Pratt, 23 Verm. 378, where the full amount of the note was recovered; it being proved, or not denied, that the necessaries for which it was given were worth that amount. On the same ground, as said by Mr. Dane (*supra*) an action might be maintained against an infant on a note not negotiable, or a negotiable note negotiated after it was dishonored.

Whoever shall examine the foregoing forty pages, will be impressed with the truth of the remark of Mr. Justice Thomas, in 1 Gray, 456, that "there is no subject, perhaps, on which there has been more apparent conflict of opinion than upon the effect to be given to the contracts of infants. Especially is this so upon the questions what contracts are obligatory, what voidable, what absolutely void, and how far the execution of the contract and the enjoyment of its benefits by the infant affect his power to rescind and recover back the consideration paid, in cases where he is unable or does not offer to restore what he has received, or its equivalent, or where, from the nature of the case, such restoration is impracticable." There has been, however, for half a century at least, a disposition and a practical effort of courts to harmonize and improve the law on these points, and much improvement has been effected. Still, it must be admitted that the law of infancy is not yet a satisfactorily consistent and symmetrically compacted system.

2. *Non Compotes Mentis.*

By *non compotes mentis* are here meant all persons (except drunkards) of such mental incapacity as disables them to make a valid contract, though they may not be included in either of Lord Coke's different classes (Co. Lit. 247, a.) spoken of in the introduction to Stock's treatise on the Law of Non Compotes Mentis.

Idiots, lunatics, &c., were always held incapable of making contracts. Finch, 102, 103. Phillips on Lunacy, 1. But from the time of Edward the Third, until recently, it was held that a person *non sanæ memoriæ*, though afterwards restored to his right mind, should not be permitted to allege his own insanity in order to avoid his grant or other agreement. This is the legal meaning of the phrase, "a man shall not be allowed to stultify himself." Blackstone relates the progress of "this notion" (as he calls it) and refers to most of the ancient cases that support it; and they deserve attention as legal curiosities. (*a*) This notion, however, except as it affects real actions, is now thoroughly exploded, and the law restored to its original state; for in the reign of Edward the First, the adjudications of the English courts were not blemished by the absurdities which prevailed on this point during some of the subsequent reigns. See 1 Story on Eq. §§ 223–225. 1 Ridgeway P. C. 549, 550.

This doctrine was denied by Fitzherbert, (*b*) and was assailed with great force in the arguments of counsel in the case of Thompson *v.* Leach, (*c*) which was carried by writ of error from the Court of Common Pleas to the King's Bench, and thence to the House of Lords. In the argument before the court of last resort, counsel said: "'T is a rule unaccountable that a man shall not be able to excuse himself by the visitation of heaven, when he may plead duress from men, to avoid his own act." (*d*) And Wilmot, J., in delivering an opinion on a commission of errors, in 1762, used nearly the

(*a*) 2 Bl. Com. 295. (*b*) Nat. Brev. 202.
(*c*) 3 Mod. 296, 1 Show. 296, 2 Vent. 198, Show. P. C. 150.
(*d*) Show. P. C. 154.

same language, and denied the rule that "a natural disability, which is the act of God, is no defence," and declared that the reason given for it in the books, namely, "that a man cannot know what he did when he was mad," was wholly unintelligible; "for what inconsistency," he asks, "is there in saying he does not know he ever did such an act, but if he did, he was mad when he did it?" (*a*)

In Yates *v.* Boen, (*b*) in debt on articles, *non est factum* was pleaded, and evidence received of the defendant's mental incapacity. This was the decision of a single judge, at nisi prius, and has been overlooked by several writers who have treated of this subject. It is now, however, recognized as sound law, and is introduced into the modern books. (*c*) There are other cases in which the same doctrine has been held; and in 1826, Littledale, J., said: "There is no doubt that a deed, bond, or other specialty, may be avoided by a plea of lunacy, if at the time it was executed the contracting party was *non compos mentis*." (*d*) The law has been held in the same way, by the court in Connecticut; (*e*) by the circuit court of the United States in the district of Connecticut, in the case of Owen *v.* Mann; (*f*) and by the courts in New York and Massachusetts. (*g*)

If, however, a lunatic contract for necessaries suitable for his state and degree, he will be held to pay for them; and, in an action to recover pay, his lunacy will not avail as a defence. (*h*) The case in which this point was decided was that of an executed contract, and the defendant had enjoyed the use of the property. Chief Justice Abbott distinguished between executed and executory contracts by such persons; but

(*a*) Evans *v.* Harrison, Wilmot, 155. (*b*) 2 Strange, 1104.

(*c*) Bac. Ab. Obligation, D. 1, (Guillim's ed.) 1 Chit. Pl. (6th Amer. ed.) 511. 2 Saunders Pl. & Ev. (2d ed.) 318.

(*d*) 7 Dowl. & Ryl. 618.

(*e*) Webster *v.* Woodford, 3 Day, 90.

(*f*) September Term, 1808, cited in a note to Day's edition of Co. Lit. 247.

(*g*) Rice *v.* Peet, 15 Johns. 503. Mitchell *v.* Kingman, 5 Pick. 431. See also 1 Bland, 376, 11 Pick. 305, and 9 Foster, 106.

(*h*) Bagster *v.* Earl Portsmouth, 7 Dowl. & Ryl. 614 and 5 Barn. & Cres. 170. See Kendall *v.* May, 10 Allen, 59. Hallett *v.* Oakes, 1 Cush. 296.

expressed no opinion as to the validity of the latter. The real ground of this determination was that of equity and justice. There had been no imposition; the defendant had received and used the plaintiff's property; he was not under the legal custody of any other person; and, though he was insane, and therefore could not in strictness make a binding agreement, yet it was right that his property should be applied to his support. It is said in Phillips on Lunacy, 17, that "the courts of law and equity imply a contract by one *non compos mentis*, to pay for necessaries supplied to him; but if he is already sufficiently supplied with any goods, it seems that he is not liable for a further supply of such goods, although supplied without notice of the previous supply." See 5 Beav. 329. 1 Y. & Col. Ch. 171. 2 Cl. & Fin. 662, 663. 4 Barr, 375. 12 Barb. 237. There is a strong analogy between the decisions in these cases, and the law as applied to the agreements made by infants, who have not, in most instances, a legal capacity to contract.

In Mannin *v.* Ball, Smith & Batty, 183, an action of ejectment upon the title of real estate conveyed by deed of a deceased grantor was tried on the question whether the grantor was of sound mind when he executed the deed. The jury were instructed that "to constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life; that it was not necessary that he should be without a glimmering of reason, but that it was sufficient if he was incapable of understanding his own ordinary concerns; and that, as one test of such incapacity, the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him." The jury found a verdict for the plaintiff, on the ground that the grantor was of unsound mind. On exceptions taken to the instructions, and argued before the judges of the King's Bench in Ireland, Chief Justice Bushe, in giving the opinion of the court, said that "incapacity, at the time, to understand the act is the criterion of unsoundness of mind." Judgment was rendered

for the plaintiff, which judgment was affirmed by the House of Lords, 1 Dow & Clark, 380 and 3 Bligh N. S. 1.

There are decisions that A.'s unsoundness of mind will not vacate his contract with B. if B. did not know of the unsoundness, and took no advantage of A.; and, especially where the contract is executed in whole or in part. (*a*) But this is not law in Massachusetts. Seaver *v.* Phelps, 11 Pick. 304.

The legal systems of every civilized community provide some means of protecting those, who are deficient in mental power, from the impositions of others, and from their own improvidence and fatuity. By the Roman law, a tutor was provided, without whose assent no act of theirs was binding. In England, the king is curator, and has the legal custody of idiots and lunatics, and exercises his superintendence through the Lord Chancellor. (*b*) In the United States, a guardian is appointed, and the statutes of the different states make different provisions.

The contracts of persons of weak understandings, though not *non compotes mentis*, are set aside in chancery, if deception and imposition be practised upon them. But this is rather on the ground of fraud than of mental incompetency, although lighter facts will avoid a contract with such persons than with those of common understanding; that is, an imposition, for which a man of ordinary intellect would be entitled to no redress, will induce a court of chancery to vacate an agreement made with a person of feeble mental powers, because the latter may be defrauded by artifices, against which common men would guard. (*c*)

By the common law, a deed of land, made by a person *non compos*, is voidable only, but not void; (*d*) and, therefore, the

(*a*) Niell *v.* Morley, 9 Ves. 478. Dane *v.* Kirkwall, 8 Car. & P. 679. Molton *v.* Camroux, 2 Exch. 487 and 4 Exch. 17. Beavan *v.* McDonnell, 9 Exch. 309. Carr *v.* Holliday, 5 Ired. Eq. 167. Beals *v.* See, 10 Barr, 56. 2 Kent Com. (11th ed.) 583. Smith on Contracts, (4th Amer. ed.) 328–335. Stock on Non Compotes, 25.

(*b*) See Bac. Ab. Idiots and Lunaties. 1 Bl. Com. 315.

(*c*) 3 Wooddeson, 453. See Blachford *v.* Christian, 1 Knapp, 73.

(*d*) 2 Bl. Com. 245. Breckenridge *v.* Ormsby, 1 J. J. Marsh. 245. Wait *v.* Maxwell, 5 Pick. 217. Allis *v.* Billings, 6 Met. 415. Shelford on Lunatics, 255.

deed of such a person conveys a seizin. In some states of the Union, the deeds of persons *non compotes mentis*, made after they are put under guardianship, are declared by statute to be utterly void.

As to real actions, it seems that a grantor cannot even yet, in England, maintain a suit to recover land conveyed by him while *non compos mentis.* (*a*) *Aliter* in the United States. Bensell *v.* Chancellor, 5 Whart. 371. Allis *v.* Billings, 6 Met. 415. Rogers *v.* Walker, 6 Barr, 371. Gibson *v.* Soper, 6 Gray, 279.

Contracts made during a lucid interval are valid. (*b*)

3. *Drunkards.*

It was formerly held that an agreement, made by a party while absolutely drunk, should bind him in law; and that it should not be set aside in chancery, unless he were made drunk by the other party, or by his contrivance. If a positive fraud were practised on the party while drunk, the agreement would be vacated on that ground. (*c*) But, on the principles of natural law, as expounded by the most approved writers, and on the principles of common law, as usually applied, such a degree of intoxication as deprives a party of his reason should avoid any engagement into which he may enter during his mental incompetency. "Yet the merriment of a cheerful cup," says Puffendorf, "which rather revives the spirits than stupefies the reason, is no hindrance to the contracting of just obligations." (*d*)

Lord Ellenborough, at nisi prius, held in two cases, that an agreement signed by a party while in a state of complete

(*a*) See this point discussed, 1 Powell on Con. 9, 29. Stearns on Real Actions, 184, note.

(*b*) 1 Dow, 177. 4 Conn. 203. 13 Wis. 425.

(*c*) 1 Powell on Con. 29. Newland on Con. 365. Bul. N. P. 172. 1 Saunders Pl. & Ev. (2d ed.) 976.

(*d*) Book iii. chap. 6, § 4. See also Vitriarii Institutiones, lib. ii. chap. 11, §§ 7, 8. Gisborne's Mor. Philos. (2d ed.) 176, 177. Wade *v.* Colvert, 2 Rep. Const. Ct. (S. C.) 27. Burroughs *v.* Richman, 1 Green (N. J.) 233. Arnold *v.* Hickman, 6 Munf. 15.

intoxication, was a nullity, as he "had no agreeing mind;"(*a*) and such is now considered to be the English law by the latest writers. Bayley, J., strongly intimates the same doctrine. (*b*) The American cases conform to this view of the matter; (*c*) and this is the present doctrine also of the courts of chancery. (*d*) Such also is the law of Scotland, (*e*) and of France. (*f*)

If a person, while in a state of total drunkenness, makes an agreement for the purchase of goods and takes them, and afterwards, when his reason returns, uses them as his own, there can be no doubt but that he may be compelled to pay for them. His subsequent conduct would be an adoption of the original agreement, or an implied contract would be raised by the law from the time of his thus appropriating the goods. (*g*)

As drunkenness is an intermittent disability, it will rarely happen that necessaries furnished to a man while drunk will be expended before he becomes sober. But if such an instance should occur, the same principle which was applied in the case of Earl Portsmouth (a lunatic), would probably be adopted by the courts; and the party held to pay, on the ground of equity and justice, for necessary supplies to himself and family.

4. *Married Women.*

By the common law, a married woman has, in general, no legal capacity to make an obligatory contract. In legal contemplation, she has, for most purposes, no separate existence

(*a*) Pitt *v.* Smith, 3 Campb. 33. Fenton *v.* Holloway, 1 Stark. R. 126. Gore *v.* Gibson, 13 Mees. & Welsb. 623. Richardson *v.* Strong, 13 Ired. 106.

(*b*) 7 Dowl. & Ryl. 614.

(*c*) King's Ex'ors *v.* Bryant's Ex'ors, 2 Haywood, 394. Barrett *v.* Buxton, 2 Aik. 167. 2 Rep. Const. Ct. (S. C.) 27. 2 Kent Com. (11th ed.) 584, 585.

(*d*) Cooke *v.* Clayworth, 18 Vesey, 15. 3 Chitty Com. and Manuf. Law, 55. 1 Wash. 164. 1 Hen. & Munf. 70. 2 Paige, 31.

(*e*) 2 Ersk. Inst. (ed. of 1828,) 593.

(*f*) 1 Poth. on Obl. (1st Amer. ed.) 26.

(*g*) See 1 Bibb, 168. 2 Har. & Johns. 423. 6 Munf. 15. 1 Bailey, 343.

from her husband. They are one person only, and she has no property with which she could be compelled to satisfy her engagements, if she were competent to contract them; as, upon the marriage, her husband becomes the proprietor of all her effects. This is the general principle; it, however, is subject to several exceptions, some of the more prominent of which will be mentioned. (*a*)

The exceptions, or the instances in which a married woman is regarded as sole, capable of making contracts, and liable for the breach of them, have been introduced for her benefit, no less than for the benefit of those who contract with her; to save her from want and suffering, as well as to provide legal security for those who supply her with the means of subsistence and comfort.

1. Where the legal existence of the husband is extinguished or suspended, where he is *civiliter mortuus*, as where he is transported for life under a judicial sentence, upon a conviction of crime, his wife may make contracts, for the performance of which she will be personally responsible, and which she may enforce as a feme sole, if they are violated by the other contracting party.

In a note to 11 East, 304, and Co. Lit. 133, note, (209,) Mr. Day, the American editor, says, that imprisonment for life, in this country, would be attended with the same effect as perpetual banishment in England. Unless, however, there be some statute provision, (as, in New York, where persons sentenced to imprisonment for life in the state prison are declared to be "civilly dead to all intents and purposes,") it is not known that such imprisonment, in the penitentiaries or other prisons of the different states, would enable the prisoner's wife to contract and render herself liable as a feme sole. Such effect has not yet been given by the courts to imprisonment for life. (*b*)

In England, the exception is confined to banishment from the realm, which is a commutation of punishment that is made only in capital convictions which induce attainder; an effect not incident to such convictions in the United States.

(*a*) The law as to a wife's separate property is not here considered.

(*b*) See 2 Kent Com. (11th ed.) 147.

In North Carolina a husband, in 1777, was required to take the oath of allegiance to the state, and having refused so to do, "he was compelled to leave the state under the penalty, by law established, of incurring the crime of high treason if he returned." Held, that his wife, who was left in the state, was to all purposes a feme sole, and might sue and be sued, and acquire and transfer property. Troughton *v.* Hill, 2 Haywood, 406. And in Connecticut, where a citizen of that state left it, in the time of the revolutionary war, and joined its enemies, it was held that his wife, who remained in the state, had the rights of a feme sole while he was absent. Cornwall *v.* Hoyt, 7 Conn. 420. See also Wright *v.* Wright, 2 Desaus. 244.

2. If the husband entered into religion, the wife might formerly be treated as a feme sole. 1 Bl. Com. 132. Co. Lit. 132. Clancy on Husb. & Wife, 210.

3. Another exception, in former times, was the voluntary abjuration (*a*) of the realm and departure from it by the

(*a*) There is, in England, no such thing as abjuration of the realm, in any legal sense, or with any legal effect, since the statute of 21 James I. c. 28. Abjuration was a sworn banishment, or an oath taken to forsake the realm forever. It was a commutation of punishment for a crime, and induced civil death. The party who had committed a felony might flee to a church or churchyard, before he was apprehended, and could not be taken thence to be tried for his offence. But upon a confession of his offence, before the proper officer, he was admitted to his oath to abjure or forsake the realm within forty days. As this state of things was found often to operate only as a perpetual confinement to some sanctuary, the statute above mentioned abolished the privilege of sanctuary, and this abjuration thereupon ceased. That there ever was anything of this sort in any part of the United States, nobody will pretend. Nor will any lawyer suppose that the courts in England would regard the wife of an emigrant, who is naturalized in this country, and has abjured his allegiance to the British throne, as a feme sole, for any purpose. The whole course of authorities shows the contrary. See Staunf. P. C. Book ii. c. 40. 2 Inst. 629. 4 Bl. Com. c. 26.

In the Mirror, c. i. § 13, is this passage: "In the right of offenders, who by mischance fall into an offence mortal out of sanctuary, and for true repentance run to monasteries, and commonly confess themselves sorrowful, and repent; such offenders, being of good fame, if they require tuition of the church, King Henry II., at Clarendon, granted unto them, that they should be defended by the church for the space of forty days; and ordained that the

husband. In the three instances above mentioned, the husband is regarded as *civiliter mortuus.*

Although it is not known that the courts of our country have now any authority to pass a sentence of banishment or transportation, as we have no extra-territorial provinces, yet punishment of death and other lighter punishments are sometimes suspended or commuted, on condition that the convict leave the country, either for a limited time or forever. In such instances, if the husband leave the United States, the principle which is applied in cases of peremptory banishment in England might perhaps be applicable here.

If, however, the punishment be suspended or commuted, on condition that the convict merely leave the state where the

towns should defend such flyers for the whole forty days, and send them to the coroner, at the coroner's view. It is in the election of the offender to yield to the law, or to acknowledge his offence to the coroners, and to the people, and to waive the law; and if he yield himself to be tried by law, he is to be sent to jail, and to wait for either acquittal or condemnation. And if he confess a mortal offence, and desire to depart the realm, without desiring the tuition of the church, he is to go from the end of the sanctuary ungirt, in pure sackcloth, and there swear that he will keep the straight way to such a port, or such a passage, which he hath chosen, and will stay in no parts two nights together, until that for this mortal offence, which he hath confessed in the hearing of the people, he hath avoided the realm, never to return, during the king's life, without leave; so God him help and the holy evangelists; and afterwards let him take the sign of the cross and carry the same; and the same is as much as if he were in the protection of the church." Britton gives substantially the same description of this antiquated proceeding. Kelham's Britton, c. 16. By statute 35 Eliz. c. 2, Popish recusants were required upon their corporal oath to abjure the realm of England, and all other the Queen's majesty's dominions forever, and thereupon to depart, at such haven and port, and at such time, as should be in that behalf assigned and appointed by the officers before whom the oath was taken. As nothing like this ever existed in this country, of course the incidents and effects of abjuration, whether upon the offender or his connexions, have no place in our laws. Hence it is incorrectly said, as it sometimes has been, that when a husband deserts his wife and removes from the country or state of his residence, not intending to return, this *amounts to an abjuration* of his former state or country; although it may have the same effect which abjuration formerly had, on his wife's rights and liabilities.

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offence was committed, and he remain in the United States, or voluntarily leave them, his wife would probably not be considered as a feme sole for the purpose of contracting.

4. Temporary transportation or banishment, though not civil death of the husband, yet entitles the wife to sue as a feme sole during his absence. (*a*) On the husband's return from transportation, his marital rights revive. (*b*)

5. By the custom of London, a feme covert trader, if her husband does not intermeddle in the trading, is regarded as a feme sole. She may sue and be sued, and though, for the sake of conformity, her husband must join and be joined nominally in suits by and against her, yet the judgment, when recovered, does not affect him. If the judgment is against her, he is not liable to respond to it. (*c*)

6. Another exception to the rule of the common law on this subject is made in this country, in cases of the husband's desertion of his wife. In Massachusetts this exception is restricted to cases of absolute and complete desertion by the husband's continued absence from the state, and a voluntary abandonment of his wife, with intent to renounce, *de facto*, the marital relation, and leave her to act as a feme sole. Gregory *v.* Pierce, 4 Met. 478. See also Robinson *v.* Reynolds, 1 Aik. 174. Ayer *v.* Warren, 47 Maine, 230, and Ames *v.* Chew, 5 Met. 320. A less restricted kind of desertion seems to have been held sufficient in Rhea *v.* Rhenner, 1 Peters, 105. That, however, was a case in equity.

An English wife, who was deserted by her husband in England for several years without any means of support left by him, and without any correspondence with him, came to this country and maintained herself here for five years, as a single woman. It was decided that she might maintain an action

(*a*) Lofft, 142. Co. Lit. 133, a. note 209. 2 Bright on Husb. & Wife, 70. Clancy on Husb. & Wife, 63.

(*b*) Spooner *v.* Brewster, 2 Car. & P. 35. Carrol *v.* Blencow, 4 Esp. R. 27.

(*c*) Langham *v.* Bewett, Cro. Car. 68 and Hetley, 9. Anon. 10 Mod. 6. Caudell *v.* Shaw, 4 T. R. 361. Beard *v.* Webb, 2 Bos. & Pul. 93. See the law of Pennsylvania, on this subject, 6 Watts & Serg. 348, 2 Serg. & R. 189; of South Carolina, 2 Bay, 162, 2 Nott & McCord, 242, 4 McCord, 413; of Rhode Island, 5 Allen, 208.

as a feme sole. Gregory *v.* Paul, 15 Mass. 31. See also McArthur *v.* Bloom, 2 Duer, 151. The same was decided in the case of the wife of a citizen of another state, after she had been driven from his house by his cruelty, without any means of support, and had resided in this state many years, and supported herself as a single woman. Abbot *v.* Bayley, 6 Pick. 89. The same decisions would undoubtedly be now made in case of the complete desertion of a wife by a native citizen of the state. This is a necessary inference from the case of Gregory *v.* Pierce, before cited.

It is not certain that, by the present law of England, a husband's desertion of his wife, or his voluntary absence from her, affects her rights or liabilities. During the last seventy years the courts have been disposed to narrow the grounds on which the rights and liabilities of femes sole were formerly transferred to married women.

Until recently it was supposed that the wife of an alien enemy, who could not come into England, was subject to the liabilities and entitled to the rights of a feme sole. 1 Ld. Raym. 147 and Comb. 402. 2 Bright on Husb. & Wife, 74. Broom on Parties, 76. But the contrary was decided in 1856, in the case of DeWahl *v.* Braune, 1 Hurlst. & Norm. 178.

It was held by Lord Kenyon, in 2 Esp. R. 554, 587, that the wife of a foreigner, who left her in England, was liable as a feme sole. This was denied and the contrary adjudged, in Kay *v.* Duchess de Pienne, 3 Campb. 123. In that case, Lord Ellenborough is reported to have expressed an opinion that the wife of an alien who had never been in England might be sued as a feme sole. But Baron Parke, in 2 Mees. & Welsb. 64, 65, said, "There must have been some misapprehension of what Lord Ellenborough said in that case, or his Lordship must have been in error; that the law does not make" a wife liable as a feme sole "merely because her husband is an alien and continually abroad." And an Englishman's absence from his wife, and his residence out of England, do not render her liable as a feme sole. Marsh *v.* Hutchinson, 2 Bos. & Pul. 226. Farrer *v.* Countess

Granard, 1 New Rep. 80. Boggett *v.* Frier, 11 East, 301. Williamson *v.* Dawes, 9 Bing. 292 and 2 Moore & Scott, 352. 2 Roper on Husb. & Wife, 125, 126. Bell on Husb. & Wife, 35. 2 Leigh's Nisi Prius, 1101–1104. See also Stretton *v.* Busnash, 1 Bing. N. R. 139 and Barden *v.* Keverberg, 2 Mees. & Welsb. 61. The English law is followed in South Carolina. Boyce *v.* Owens, 1 Hill, (S. C.) 8. (*a*)

A married woman, sued for goods sold to her, is not estopped to set up the defence of coverture by reason of her having previously to the sale executed deeds and sued out writs and carried on actions, denominating herself as a widow. Davenport *v.* Nelson, 4 Campb. 26. And where such woman executed a warranty deed of her real estate by her maiden name, dated before the time of her marriage, for a fraudulent purpose, and without disclosing her marriage, it was decided that she did not estop herself and her heirs to set up her title to the land, as against her grantee, or against a purchaser from him without notice. Lowell *v.* Daniels, 2 Gray, 161. See also Concord Bank *v.* Bellis, 10 Cush. 276.

It is the law of most of the states of the Union, that a married woman may convey her real estate and release dower in the estate of her husband, by joining in a deed thereof with him. 1 Washburn on Real Property, (1st ed.) 284, (2d ed.) 278, 279.

7. If husband and wife are divorced *a mensa et thoro*, though the marriage is not dissolved, and they may lawfully live together again as soon as they agree so to do, yet, while they are separated, the wife, for some purposes, is regarded as a feme sole. She may sue her husband for alimony decreed to her by the court, upon the divorce; and, of course, may maintain an action against an officer, in her own name only, for any default in executing process to enforce the allowance

(*a*) By an English statute, (20 and 21 Victoria, c. 85,) it is provided that a wife, deserted by her husband, may apply to a police magistrate for an order to protect any money or property that she may acquire by her own industry, &c., after being deserted; and that, after obtaining such order, such earnings and property shall belong to her as if she were a feme sole. See an action by a wife under this statute. Thomas *v.* Head, 2 Fost. & Finl. 88.

of alimony. (*a*) In a case reported by Moore, (*b*) it is said, the court seemed to suppose she may sue alone on a cause of action against a third person. And, in the ecclesiastical courts, which proceed according to the rules of the civil law, by which husband and wife are not regarded as one person, suits are constantly brought by the wife alone, after a divorce *a mensa et thoro*, for personal injuries. (*c*)

The court in Massachusetts has decided that after such partial divorce, the wife can contract debts and sue and be sued as a feme sole. (*d*) The contrary, however, has been decided by the court of King's Bench. (*e*)

There were several decisions in the time of Lord Mansfield, that after a voluntary separation of husband and wife under articles of agreement, by which a separate maintenance was secured to the wife, she might contract debts and be sued as a feme sole. Mr. Powell (*f*) strongly contested this doctrine; and in the case of Marshall *v.* Rutton, (*g*) which was argued before all the judges of England, it was unanimously overruled. But those overruled cases have been defended in Reeve Dom. Rel. 99 *&* *seq.* and 1 Dane Ab. 339, 361. See also Ayer *v.* Warren, 47 Maine, 224 *&* *seq.*

If a husband be absent seven years unheard from, the wife may be treated as a feme sole, and may contract and be sued as such, although her husband may in fact be alive and within the country. The legal presumption in that case is that he is dead. (*h*)

(*a*) Howard *v.* Howard, 15 Mass. Rep. 196. Prather *v.* Clarke, 1 Const. Rep. (S. C.) 453. *Contra* in Wisconsin. Barber *v.* Barber, 1 Chand. 280.

(*b*) Stephens *v.* Tot, Mo. 665. But in Croke's report of this case, no such intimation of the court is given. Cro. Eliz. 908.

(*c*) Motteram *v.* Motteram, 3 Bulst. 264. Chamberlaine *v.* Hewson, 5 Mod. 71 and 1 Ld. Raym. 73. 2 Dane Ab. 307. Reeve Dom. Rel. 205.

(*d*) Dean *v.* Richmond, 5 Pick. 461. Pierce *v.* Burnham, 4 Met. 303.

(*e*) Lewis *v.* Lee, 3 Barn. & Cres. 291 and 5 Dowl. & Ryl. 98. Faithorne *v.* Blaquire, 6 M. & S. 73.

(*f*) 1 Powell on Con. 77 *&* *seq.*

(*g*) 8 T. R. 545.

(*h*) Doe *v.* Jesson, 6 East, 85. Doe *v.* Deakin, 4 B. & Ald. 434. King *v.* Paddock, 18 Johns. 141. 1 Greenl. Ev. § 41. Roscoe on Ev. (10th ed.) 34. Loring *v.* Steineman, 1 Met. 211. See 12 Allen, 133.

Subject to these exceptions, and to such others as may be made by various local statutes, husband and wife are regarded in law as one person, and the wife's separate existence, so far at least as the power of making contracts is concerned, is merged and discontinued. She can acquire no property, and is therefore liable to pay no demand. Any promise made by her is void, and so is any deed executed by her, except in conjunction with her husband. (*a*) If a third person give or bequeath anything to her, it becomes the husband's; and any promise made to the wife can be enforced only by the husband, and for his benefit.

A gift by a husband to his wife, though a nullity in law, will sometimes be recognized and enforced in equity, if the rights of his creditors are not thereby prejudiced. (*b*)

A widow cannot recover of her husband's executors or administrators a promissory note given to her by him during coverture, though it was given for money which was hers before marriage. Sweat *v.* Hall, 8 Verm. 187. Jackson *v.* Parks, 10 Cush. 550. And see 12 Allen, 104.

But at law, in Massachusetts, where the husband, on the sale of his wife's real estate, took from the purchaser a note and mortgage to himself and wife jointly, and died without collecting the note or bringing an action to foreclose the mortgage, it was decided that they survived to the wife. Draper *v.* Jackson, 16 Mass. 480, 486. Jackson, J., there said that the husband, by taking security in this form, is understood to assent and intend that the wife shall have some peculiar benefit from it; otherwise he would have taken it in his own name alone; that he might have afterwards changed his mind, released the demand, or brought an action in his own name, and upon recovering the money might have retained it to his own use. But as he did not reduce it to possession, he was considered as assenting that it should continue to be the

(*a*) See Colcord *v.* Swan, 7 Mass. 291. Porter *v.* Bradley, 7 R. I. 538. 2 Kent Com. (11th ed.) 163.

(*b*) 2 Story on Eq. § 1372. 2 Kent Com. (11th ed.) 154. Tullis *v.* Fridley, 9 Min. 79. Liles *v.* Fleming, 1 Dev. Eq. Rep. 187. 1 Bright on Husb. & Wife, 33. Ward *v.* Crotty, 4 Met. (Ky.) 59.

property of the wife. See also 9 Gray, 66, 70. So after the husband's death, his wife was held entitled to the full value of shares which she owned before marriage, in a bank whose charter afterwards expired; the husband having, as authorized by law, subscribed half the number of her shares in a new bank, in her name, and having refused to receive the balance of her old shares in money, saying that it was not his, but his wife's. Stanwood *v.* Stanwood, 17 Mass. 57. The like decision was made where the wife lent the interest of money accruing on a promissory note due to her before marriage, and took the borrower's note therefor, payable to herself, according to the wishes of her husband, who often declared that the money, as well as the interest thereon, was her separate property, and that he did not claim or receive any part of it to his own use. Phelps *v.* Phelps, 20 Pick. 556. In Adams *v.* Brackett, 5 Met. 280, the husband bought shares in a bank, saying that they were his wife's, and a certificate was issued to her as owner, and he never treated them as his, but always as hers; and in Fisk *v.* Cushman, 6 Cush. 20, the husband deposited money in a savings bank in the name and to the credit of his wife, saying that the money was hers, and delivering the deposit book to her, and never withdrawing or transferring the deposit, but keeping a separate one, in the same bank, in his own name. In both these cases, the gift was supported, after the husband's death, his intention to make a gift being manifest, and the act of giving being complete. In all the above cases, and in Ames *v.* Chew, 5 Met. 320, it was distinctly stated that the gifts were valid as against the husband's heir and legatees, though not against his creditors.

Some of the inconveniences and hardships of the common law, as they affect married women, are removed or mitigated by a court of chancery; but, of this branch of the subject it is not purposed to treat.

Great changes, which cannot be here set forth, have been made by state legislatures within a few years, respecting the legal rights and powers of married women. (*a*)

(*a*) See a collection of the statutes of thirty states of the Union on this subject, in 1 Parsons on Con. (3d ed.) 306 *& seq.*, (5th ed.) 371 *& seq.*

5. *Outlaws and Persons Attainted.*

The process by which, according to the common law, a person is outlawed in a criminal prosecution, or civil suit, may be found described in the books cited in the margin. (*a*)

The incidents of outlawry, so far as the outlaw's power of making contracts is in question, are, that he cannot, while the judgment of outlawry remains in force, maintain any suit in his own right, so that he is in effect disabled to contract for his own benefit. A bond, note, or other promise, given to him, is of no present value, for he cannot enforce the collection or performance. The other party may plead the plaintiff's disability, and deprive him of all remedy; which shows that there is no present legal obligation or right resulting from the contract. He cannot hold and enjoy any property that is given or devised to him; it is forfeited to the king, in England, and was forfeited to the commonwealth here. (*b*) Outlaws, however, may be sued on their own contracts, and for other causes of action. "Let them be answerable to all, and none to them," is the language of the common law. (*c*) They may bring actions *en autre droit*, as executors, administrators, &c., because the persons whom they represent have the privilege of law, and outlawry is no objection to their representation. (*d*)

Attainder includes in its meaning all the disabilities that

(*a*) Bac. Ab. Outlawry. 4 Bl. Com. c. 24. 3 ib. c. 19. Appx. No. iii. Syst. Pl. 331 *& seq.* 1 Chit. Crim. Law, 347 *& seq.* The process of outlawry was abolished in Massachusetts, in June, 1831. It was obsolete long before. Yet, until that time, a statute was in force, prescribing the proceedings by which persons charged with criminal offences before the supreme court, by indictment or presentment of a grand jury, and who absconded, &c., might be pursued to outlawry, and declaring the disabilities thereby incurred by the offender. Statute of 1782, c. 19. The only case in which a person could be pursued to outlawry in a civil proceeding was that of a collector of taxes, who should "abscond or secrete himself for the space of one month, having assessments in his hands unsettled." Statute of 1785, c. 46, § 15. The incidents of outlawry, in this case, were not mentioned in the statute. Doubtless they were those of the common law.

(*b*) Bac. Ab. Outlawry. Mass. St. of 1782, c. 19.

(*c*) Britton, c. 12, § 8. Cro. Jac. 426. Noy, 1.

(*d*) Co. Lit. 128. Gilb. C. P. 197. Finch, 27, 168.

follow a capital sentence. When a person is sentenced for a capital offence, he is immediately, by the operation of the common law of England, placed in a state of attainder. It does not follow upon conviction merely; for judgment may be arrested. So, upon a judgment of outlawry, in case of a charge of a capital offence, the defendant becomes attainted; and so of acts of parliament to attaint particular persons of treason or felony.

The incidents of attainder, at the common law, may be learned from Blackstone (*a*) and Chitty. (*b*) The only point, that concerns the present subject, is the capacity of the attainted person as to contracts. And in this respect he stands on the same ground as a person outlawed in a criminal process. Indeed, a judgment of outlawry, as has been just stated, puts the defendant into a state of attainder, if it be in a criminal prosecution and for a capital offence.

The person attainted can maintain no suit against another, and therefore cannot contract for his own benefit. (*c*) He is liable to the suits of others, though this liability is of no value to them, nor injury to him, unless he is pardoned. (*d*) Upon the reversal of a judgment of outlawry, and the pardon of a person attainted, the party is restored to his law. His competency to contract, and his right to enforce contracts by suit, revive. And so of the reversal of an attainder by parliament. (*e*)

In the New England states, no forfeiture of property, nor disability to contract and sue, follows the conviction and sentence of a capital or other offence; and this, probably, is equally true of all the states in the Union, except it may be by statute. In New York, no conviction works corruption of blood, or forfeiture of property, except in cases of treason. (*f*)

The Constitution of the United States (*g*) confers on congress

(*a*) 4 Bl. Com. 380. 2 ib. 254.

(*b*) 1 Chit. Crim. Law, 723.

(*c*) See Bullock *v.* Dodds, 2 B. & Ald. 258.

(*d*) Cro. Eliz. 516. 1 Wils. 217. Foster's Crown Law, 61.

(*e*) Bac. Ab. Pardon. H. 10 Johns. 232, 483. 3 Johns. Cas. 333. 2 Hawk. c. 37.

(*f*) 10 Johns. 233.

(*g*) Art. iii. § 3.

the power of declaring the punishment of treason; but declares, that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." The punishment of treason, by the act of congress, is death without any forfeiture of property. (*a*) By the Constitution of the United States, (*b*) congress is prohibited from passing any bill of attainder; and the same prohibition is also laid upon the legislatures of the several states. (*c*) The twenty-fifth article of the Bill of Rights, prefixed to the constitution of Massachusetts, had previously announced that "no subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature."

6. *Persons Excommunicated.*

By the English law, persons excommunicated were formerly subject to some of the same disabilities which attach to outlaws and persons attainted. Though they were responsible on their contracts, they could maintain no action against persons contracting with them, nor even sue *en autre droit.* This and other disabilities ceased, however, when the excommunicated persons were assoiled by the proper ecclesiastical authority. (*d*)

By a modern English statute, (*e*) the causes of excommunication by the ecclesiastical courts are reduced in number, and it is enacted that no civil incapacity shall be incurred by that punishment, when inflicted as a spiritual censure for an offence of ecclesiastical cognizance. (*f*) Excommunication in this country produces no legal disability. It is merely an ecclesiastical censure, of which the law takes no notice.

7. *Aliens.*

An alien, whether enemy or friend, cannot hold lands, which come to him by purchase, nor will land descend to him. But

(*a*) 1 U. S. Laws (Story's ed.) 83. (Peters' ed.) 112.
(*b*) Art. i. § 9. (*c*) Art. i. § 10.
(*d*) See Co. Lit. 133, 134. Syst. Pl. 11. 3 Bl. Com. 102. Bac. Ab. Excommunication. (*e*) 51 Geo. III. c. 127.
(*f*) See 1 Haggard's Consistory Rep. Appx. 24–26, the statute at large.

no one except the sovereign power, the king in England, the commonwealth here, can disturb him in his title or enjoyment. By an inquest, the sovereign power may seize an alien's lands, and vest the title in itself. (*a*)

An alien enemy, that is, the subject of a country with which we are at war, can make no contract with our citizens during the continuance of war, unless he reside here under the license and protection of the constituted authorities of the United States.

The principle on which this disability rests, is the impolicy and danger of permitting an enemy to recover or obtain from our citizens money or other property, which may diminish the resources of the country for defence, and convert them to purposes injurious to our interests. Contracts made with an alien enemy during war are regarded as illegal, and can never be enforced against our citizens. But if made before the war, they are suspended only while the war continues, and may be enforced in our courts on the return of peace. (*b*)

At common law, and by the law of nations, there seems to be an exception to this rule, in the case of ransom bills, &c. But by English statutes, contracts for ransoming captured property are forbidden and declared void. (*c*)

8. *Spendthrifts.*

In Massachusetts and New Hampshire it is provided by statute, that persons who are put under guardianship for wasting their estate by excessive drinking, gaming, idleness, or debauchery of any kind, can make no valid contract for the payment of money, or the sale of personal or real property, nor any valid gift, after notice has been given to them of the application to the probate court, to have guardians appointed over them, and the order of notice has been filed in the office

(*a*) Wooddeson, Lect. xiv. 1 Bl. Com. 392. 2 ib. 252, 297. 1 Johns. Cas. 399. 3 ib. 109. 1 Mass. 256. 8 ib. 445. 12 ib. 143.

(*b*) See 7 Taunt. 439, (Amer ed.) and note. 10 Johns. 69, 183. Bac. Ab. Alien.

(*c*) See 3 Bur. 1731. 2 Doug. 641–650. 8 T. R. 268. 2 Gallison, 325. 15 Johns. 6. 1 Kent Com. (11th ed.) 113.

of the register of deeds for the county where they may belong. And see Revised Statutes of Maine, pp. 430, 433. See Manson *v.* Felton, 13 Pick. 206. In McCrillis *v.* Bartlett, 8 N. Hamp. 569, it was held that the statute did not render void a spendthrift's implied contracts for necessaries; and that money furnished to him for the purpose of defending against the appointment of a guardian, where such defence might reasonably be made, might be regarded as a necessary expenditure.

9. *Slaves.*

While slavery existed in the United States, the condition of slaves here was analogous to that of the slaves of the ancients, the Greeks and Romans, and not that of the villeins of feudal times. They were, generally speaking, not considered as persons but as things. By the Roman law, slaves could not take property by descent or purchase; and, such in the main, seems to have been the law of this country. (*a*) Thus, a devise to a slave was void; for, "it would be a solecism," said Taylor, J., "that the law should sanction or permit the acquisition of property by those from whom it withholds that protection, without which property is useless." "A slave could bring no action. He could neither acquire nor transfer property by descent or purchase." (*b*) No promise made to a slave could be enforced by a court either of law or equity. (*c*) A note given to a slave was void, and the master could not recover it. (*d*) There were some modifications of these rigid rules of the civil law, by usage and statutes, in the different slave-holding states; but these were the prevalent doctrines. (*e*)

(*a*) Bynum *v.* Bostick, 4 Desaus. 267.

(*b*) Cunningham's Heirs *v.* Cunningham's Executors, Cam. & Norw. 356.

(*c*) Beall *v.* Joseph. Hardin, 52. See also Glen *v.* Hodges, 9 Johns. 67, where it was decided that a slave could not contract a debt.

(*d*) Gregg *v.* Thompson. 2 Rep. Const. Ct. (S. C.) 331.

(*e*) See Heineccius (Inst.) lib. i. tit. 3. ii. tit. 9. iii. tit. 18. Recitationes, lib. i. tit. 5. xv. tit. i. § 178. xlv. tit. 3.

A slave might contract with his master respecting his manumission, and the law enforced the agreement. 3 Bos. & Pul. 69. 7 Johns. 324. 2 Root, 364. See also 9 Grattan, 708. Cobb on Slavery, 278–317.

See Stroud's Law relating to Slavery, and Hurd's two volumes on Freedom and Bondage, published in 1858.

10. *Seamen.*

By a statute of the United States, passed on the 20th of July, 1790, (*a*) it is provided that "every master or commander of any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel of the burden of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such ship or vessel (except such as shall be apprentice or servant to himself or owners) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped." And it was also therein provided that if the master should carry out any seaman without such agreement being first made and signed by the seamen and mariners, such seaman should not be bound by the regulations, nor subject to the penalties and forfeitures contained in said statute. Under this last provision it was held that if a seaman entered upon a voyage without signing shipping articles, there was an implied contract which bound him to remain with the ship until the termination of the voyage. Jansen *v.* The Heinrich, Crabbe, 226. See Ware (2d ed.) 448.

By another statute of the United States, passed on the 20th of July, 1840 (*b*) all shipments of seamen made contrary to the provisions therein contained, or contained in any other statute of the United States, are declared void, and it is provided that any seaman, so shipped, may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment.

Questions have been often raised, whether shipping articles, signed by seamen, described the voyage or voyages for which

(*a*) 1 U. S. Laws (Story's ed.) 133, (Peters' ed.) 104.
(*b*) 5 U. S. Laws (Peters' ed.) 395.

they shipped sufficiently to bind them. And if there is ambiguity in the description, or it is susceptible of two constructions, that which is most favorable to the seaman is adopted. Crabbe, *supra*. Daveis, 407. Sprague's Decis. 300, 302.

Shipping articles for a voyage "from Philadelphia to Gibraltar, other ports in Europe or South America, and back to Philadelphia" were held sufficient, and to authorize a voyage directly from Gibraltar to South America, without proceeding to any intermediate port in Europe, but not to a return from South America to a European port. And a seaman was held not to be justified in leaving the ship in South America unless he knew that a change in the voyage described in the shipping articles had been resolved on and the ship was about to sail to a port in Europe. Douglass *v.* Eyre, Gilpin, 147. And where the voyage was described in the shipping articles to be "from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia," the description was not such as to avoid the contract, and that the master had not violated the articles by proceeding from South America to Europe, and that the seamen were not justified in leaving the ship for that cause. Magee *v.* The Moss, Gilpin, 219. A voyage to a port named, "or elsewhere for a market," was held by Woodbury, J., to be sufficiently definite, and to be binding on the seamen. 1 Woodb. & M. 338. See Brown *v.* Jones, 2 Gallison, 477, where the voyage was described as "from Boston to the Pacific, Indian, and Chinese Oceans, or elsewhere, on a trading voyage, and from thence back to Boston." Story, J., said "it would be an utter evasion of the statute to allow such an indefinite expression as 'elsewhere' to control or extend the meaning of the other certain description of the voyage, or to constitute, of itself, a sufficient description." And the same was held in Ely *v.* Peck, 7 Conn. 242. See 1 Hagg. Adm. Rep. 248, 347.

In the shipping articles of an English vessel, the voyage was described to be from Liverpool to Savannah and any port or ports of the United States, of the West Indies, and of

British North America, the term of service not to exceed twelve months. Held, that the voyage intended was confined to the ports on the eastern shore of the continent, and that the articles did not authorize a voyage to San Francisco or the northwest coast. The Ada, Daveis, 407.

A voyage was described to be "from Havre to New Orleans, and thence to one or more ports in Europe, and finally back to a port of discharge in the United States, for a period not exceeding twelve calendar months." Held, that there were two restrictions, one of time the other of ports, and that the seamen were not bound for twelve months, unless the vessel went to the ports in the order described. Sprague's Decis. 485. The words "a voyage from Boston to Valparaiso or other ports of the Pacific Ocean, at and from thence home direct or *via* ports in East Indies or Europe" were held not to describe the voyage with sufficient certainty, and not to bind the seamen after arrival at Valparaiso. Sprague's Decis. 300 and 2 Curtis, 301. An English seaman signed shipping articles in England, which described the voyages to be "from Liverpool to Calcutta, thence, if required, to any ports or places in the Indian, Pacific and Atlantic Oceans, and China and Eastern Seas, thence to a port for orders, and to the continent of Europe, if required, and back to a final port of discharge in the United Kingdom; the term not to exceed three years." The vessel sailed from Liverpool to Calcutta, and thence to Boston, where a seaman left her without the master's consent, and there brought an action against the master for the amount of wages which would have been due to him if he had been there discharged. Defences, that the plaintiff had forfeited his wages by desertion, and that an English statute provided that in a contract like this, no seaman should sue for wages in any court abroad, except in cases of discharge or of danger to life. It was decided that the voyage was not so described as to be binding by the English law (as held in the case of The Westmoreland, 1 W. Rob. Adm. Rep. 216) and judgment was rendered for the plaintiff. Roberts *v.* Knights, 7 Allen, 449.

It was said by Story, J., (Brown *v.* Lull, 2 Sumner, 449,)

that shipping articles, in their common form, coincide with the general principles of maritime law as to seamens' wages, and that courts of admiralty jealously watch every deviation from those principles, in the articles, as injurious to the rights of seamen, and founded in an unconscionable inequality of benefit between the parties; that seamen are extravagant, indifferent to the future, and easily overreached; and that those courts consider them peculiarly entitled to their protection, and are not confined to the mere dry and positive rules of the common law, but act, as far as their powers extend, upon the liberal jurisprudence of courts of equity; and when they find in shipping articles any stipulation which derogates from the general rights and privileges of seamen, they declare it void, unless the nature and operation of such stipulation were fully and fairly explained to the seamen, and additional compensation is allowed to them, adequate to the restrictions and risks imposed on them by such stipulation. And he held that because capture of a neutral ship does not dissolve the seamens' contract for wages, and if she is restored, they are entitled to full wages for the whole voyage, if they remained on board, or if, being taken out, they were unable, without their own fault, to rejoin the ship, therefore, the following clause in shipping articles was void: "In case of the said vessel being taken or lost in the course of said voyage, no wages shall be demanded or received, except the advance wages received at the time of entry on board; and if the vessel shall be restrained for more than thirty days at any one time, the wages shall cease during such restraint." (*a*) And he cited the judgment of Lord Stowell in the case of The Juliana, 2 Dodson, 507. In Harden *v.* Gordon, 2 Mason, 541, Story, J., had before decided that a stipulation by seamen that they should pay for medical advice, and for medicines, without any condition that there should be a suitable medicine chest on board, was void, being contrary to the policy of the eighth section of the statute (before mentioned) of July 20th 1790. In the case of The Sarah Jane, 1 Blatchf. & Howland, 401, a stipulation that

(*a*) See also Seamen of Fair American *v.* Fair American and Captain, Bee, 134. Swift *v.* Clark, 15 Mass. 173.

the seamen should prosecute their suits for wages in courts of common law only (as it amounted to a waiver of their lien upon the vessel) was void, unless it was proved that the matter was clearly explained to them before they entered into such stipulation, and that no prejudice to their rights would be thereby incurred. And when the crew of a foreign vessel, about to sail to this country, agreed that they would not sue in any courts abroad, but would refer all disputes to the courts of their own country, it was held that though this was a lawful agreement, yet that the interests of justice required it to be disregarded, when the voyage was broken up in an American port by some other cause than the wreck of the vessel, or where the seaman was discharged, or became entitled to a discharge by reason of improper treatment. Bucker *v.* Klorkgeter, Abbotts' Rep. 402. A stipulation in shipping articles that seamen shall not demand their wages until after the expiration of a certain time is void, if their service is completed, or they are discharged, before such time expires. The Cypress, 1 Blatchf. & Howland, 83. See also Ware (2d ed.) 514. Sprague's Decis. 199, 556. Olcott, 24. 2 Paine, 229. 3 Kent Com., Lecture xlvi.

A seaman does not forfeit his wages by leaving a vessel that is dangerously unseaworthy, and which the master omits to repair when she is in port and he has a suitable opportunity to do it. Savary *v.* Clements, 8 Gray, 155. When the owners of a vessel are sued for the recovery by a seaman of damages caused by the master's abuse in wounding him and discharging him in a foreign port, the jury may allow the seaman wages up to the time when he had so recovered as to be able to sail for home, and for such further time as was reasonable for obtaining a passage and making a voyage home, and the expenses of his board, and for nursing, medicine and medical attendance until he had so recovered, and of his passage home, although the time was longer than that occupied by the voyage described in the shipping articles. Croucher *v.* Oakman, 3 Allen, 185.

When the prosecution of a voyage is rendered impossible by any disaster to the vessel, the seamen are discharged from

the principal obligation to perform the voyage, but not from the incidental obligation to render their best services for saving as much of the ship and cargo as is practicable. And by the law of this country, seamen, in cases of shipwreck, are entitled to their full wages up to the time of the disaster, if by their exertions enough of the freight and wreck is saved; and are also entitled to claim, according to the merit of their services, an extra reward, beyond their wages, against the property saved; the old English rule, that freight is the only fund against which wages can be claimed, having never been adopted in the United States, and never having been the rule of the maritime law. The Dawn, Daveis, 121. See Locke *v.* Swan, 13 Mass. 76.

A custom of a port, that the advance wages of seamen due under shipping articles, shall be paid to the shipping agent, to be paid by him, for their benefit, to the keeper of the boarding-house who brings them, is unreasonable and does not bind them, though they know such custom when they sign the articles. Metcalf *v.* Weld, 14 Gray, 210.

By the fourth section of the statute of July 20th, 1790, (before cited,) it is provided that "no sum, exceeding one dollar, shall be recovered of any seaman or mariner" in the merchant service, "by any person for any debt contracted during the time such seaman or mariners shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged shall be ended." In the case of Reynard *v.* Brecknell, 4 Pick. 302, it was held that as the effect of this provision is to avoid, or at least to suspend, a contract which, but for that provision, might be enforced at law, the seaman must strictly prove his exemption, and must therefore produce the shipping paper which, by the first section of the same statute, he is required to sign, or make out a case for the admission of secondary evidence of that paper.

The United States statute, passed on the 19th of June, 1813, requires that "the master or skipper of any vessel of the burden of twenty tons or upwards, qualified according to law for carrying on the bank or other cod fisheries, bound from a port of

the United States to be employed in any such fishery, shall, before proceeding on such fishing voyage, make an agreement in writing or print, with every fisherman who may be employed therein; and in addition to such terms of shipment as may be agreed on, shall in such agreement express whether the same is to continue for one voyage or for the fishing season, and shall also express that the fish, or the proceeds of such fishing voyage or voyages, which may appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish which they may respectively have caught; which agreement shall be indorsed or countersigned by the owner." 3 U. S. Laws, (Peters' ed.) 2. Since the passing of the United States statute of May 24th, 1828, "authorizing the licensing of vessels to be employed in the mackerel fishery" a vessel licensed for the cod fishery is not authorized by such license to engage in the mackerel fishery. The Nymph, Ware, (2d ed.) 259.

Under the statute of June, 1813, the shipping articles, which are required to be indorsed or countersigned by the owner of the vessel, do not conclusively determine, by the indorsement, who are the owners, nor with whom the agreement was made; and a seaman may have his remedy against all the owners for his share of the fish taken, and may show, by other evidence than the articles, who the owners are. And on showing that others besides those who indorsed the articles were owners and shared in the proceeds of the voyage, he may make them defendants jointly with those by whom the articles were indorsed, and recover against them all. Wait *v.* Gibbs, 4 Pick. 298. The owners of a fishing vessel may employ seamen to navigate her and to fish on wages instead of shares; and if one of the owners acts as master, and the others do not interfere, he will be deemed their agent; and such contract, made by him in his name, will enure to their use and bind them. And a seaman's contract for wages is not affected by his signing shipping articles agreeing to receive a share of the fish as his compensation, if fraudulent representations induced him to sign them. Baker *v.* Corey, 19 Pick. 496. The general owners of a vessel engaged in the mackerel fishery are liable,

as such, for the wages of a cook employed by the master, unless the master has become owner *pro hac vice*, or there is some usage or contract by which the master or the master and crew only are liable. Such owners' liability is suspended only when they have let out the vessel for a term of time to another person, giving him the entire control for such term, to employ her in such voyages and enterprises as he pleases, to engage and employ seamen, and to pay all expenses incident to the navigation. (*a*) It is not suspended nor affected by an agreement in the shipping articles "that the owner or agent of said schooner is not holden for any wages due on said voyage, unless by special agreement made with the owner or agent." And although by the general usage in the mackerel fishery, the amount of the cook's wages is always to be deducted from that part of the proceeds of the voyage which is proportioned to the master and crew, and not from that part retained by the owners of the vessel, yet this does not exempt the owners from their legal liability for the cook's wages. Harding *v.* Souther, 12 Cush. 307. (*b*)

For full knowledge of the law respecting seamen's contracts, duties and rights, resort is to be had to the numerous Admiralty Reports, English and American, and Treatises on Shipping and on Maritime Law.

11. *Attorneys and other Agents.*

The word "attorneys" here means persons constituted, by letter under seal, to transact another's business. Co. Lit. 52. By agent is meant a person in any way authorized to act for another. Agent is the genus, attorney a species. The correlate of attorney is constituent; of agent, principal. In

(*a*) See Mayo *v.* Snow, 2 Curtis, 102.

(*b*) "In the whale fishery, no statute has yet, in terms, required the contract to be in writing, but the invariable usage of that trade, and in fact the nature of the contract, have insured the universal adoption of a written agreement. It contains a description of the voyage, the share or 'lay,' as it is called, of each officer and seaman," &c. Curtis on Rights and Duties of Merchant Seamen, 60, and Appendix, 391. And see Barney *v.* Coffin, 3 Pick. 115. Baxter *v.* Rodman, ib. 435. Tripp *v.* Brownell, 12 Cush. 376. Taber *v.* Jenny, Sprague's Decis. 315.

common parlance, however, these terms are used indiscriminately; and a like want of precision is found in many modern books. What is now to be said concerning contracts by agents will include attorneys, without thus designating them except when the word "attorney" is used in quotations that may be made.

An agent cannot bind his principal by deed, (that is, a specialty,) unless he is empowered by deed. (*a*) There is an exception to this rule in case of a corporation which has a common seal. A vote of the corporation authorizing an agent to contract by deed is sufficient. And see, as to partners, *post.* 124. A parol (unsealed) authority will authorize a parol contract, and an oral authority will warrant a written exercise of it. (*b*)

A deed made by an agent for his principal must, to give it validity as such, be made in the name of the principal. If it be executed in the principal's name, it is not material by what form of words such execution is denoted; whether it be "for A. B., C. D." or "A. B. by C. D. his attorney" or "C. D. attorney for A. B." (*c*)

"The conveyance," says Parsons, C. J., 7 Mass. 19, "must be the act of the principal, and not of the attorney; otherwise the conveyance is void. And it is not enough for the attorney, in the form of the conveyance, to declare that he does it as attorney; for he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name." And Story, J., 5 Peters, 350, says that though it is apparent that the agent, in cases in which he wrongly executes a deed in his own name, intended to bind his principal, yet "the law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity."

(*a*) Paley on Agency, (4th Amer. ed.) 157. Hanford *v.* McNair, 9 Wend. 54. Wheeler *v.* Nevins, 34 Maine, 54. By Sewall, J., 5 Mass. 40.

(*b*) Anon. 12 Mod. 564. Kyd on Bills, (3d ed.) 189.

(*c*) Combes's case, 9 Co. 76. Wilks *v.* Back, 2 East, 142. Elwell *v.* Shaw, 16 Mass. 42 and 1 Greenl. 339. Fowler *v.* Shearer, 7 Mass. 14. Brinley *v.* Mann, 2 Cush. 337. Mussey *v.* Scott, 7 Cush. 215. Jones's Devisees *v.* Carter, 4 Hen. & Munf. 184. Wilburn *v.* Larkin, 3 Blackf. 55. Hunter *v.* Miller, 6 B. Monroe, 612. Eckhart *v.* Reidel, 16 Texas, 67.

Contracts by agents as such, if made in proper form, are the contracts of the principals, and of the same binding force as if made by themselves personally. If made by an authorized agent in terms which do not legally bind the principal, they sometimes bind the agent. So if made by him who assumes to act as agent, but who is not duly authorized to act as such, they may bind him personally. But it does not necessarily follow that a contract which fails to bind the principal, whether made by an authorized agent or by one who wrongly assumes to act as such, does therefore render the person who made it answerable for its performance.

Whether a contract is that of the principal or of the agent, or of neither, whether it binds the one or the other, or is void, depends upon the legal effect of its terms and the legal authority of the person acting as agent. See Abbey *v.* Chase, 6 Cush. 56. On these points, though the decisions are numerous, and in confusion if not in conflict, yet perhaps all the cases in which the party's agency, real or assumed, appears on the face of the contract, are comprised in the following principles or rules of decision:

First. If a duly authorized agent uses such terms as legally import an undertaking by the principal only, the contract is that of the principal, and he alone is the party by whom it is to be performed.

Second. If a person, assuming to act as agent, uses such terms as legally import a personal undertaking by himself, and not by the principal, the contract is his, and not that of the principal, and is to be performed by him alone. In such case it is immaterial whether he was or was not authorized to act as agent.

Third. If one who is not duly authorized to act as agent, assumes to act as such, and uses such terms as legally import the undertaking of the principal only, the contract is void.

In cases of simple contracts (except negotiable notes, and bills of exchange) in which no agency appears on their face, but they purport to be made by the parties personally, "it is competent," as said by Baron Parke, in Higgins *v.* Senior, 8 Mees. & Welsb. 844, "to show that one or both of the parties

were agents for other persons and acted as such agents in making the contract so as to give the benefit of the contract on the one hand to, (4 Barn. & Cres. 664,) and charge with liability on the other, (15 East, 62,) the unnamed principal; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal." To the same effect are the remarks of Lord Denman, in Willm. Woll. & Dav. 241, and in 5 B. & Ad. 393. The same law is applied to oral contracts made by an agent in his own name. Addison on Con. (2d Amer. ed.) 618. 5 Gray, 562. Thus when a factor or other agent sells the goods of his principal without disclosing his agency or its being otherwise known to the buyer, and payment has not been made to the agent, the principal may recover payment from the buyer.

"If a factor *sells* goods as owner, and the buyer *bonâ fide* purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the agent against a demand preferred by the principal." By Creswell, J., 7 C. B. 693. "Where a factor," says Lord Mansfield, "dealing for a principal, but concealing the principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents as the principal; and though the real principal may appear and bring an action upon the contract, against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor, in answer to the demand of the principal." Rabone *v.* Williams, 7 T. R. 360, *note*. But when the purchaser has notice, at the time of purchasing, that the seller is dealing merely as agent of some other person, he cannot, though he acted in good faith, set off a debt due to him from the seller, at the expense of the principal. The buyer, in such case, needs not to have notice who the principal is. Fish *v.* Kempton, 7 C. B. 687. See also Squires *v.* Barber, 37 Verm. 558.

So if an agent *buys* goods in his own name for a principal,

the seller, on discovering the principal, may recover payment from him. "An unknown principal, when discovered, is liable," says Lord Ellenborough, "on the contracts which his agent makes for him; but that must be taken with some qualification; and a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor." Paterson *v.* Gandasequi, 15 East, 68. (*a*)

As to bills of exchange and negotiable notes, it has been long settled that he who takes negotiable paper contracts with him who, on its face, is a party thereto, and with no other person. By Lord Abinger and by Baron Parke, 9 Mees. & Welsb. 92, 96. Broom on Parties, § 187. Story on Bills, (4th ed.) § 76. Edwards on Bills, (2d ed.) 80. Byles on Bills, (4th Amer. ed.) 96, 97. 2 Taylor on Ev. 934. 8 Allen, 460. Hence evidence is not admissible to charge any other person thereon upon the ground of his having been the copartner or principal of the party named. (*b*) Whether a bill or note is, on its face, the contract of the principal or of the agent, is decided by the same rules of construction which are applied to other simple contracts.

The third of the above suggested rules, though not sustained by uniformity of decisions, seems to be supported by the better reason and the preponderance of authority. There

(*a*) These are matters of common learning which are found, with citations of most of the adjudged cases, in the Treatises on Contracts that are in general use, and also in Russell on Factors, Smith on Merc. Law, Paley on Agency, and Story on Agency. See also Taintor *v.* Prendergast, 3 Hill, 72. Pitts *v.* Mower, 18 Maine 361. Edwards *v.* Golding, 20 Verm. 30. Walter *v.* Ross, 2 Wash. C. C. 283. Hogan *v.* Shorb, 24 Wend. 458. Huntington *v.* Knox, 7 Cush. 371. Eastern Railroad Co. *v.* Benedict, 5 Gray, 562. Lerned *v.* Johns, 9 Allen, 421.

(*b*) *Bills.* Thomas *v.* Bishop, 2 Strange, 955. Emly *v.* Lye, 15 East, 7. Sowerby *v.* Butcher, 2 Crompt. & Mees. 368 and 4 Tyrw. 320. Mare *v.* Charles, 5 El. & Bl. 978. Leadbitter *v.* Farrow, 5 M. & S. 345. Goupy *v.* Harden, 7 Taunt. 159 and 2 Marsh. 454. Hancock *v.* Fairfield, 30 Maine, 299. Fuller *v.* Hooper, 3 Gray, 341. Bank of British North America *v.* Hooper, 5 Gray 571. Slawson *v.* Loring, 5 Allen, 340. Pentz *v.* Stanton, 10 Wend. 271. *Notes.* Fox *v.* Frith, 10 Mees. & Welsb. 136. Stackpole *v.* Arnold, 11 Mass. 27. Fiske *v.* Eldridge, 12 Gray, 474. Haverhill Mut. F Ins. Co. *v.* Newhall, 1 Allen, 130. Babcock *v.* Beman, 1 Kernan, 200.

are cases in which it has been adjudged that he, who without authority contracts for another in terms which legally import the other's sole undertaking, is himself legally answerable in an action on the contract itself. (*a*) Might it not as well be held that he who forges another's name to an instrument is party thereto and may be charged as such in an action thereon? Other decisions sustain that rule, and decide that the remedy is by action to recover, of the party wrongly assuming to act as agent, damages for the failure of the contract. (*b*) Such action has heretofore been framed in tort; but it has been recently decided in England, (as stated, *ante* 5,) that the party is liable to an action on an implied promise that he was authorized as agent. Yet as the ground of his liability is his wrongful conduct, he is not liable where he was in no fault; as where the authority which he once had was ended by the death of his principal, of which he had no notice, or by his mistake as to the power conferred by his authority. (*c*)

In the *application* of the foregoing rules, the diversity in the adjudged cases is on the question, what terms, used in a contract made by an agent, do or do not legally import his sole undertaking, or that of the principal; and this chiefly in

(*a*) Dusenbury *v.* Ellis, 3 Johns. Cas. 70. White *v.* Skinner, 13 Johns. 307. Palmer *v.* Stephens, 1 Denio, 480, and other New York cases there cited. (But see 5 Selden, 585, 586, and 13 Barb. 639, 640.) Bay *v.* Cook, 2 Zab. 343. Bank of Hamburg *v.* Wray, 4 Strobhart, 87. Byars *v.* Doore's Adm'r, 20 Missouri, 284.

(*b*) Jenkins *v.* Hutchinson, 13 Ad. & El. N. S. 744. Lewis *v.* Nicholson, 18 ib. 511. These cases overruled the previous English decisions that one who contracts as agent when he has no principal, may be regarded as himself the principal, and personally liable on the contract. "I always thought the notion," says Lord Campbell, 7 El. & Bl. 312, "of suing the agent as principal absurd." See also Hopkins *v.* Mehaffy, 11 Serg. & R. 129. Delius *v.* Cawthorn, 2 Dev. 90. McHenry *v.* Duffield, 7 Blackf. 41. Potts *v.* Henderson, 2 Carter, (Ind.) 327. Ogden *v.* Raymond, 22 Conn. 385. Long *v.* Colburn, 11 Mass. 97. Ballou *v.* Talbot, 16 Mass. 461. Jefts *v.* York, 4 Cush. 371 and 10 Cush. 395. Moor *v.* Wilson, 6 Foster, 336. 2 Kent Com. (11th ed.) 840. Smith on Merc. Law, (5th ed.) 219. 2 Smith Lead. Cas. (6th Amer. ed.) 414.

(*c*) See 10 Mees. & Welsb. 9. 6 Met. 528. 10 Cush. 395, 396. 1 Amer. Lead. Cas. (4th ed.) 637. Story on Agency, § 264 *&c. seq.* See also Randell *v.* Trimen, 18 C. B. 786. Collen *v.* Wright, 7 El. & Bl. 301.

respect to simple contracts. As to contracts under seal there is great uniformity of decision, that though they are, in terms, made in behalf of a principal whom the agent names, yet if he contracts in his own name only, and affixes his private seal, he thereby binds himself only. (*a*) So of contracts in like terms, though not under seal. (*b*)

But when a simple contract is made by an agent, in such terms and signed in such manner as would bind the principal, if it were under seal, it does not bind the agent. (*c*) And this is now generally held to be the law, which is to be applied to agents of foreign as well as of domestic principals, contrary to the statement in Story on Agency, § 268, that the agent of a foreign principal is ordinarily presumed to be personally and exclusively liable on a contract made for him, whether it be made as agent, or not. The present doctrine is,

(*a*) Appleton *v.* Binks, 5 East, 148. Duvall *v.* Craig, 2 Wheat, 56. Stone *v.* Wood, 7 Cowen, 453. Tippets *v.* Walker, 4 Mass. 595. Damon *v.* Granby, 2 Pick. 345. Fullam *v.* West Brookfield, 9 Allen, 1. It is the doctrine of the courts of New York, that if an authorized agent executes, in his own name and under his private seal, a contract for the exclusive benefit of the principal, and which is not required to be under seal, he is not personally bound thereby, but that it may be treated as the simple contract of the principal. Randall *v.* Van Vechten, 19 Johns. 60. Dubois *v.* Delaware & Hudson Canal, 4 Wend. 285. Worrall *v.* Munn, 1 Selden, 229. Ford *v.* Williams, 3 Kernan, 577. Haight *v.* Sahler, 30 Barb. 218. See also Bledsoe *v.* Cains, 10 Texas, 455, and Crozier *v.* Carr, 11 ib. 376.

(*b*) Burrell *v.* Jones, 3 B. & Ald. 47. Norton *v.* Herron, Ry. & Mood. 229 and 1 Car. & P. 648. Higgins *v.* Senior, 8 Mees. & Welsb. 834. Jones *v.* Littledale, 6 Ad. & El. 490 and 1 Nev. & P. 677. Cooke *v.* Wilson, 1 C. B. N. S. 153. Wilson *v.* Zulueta, 14 Ad. & El. N. S. 405. Kennedy *v.* Gouveia, 3 Dowl. & Ryl. 503. Tanner *v.* Christian, 4 El. & Bl. 591. Parker *v.* Winlow, 7 ib. 942. Simonds *v.* Heard, 23 Pick. 120. Broom on Parties, 142 *& seq.*

(*c*) Lyon *v.* Williams, 5 Gray, 557. Lord Galway *v.* Matthew, 1 Campb. 403. Green *v.* Kopke, 18 C. B. 549. Mahony *v.* Kekulé, 14 C. B. 390, which was thus: "Contract between Vacher & Tilly and M. Mahony," and signed in this manner: "For Vacher & Tilly, Charles Kekulé. M. Mahony." In an action by Mahony against Kekulé for breach of this contract, it was decided that he was not personally liable. If he had affixed a seal after his signature, it would have been duly executed in the name of his principals, and have been their act, if he was duly authorized by them. Cases cited *ante*, 105, note *c*.

that when the terms of a contract made by an agent are clear, they are to have the same construction and legal effect, whether made for a domestic or for a foreign principal. In either case, it is a question of intention, to be determined, as in other instruments in writing, by the terms of the contract. If the terms of such contract are ambiguous, so that it is doubtful to whom credit was intended to be given, the fact that the principal was a foreigner may be considered in deciding whether the agent is liable. (*a*)

A foreign principal, whose goods are sold by his agent, has the same right which a domestic principal has, to resort to the buyer for payment. (*b*)

As to most of the simple contracts made by agents, it seems impracticable to deduce from the decisions any single distinctive proposition that will serve as a test of the question whether they bind the principal or the agent. The cases are in confusion, and apparently in conflict. There seem to be distinctions where the differences, if any, are so thin and shadowy as to elude common discernment. They all, however, assume the rightful rule, that they are to be determined according to the intention of the parties, which is to be ascertained from the terms of the contract in suit.

Instead of a useless attempt to collect and compare the multiplied decisions on this subject, reference is made to the Treatises on Agency, and to Eastern Railroad Co. *v.* Benedict, 5 Gray, 561, Bank of British North America *v.* Hooper, ib. 567, and Barlow *v.* Congregational Society in Lee, 8 Allen, 460, which cases contain a more instructive discussion of this matter than has been found elsewhere. And it will there appear that contracts by or with cashiers of banks and treasurers

(*a*) Mahony *v.* Kekulé, 14 C. B. 398. Green *v.* Kopke, 18 C. B. 557. Pennell *v.* Alexander, 3 El. & Bl. 304. Oelricks *v.* Ford, 23 Howard, 49. Kirkpatrick *v.* Stainer, 22 Wend. 244. Bray *v.* Kettell, 1 Allen, 80. 2 Kent Com. (6th ed.) 631. 3 Robinson's Practice, 57 *& seq.* 1 Amer. Lead. Cas. (4th ed.) 639, 640. But the courts of Maine (22 Maine, 138 and 33 ib. 112,) and of Louisiana (1 Rob. 149,) recognize the doctrine advanced in Story on Agency.

(*b*) Hardy *v.* Fairbanks, 1 James (Nov. Scotia,) 432. Barry *v.* Page, 10 Gray, 398. By Cowen, J., 3 Hill, 73.

of corporations, made in their names as such officers, are generally regarded as contracts by or with the banks or corporations of which they are officers. In the Massachusetts decisions, if the case of Mann *v.* Chandler, 9 Mass. 335, be excepted, it is believed that there is no conflict.

A public agent is not personally liable on a contract made by him in behalf of the government, unless he expressly pledges his own responsibility. The reason for a different construction of similar contracts, when used by a private and when used by a public agent, is stated by Parsons, C. J., in 4 Mass. 597; namely, that "the faith and ability of the state, in discharging all contracts made by its agents in its behalf, cannot, in a court of justice, be drawn into question." (*a*)

A ratification of an act done by one who assumes to be an agent is tantamount to a prior authority. A parol contract may be ratified by an express parol recognition or by conduct of the principal which implies acquiescence, or even by his silence. The conduct of the principal may estop him to deny the agent's authority. (*b*)

"It is said to be a rule, on the ground that a ratification operates as equivalent to a previous authority, that where the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner; and thus, as an authority to execute deeds must be under seal, there cannot be a parol ratification of a deed executed without authority under seal. This is certainly applicable to express ratifications,

(*a*) See Macbeath *v.* Haldimand, 1 T. R. 172. Unwin *v.* Wolseley, ib. 674. Myrtle *v.* Beaver, 1 East, 135. Rice *v.* Chute, ib. 579. Hodgson *v.* Dexter, 1 Cranch, 345. Parks *v.* Ross, 11 Howard, 374. Tucker *v.* Justices, 13 Ired. 434. Jones *v.* Le Tombe, 3 Dallas, 384. Brown *v.* Austin, 1 Mass. 208. Copes *v.* Matthews, 10 Smedes & Marsh. 398. Blair *v.* Robinson, 3 Kerr, (N. B.) 487. Ryan *v.* Terrington, Newfoundland Rep. 29. Stanly's Ex'or *v.* Hawkins, Martin, (N. C.) 55. Chit. on Con. (10th Amer. ed.) 303–305. Story on Agency, (6th ed.) c. xi. By statutes in Massachusetts and Maine, the wardens of the state prisons are to be held personally liable on certain contracts made by them in behalf of the public. 11 Met. 138, 139, 220. 3 Pick. 17.

(*b*) Paley on Agency, (4th Amer. ed.) 171–174. Story on Agency, §§ 239–260.

and no doubt also to ratifications by such acts of recognition and acquiescence as operate merely as evidence of assent; but it can hardly be questionable that an act which operates as an estoppel *in pais*, such as the receiving and retaining of the benefit of a contract under seal, would confirm a contract made by an agent without legal authority." 1 Amer. Lead. Cas. (4th ed.) 595. See also McIntyre *v.* Parks, 11 Gray, 102. As to ratification of one partner's sealed contract by his copartner, see *post.* 124.

12. *Partners.*

Partnership (*a*) is usually defined as a contract between two or more persons to place their money, effects, labor, and skill in commerce or business and to divide the profit and loss in certain proportions. This, says Chief Justice Eyre, (2 H. Bl. 246) is a good definition as between the parties themselves, but not with respect to the world at large. For there are cases in which persons, who are not members of a firm, according to an agreement of partnership, are liable to the world at large for the debts of the firm, as if they were actual members.

Thus, a person who holds himself out as a partner, representing himself to be such, may be answerable as such. In a suit against such person it has been decided that the law is this: The defendant is liable, if the debt was contracted upon his representation of himself to the plaintiff as a partner, or upon such a public representation of himself in that character, as to lead the jury to conclude that the plaintiff, knowing of that representation, and believing the defendant to be a partner, gave him credit under that belief. (*b*) The holding one's self out to the world as a partner, as contradistin-

(*a*) The law as to Joint Stock Companies is not here considered. See the works of Wordsworth and of Thring on such companies. Nor the law of limited partnerships.

(*b*) Ford *v.* Whitmarsh, Hurlst. & Walms. 53. See also Dickinson *v.* Valpy, Lloyd & Welsb. 6, 5 Man. & Ryl. 126 and 10 Barn. & Cres. 128. Fitch *v.* Harrington, 13 Gray, 469, 475. Watson on Part. (Amer. ed.) 5. Wood *v.* Pennell, 51 Maine, 52. Hicks *v.* Cram, 17 Verm. 449. Bowie *v.* Maddox, 29 Georgia, 285. Davis *v.* White, 1 Houston, 232.

guished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership, and is incompatible with the want of knowledge that his name has been so used. (*a*) As to the facts which will or will not show such voluntary act, see Cary on Part. 18, 19. Potter *v.* Greene, 9 Gray, 309. Currier *v.* Silloway, 1 Allen, 19.

And if there be an agreement between those who are already partners and a third person, that he shall participate in the profits of the firm, as profits, such person is held liable for the debts of the firm, or if two persons agree that each shall have a share of the profits of certain business which they transact separately, they become partners, and each is liable for the debts of both, which are incurred in such business; on the ground that every one who has a share of the profits ought also to bear his share of the loss, as he takes a part of that fund on which creditors rely for their payment. (*b*) "The ground as to third persons," said Lord Eldon, "is this: It is already settled, that if a man stipulates that as the reward of his labor he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner, and in a question with third persons no stipulation can protect him from loss." Ex parte Hamper, 17 Ves. 412. And such is the present acknowledged law. Story on Part. §§ 35 *& seq.* Bisset on Part. 13 *& seq.* and the other treatises on partnership. Perry *v.*

(*a*) By Tindal, C. J. in Fox *v.* Clifton, 4 Moore & Payne, 713 and 6 Bing. 794.

(*b*) Grace *v.* Smith, 2 W. Bl. 1000. Waugh *v.* Carver, 2 H. Bl. 235. Cheap *v.* Cramond, 4 B. & Ald. 663. Hesketh *v.* Blanchard, 4 East, 144. Pott *v.* Eyton, 3 C. B. 32. Holt *v.* Kernodle, 1 Ired. 202. Dob *v.* Halsey, 16 Johns. 40. Purviance *v.* M'Clintee, 6 Serg. & R. 259. Champion *v.* Bostwick, 18 Wend. 175. Olmstead *v.* Hill, 2 Pike, 346. Young *v.* Smith, 25 Missouri, 344. 3 Kent Com. (11th ed.) 25. Chitty on Con. (10th Amer. ed.) 260 *& seq.* See an able criticism of the first two of these cases in 1 Lindley on Partnership (Amer. ed.) 93–96, and a "hope" expressed by Mr. Lindley, that this rule "will ere long cease to exist." And see 3 Best & Smith, 847.

Butt, 14 Georgia, 699. See further, that a stipulation in articles of partnership, exempting one of the partners from losses, will not affect his liability to the creditors of the firm. 2 H. Bl. 246. 3 Mees. & Welsb. 361. Story on Part. §§ 60, 61. Gow on Part. (1st Amer. ed.) 18. 1 Montagu on Part. 5. Watson on Part. (Amer. ed.) 13 *& seq.*

Another mode in which one, who is not a partner under the articles of partnership, may become liable for the debts of the firm, is by an agreement with one of the members that he shall participate in that member's share of the profits of the firm. (*a*)

Those only who are by law permitted to make other contracts can make a contract of partnership. Hence an alien enemy (unless he resides here under the license and protection of the government) cannot be a partner. (*b*) Nor a married woman, except when the law enables her to act as a feme sole; and the statutes of Massachusetts do not enable her to be a partner in a firm of which her husband is a member. Lord *v.* Parker, 3 Allen, 127. In 1 Lindley on Part. (Amer. ed.) 118, it is said, on the authority of the cases cited *ante*, 80, note *a.*, that by the law of England a lunatic is capable of being a partner. An infant may be a partner under a contract voidable like his other contracts; and his rights and liabilities under such contract are stated *ante*, 63, 64. Under the English statute, 57 Geo. III. c. 99, § 3, which enacted that no spiritual person having any dignity, prebend,

(*a*) Fitch *v.* Harrington, 13 Gray, 468. In this case the defendant relied on the statement in Colly. on Part. (3d Amer. ed.) § 194, that though a stranger cannot be introduced as a partner against the will of any of the copartners, "yet no partner is precluded from entering into a sub-partnership with a stranger. In such case the stranger may share the profits of the particular partner with whom he contracts, and not being engaged in the general partnership, will of course not be liable for their debts." This was decided not to be sustained by the cases cited by Mr. Collyer, and not to be the law. In 1 Lindley on Part. (Amer. ed.) 101, 102, the law is stated as in Collyer, but with no additional citations which support it. See 3 Ross's Lead. Cas. (Amer. ed.) 480–483. See 12 Allen, 544.

(*b*) Bisset on Part. 2, 3. Story on Part. § 9. Griswold *v.* Waddington, 15 Johns. 57 and 16 Johns. 438.

benefice, lectureship, &c., should engage in or carry on any trade or dealing for gain or profit, it was decided that such spiritual person could not lawfully be a member of a partnership formed for the purpose of carrying on the business of bankers. (*a*) A manufacturing corporation established under the laws of Massachusetts cannot form a partnership with an individual, (*b*) and among the reasons given are such as would seem to apply to all corporations. But see 1 Lindley on Part. (Amer. ed.) 119. Two or more corporations cannot enter into partnership, unless authorized by express grant or necessary implication. (*c*)

A contract of partnership in business which is contrary to law confers no right on either party against the other, but is void. And this is so not only when the business is contrary to the provisions of statutes, but also when it violates morality, religion, or public policy; as the business of pawnbrokers, or of acting plays, contrary to a statute; (*d*) or for smuggling; (*e*) or for unlawful gaming; (*f*) or for the fraudulent purpose of hindering or delaying the creditors of one of the parties in the collection of their debts; (*g*) or for the support of a house used for any unlawful business or purposes. (*h*) But third persons who are not aware of the unlawfulness of a partnership have the same rights which they have against lawful partners. Cary on Part. (Amer. ed.) 8. And as to the parties themselves, the supreme court of the United States (Catron, J. dissenting) have decided that after a partnership, which was against public policy, has been carried out, and money

(*a*) Hall *v.* Franklin, 3 Mees. & Welsb. 259. See Lewis *v.* Bright, 4 El. & Bl. 917. Tench *v.* Roberts, Madd. & Geld. 145, note.

(*b*) Whittenton Mills *v.* Upton, 10 Gray, 582. See 10 Allen, 456.

(*c*) Angell & Ames on Corp. § 272, citing N. York & Sharon Canal Co. *v.* Fulton Bank, 7 Wend. 412, and Pearce *v.* Madison & Indianapolis Railroad Co. 21 Howard, 441. See Grant on Corp. 8. 14 Barb. 471.

(*d*) Lewis *v.* Armstrong, 3 Myl. & Keen, 64, 4 Moore & Scott, 1, and 2 Crompt. & Mees. 274. Ewing *v.* Osbaldiston, 2 Myl. & Craig, 53. De Begnis *v.* Armistead, 10 Bing. 107 and 3 Moore & Scott, 511.

(*e*) Biggs *v.* Lawrence, 3 T. R. 454. Stark on Part. 48.

(*f*) Watson *v.* Fletcher, 7 Grattan, 1.

(*g*) McPherson *v.* Pemberton, 1 Jones, (N. C.) 378.

(*h*) Story on Part. § 6.

contributed by one of the partners has passed into other forms, and the results of the intended operation have been completed, a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the unlawful character of the original contract. (*a*)

Though it is essential to a partnership that there should be an agreement to share profits, it is not essential to a partnership *inter se* that there should be an agreement to share losses. Nor is it necessary that there should be any joint capital or stock. Persons laboring together for a common object, for the sake of gain and of dividing it, are partners, although each labors with his own separate means. (*b*)

A partnership between the parties themselves exists only when such is their actual intention. A mere participation in the profits will not make the parties partners *inter se*, whatever it may do as to third persons. By Story, J., in Hazard *v.* Hazard, 1 Story R. 373. In that case, certain business was transacted by A. and B., and B. was to devote his time to the management of that business and to be allowed for his services a certain part of the profits thereof as the sole reward of his services. It was decided that there was not a partnership. So when A. & B., owners of a woollen factory, agreed with C. & D. that C. & D. should furnish wool for the supply of said factory, and that A. & B. should manufacture the wool, and that the net proceeds of the cloths manufactured should be divided, in agreed proportions between the four, it was held that this agreement did not constitute a partnership. Loomis *v.* Marshall, 12 Conn. 69. Numerous other decisions, in which a like doctrine has been applied, are cited in the margin. (*c*)

(*a*) Brooks *v.* Martin, 2 Wallace, 70. See *post.* c. iv, on the subject of Unlawful Contracts.

(*b*) Fromont *v.* Coupland, 9 Moore, 319 and 2 Bing. 170. French *v.* Styring, 2 C. B. N. S. 357. Wilson *v.* Whitehead, 10 Mees. & Welsb. 503. Brown *v.* Cook, 3 N. Hamp. 64. Julio *v.* Ingalls, 1 Allen, 41. Bulfinch *v.* Winchenbach, 3 Allen, 161. Pierson *v.* Steinmyer, 4 Richardson, 309. 1 Lindley on Part. (Amer. ed.) 75, 76. Colly. on Part. §§ 16, 17.

(*c*) Turner *v.* Bissell, 14 Pick. 192. Denny *v.* Cabot, 6 Met 82. Holmes *v.*

Each partner has implied authority to bind the firm by simple contracts, made in their names, relating to the partnership, and within its general scope and ordinarily incident to its business; viz. to draw or accept bills of exchange, make or indorse promissory notes, make purchases, sales, pledges, and mortgages of goods, and compromise claims; although this may be contrary to express private arrangement among themselves. (*a*) If, however, the party to whom a single partner makes the promise of the firm has notice that the partner is violating a stipulation between the members of the firm, he cannot hold the firm on such promises.

It is only in business which relates to the partnership that a third party, who takes a contract from one partner, in the name of the firm, has a right to rely on the credit of the partnership funds. Therefore if one partner, without the consent of the others, makes a contract in the name of the firm, for his private benefit, or out of the course of the partnership business, it will not bind the firm, if the other contracting party has notice of the single partner's want of authority; as when one partner gives the note of the firm for money borrowed for his private use, or gives such note in payment of his private debt, the holder of the note, if he had notice, cannot collect it of the firm. (*b*) And it is not necessary that express notice or knowledge should be fixed on the holder of such note, or of the class of notes next to be mentioned, or on the

Old Colony Railroad Corp. 5 Gray, 58. Perrine *v.* Hankinson, 6 Halst. 181. Vanderburgh *v.* Hull, 20 Wend. 70. Salter *v.* Ham, 31 N. Y. Rep. 321. Faucett *v.* Osborn, 32 Illinois, 412. Potter *v.* Moses, 1 R. I. 430. Clement *v.* Hadlock, 13 N. Hamp. 185. Atherton *v.* Tilton, 44 N. Hamp. 456. Miller *v.* Bartlet, 15 Serg. & R. 137. Smith *v.* Perry, 5 Dutcher, 74. Bowyer *v.* Anderson, 2 Leigh, 550. Polk *v.* Buchanan, 5 Sneed, 721. Smith's Ex'or *v.* Garth, 32 Alab. 368. Brundred *v.* Muzzy, 1 Dutcher, 268. Benson *v.* Ketchum, 14 Maryl. 331. Bartlett *v.* Jones, 2 Strobhart, 471. Macy *v.* Combs, 15 Ind. 469.

(*a*) 3 Kent Com. (11th ed.) 43 *& seq.* Bisset on Part. (Amer. ed.) 40 *& seq.*, and other treatises on partnership.

(*b*) Ib. *supra.* Gallway *v.* Mathew, 10 East, 264. Vice *v.* Fleming, 1 Y. & Jerv. 227. Willis *v.* Dyson, 1 Stark. R. 164. Rooth *v.* Quin, 7 Price, 391. Baxter *v.* Clark, 4 Ired. 127. Hayward *v.* French, 12 Gray, 457

person contracting with the single partner. Circumstances from which his knowledge may be inferred, or which ought to have put him on inquiry, are sufficient to exonerate the firm; (*a*) and by a recent decision in England, Leverson *v.* Lane, 13 C. B. N. S. 278, it is adjudged, as it generally has been in this country, that the burden of proof is on him to to show that such note was given with the concurrence of the other partners.

What is within the scope of partnership business depends on the nature of that business. It is within the scope of a trading partnership (as just stated) to make contracts respecting the property in which it deals; as to give notes, &c.. in payment thereof. But it is not within its scope to guaranty others' debts or become surety for others, or to make or indorse negotiable paper for the accommodation of others. The same law is applied to contracts of this kind, which is applied to those last mentioned. (*b*)

It is held that one partner has implied authority to mortgage the whole personal property of the firm to secure creditors of the firm (*c*) or to sell and transfer the whole to a creditor of the firm, in payment of a debt (*d*) or to sell the whole, to any purchaser, at a single sale. (*e*) And there are decisions that he may assign the whole for payment of the

(*a*) Rogers *v.* Batchelor, 12 Peters, 221. Frankland *v.* McGusty, 1 Knapp, 305, 306. Dob *v.* Halsey, 16 Johns. 34. Chazournes *v.* Edwards, 3 Pick. 5. Miller *v.* Hines, 15 Georgia, 197.

(*b*) Theobald on Prin. & Surety, § 41. Duncan *v.* Lowndes, 3 Campb. 438. Lanier *v.* McCabe, 2 Florida, 32. Bank of Commerce *v.* Selden, 3 Min. 155. Andrews *v.* Planters' Bank, 7 Smedes & Marsh. 192. Bank of Tennessee *v.* Saffarrans, 3 Humph. 597. Baker *v.* Bandy, 2 Head, 197. Mauldin *v.* Branch Bank, 2 Alab. 502. Mayberry *v.* Bainton, 2 Harrington, 24. Bowman *v.* Cecil Bank, 3 Grant, 33. Gansevoort *v.* Williams, 14 Wend. 133. Rollins *v.* Stevens, 31 Maine, 454. Sweetser *v.* French, 2 Cush. 309. Brettel *v.* Williams, 4 Exch. 623. Fell on Guaranties, 18 *& seq.*

(*c*) Tapley *v.* Butterfield, 1 Met. 515. 3 Kent Com. (11th ed.) 48. Trower on Debtor and Creditor, 401. 13 Iowa, 474.

(*d*) Mabbett *v.* White, 2 Kernan, 442.

(*e*) Arnold *v.* Brown, 24 Pick. 89. Whitton *v.* Smith, 1 Freem. Ch. Rep. (Miss.) 231. Montjoys *v.* Holden, Litt. Sel. Cas. 447. Colly. on Part. § 394.

debts of the firm; (*a*) but there are also decisions to the contrary. (*b*) There are also cases in which a distinction is made between assignments in which certain creditors are preferred and those which provide for equal distribution to all creditors, and between assignments made against the objection of the other partners, and those that are made when there is a mere want of consent by the others. (*c*)

One partner has authority to compound and compromise a debt, whether due to or by the firm. (*d*)

When an insurance company constitutes a firm its agents to make contracts of insurance, one member of the firm may make such contracts; it being held that his act in that particular relation, like his acts in the management of the general business of the partnership, is in behalf of all and with the powers of all. (*e*)

It is the established law in England, and is held by several of the courts in this country, that one member of a trading firm has not implied authority to bind the others by submission of matters of the firm to arbitration; such submission being no part of the ordinary business of such firm; (*f*) nor

(*a*) Harrison *v.* Sterry, 5 Cranch, 289. Anderson *v.* Tompkins, 1 Brock. 456. M'Cullough *v.* Sommerville, 8 Leigh, 415, 431. Deckard *v.* Case, 5 Watts, 22. Hennesy *v.* Western Bank, 6 Watts & Serg. 300. Robinson *v.* Crowder, 4 M'Cord, 519. Lasell *v.* Tucker, 5 Sneed, 36. Egberts *v.* Wood, 3 Paige, 517. Sweetzer *v.* Mead, 5 Mich. 107. 1 Handy, 94.

(*b*) Kirby *v.* Ingersoll, 1 Doug. (Mich.) 477. Hughes *v.* Ellison, 5 Missouri, 463. Dickinson *v.* Legare, 1 Desaus. 537.

(*c*) Hitchcock *v.* St. John, Hoffman, 511. Havens *v.* Hussey, 5 Paige, 30. Mills *v.* Argall, 6 ib. 582. Deming *v.* Colt, 3 Sandf. 284. Kemp *v.* Carnley, 3 Duer, 1. Dana *v.* Lull, 17 Verm. 390. Bull *v.* Harris, 18 B. Monroe, 195. See further, Chit. on Con. (10th Amer. ed.) 274, 278, Story on Part. § 101, Collyer on Part. §§ 394, 395, and notes in each of these books.

(*d*) Doremus *v.* M'Cormick, 7 Gill, 49, 65. Cunningham *v.* Littlefield, 1 Edw. Ch. 104. Raymond *v.* McMackin, 4 Allen, (N. B.) 524. Story on Part. § 115.

(*e*) Kennebec Co. *v.* Augusta Ins. & Banking Co., 6 Gray, 204, 207.

(*f*) Stead *v.* Salt, 3 Bing. 101 and 10 Moore, 389. Adams *v.* Bankart, 1 Crompt. Mees. & Rose. 681 and 5 Tyrw. 425. Karthaus *v.* Ferrer, 1 Peters, 222. McBride *v.* Hagan, 1 Wend. 326. Buchoz *v.* Grandjean, 1 Mich. 367. Jones *v.* Bailey, 5 Cal. 345. *Contra* in Kentucky, Ohio, and Pennsylvania. 3 Monroe, 435, 436. Wright, 420. 12 Serg. & R. 243.

to confess judgment or consent to an order for judgment, or *cognovit actionem*, in an action against the firm. (*a*)

Though the rights and responsibilities of other partnerships attach to a partnership between attorneys at law, (*b*) yet it is held in England that it is not within the scope of the ordinary business of an attorney to receive money from a client for the general purpose of investment, and that a receipt for such purpose by one partner, without authority from the copartner, does not render the firm liable to account for the money; such a transaction being part of the business of a scrivener, and attorneys, as such, not necessarily being scriveners. But the receipt of money by one partner, for the purpose of its being invested in a particular security, is within the ordinary business of an attorney, and the firm are liable to account for it. (*c*) It is not within the scope and object of such partnership to borrow money on the credit and in the name of the firm; (*d*) nor to give promissory notes for the debts of the firm; (*e*) nor to guaranty payment of a debt due by a client, on the creditor's discharging the client from custody. (*f*) Where persons were partners as railway contractors, it was held that one of the partners had not authority to guaranty, in the name of the firm, payment for coals to be furnished to those with whom the firm had a contract for making bricks; there being no evidence that the guaranty was necessary for carrying into effect the contract of the firm. (*g*) One member of a partnership between physicians cannot bind the firm by

(*a*) Hambridge *v.* De la Crouée, 3 C. B. 742. Morgan *v.* Richardson, 16 Missouri, 409. Remington *v.* Cummings, 5 Wis. 138. Shedd *v.* Bank of Brattleborough, 32 Verm. 710. Barlow *v.* Reno, 1 Blackf. 252. Hull *v.* Garner, 31 Miss. 145. Crane *v.* French, 1 Wend. 313. Binney *v.* Le Gal, 19 Barb. 592.

(*b*) Warner *v.* Griswold, 8 Wend. 666. Smith *v.* Hill, 8 English, 173.

(*c*) Harman *v.* Johnson, 2 El. & Bl. 61, overruling the instructions given at nisi prius, 3 Car. & Kirw. 272. And See Sims *v.* Brutton, 5 Exch. 802.

(*d*) Breckinridge *v.* Shrieve, 4 Dana, 378, 379.

(*e*) Hedley *v.* Bainbridge, 3 Ad. & El. N. S. 316 and 2 Gale & Dav. 483. Levy *v.* Pyne, Car. & Marshm. 453.

(*f*) Hasleham *v.* Young, 5 Ad. & El. N. S. 833 and Dav. & Meriv. 700.

(*g*) Brettel *v.* Williams, 4 Exch. 623.

a note in their names, for the purpose of raising money. (*a*) And the same rule is applied to other partnerships which are not formed for the purpose of carrying on trade ; to wit, partnerships in farming; 22 Howard, 256, 10 Barn. & Cres. 138, 139, by Littledale, J.; in tavern-keeping; 3 Alab. 175; or in mining; 5 Man. & Ryl. 126 and 10 Barn. & Cres. 128; or for establishing and putting in operation a steam saw-mill; 2 Florida, 32, unless a jury find it to be also a trading firm. 22 Howard, *supra.*

In Vermont one partner may employ an attorney to appear in a suit against the firm, and his appearance is binding and conclusive upon the other partners. Bennett *v.* Stickney, 17 Verm. 531. *Contra* in South Carolina. Haslet *v.* Street, 2 McCord, 310. See Tripp *v.* Vincent, 8 Paige, 176.

There are decisions that one partner is bound individually by a contract, made by him in the name of the firm, which does not bind the other partners ; as in cases where, without the consent of the other partners, he undertakes to submit matters of the firm to arbitration; (*b*) or to execute a sealed instrument; (*c*) or to confess judgment; (*d*) or to give a note, &c., after dissolution of the partnership, (*e*) or where he promises in the name of the firm to pay that for which he and not the firm is liable. (*f*)

The form in which one partner can bind the firm is said by Baron Alderson to be "in the name of the partnership and in that only;" and it was decided that where two persons carried on business in the name of J. B. one of them was not liable

(*a*) Crosthwait *v.* Ross, 1 Humph. 23.

(*b*) McBride *v.* Hagan, 1 Wend. 326. Armstrong *v.* Robinson, 5 Gill & Johns. 412. Lee *v.* Onstott, 1 Pike, 206. Jones *v.* Bailey, 5 Cal. 345.

(*c*) Williams *v.* Hodgson, 2 Har. & Johns. 474. Pierce *v.* Cameron, 7 Richardson, 114. Story on Part. § 119. And see Bowker *v.* Burdekin, 11 Mees. & Welsb. 128.

(*d*) York Bank's Appeal, 36 Penn. State Rep. 458.

(*e*) Fowle *v.* Harrington, 1 Cush. 146. Tombeckbee Bank *v.* Dumell, 5 Mason, 56. Elliot *v.* Davis, 2 Bos. & Pul. 338.

(*f*) Shipton *v.* Thornton, 9 Ad. & El. 314 and Willm. Woll. & Hodges, 710.

on a bill drawn and indorsed by the other in the name of J. B. & Co. (*a*) See Nicholson *v.* Ricketts, 2 El. & El. 497.

It is said, in 1 Lindley on Part. (Amer. ed.) 258, that there is nothing in the law of England to prevent a firm from carrying on business under the name of one individual, and that if it can be shown that an individual allows his name to be used by a firm, and the firm uses it as its own, either always or only occasionally and for some purposes, paper bearing the name in question may be held by any *bonâ fide* holder for value, without notice whose paper it really is, either as the paper of the firm or as that of the individual whose name is upon it. And he cites South Carolina Bank *v.* Case, 6 Barn. & Cres. 427 (which is reported also in 2 Man. & Ryl. 459) as sustaining this statement of the law. But it was held in United States Bank *v.* Binney, 5 Mason, 176, that where a partnership is carried on in the name of one partner only, and he indorses notes in his own name, the firm is not bound thereby, unless the notes were received or discounted as notes binding the firm, upon a representation to that effect of the partner giving the same, and were made for the common benefit and business of the firm. And see, to the same effect, Manuf. & Mechanics' Bank *v.* Winship, 5 Pick. 11, and Etheridge *v.* Binney, 9 Pick. 272.

Generally a firm is not liable on a negotiable instrument made, drawn, or indorsed in the name of one partner only. There is an exception to this rule, (as seen above) when the firm transacts business in the name of one partner only, and also when one partner accepts a bill drawn on the firm, or uses his single name in other cases in which it appears on the face of the paper to have been on partnership account. (*b*) Yet though if a bill is drawn on the firm and is accepted by one partner, the firm is bound, such acceptance also binds the partner who thus accepts, and an action may be maintained against him alone. (*c*)

(*a*) Kirk *v.* Blurton, 9 Mees. & Welsb. 284, 288. See also Faith *v.* Richmond, 11 Ad. & El. 339 and 3 P. & Dav. 187.

(*b*) 3 Kent Com. (11th ed.) 44. 1 Lindley on Part. (Amer. ed.) 259. Story on Part. § 102. Mason *v.* Rumsey, 1 Campb. 384. Crozier *v.* Kirker, 4 Texas, 252. Heenan *v.* Nash, 8 Min. 407.

(*c*) Owen *v.* Van Uster, 10 C. B. 318.

One partner may bind the firm in simple contracts, by signing the name of all the partners, as well as by signing the name of the firm. (*a*)

The decisions are numerous that, as a general rule, one partner has not implied authority to bind the other partners by a sealed instrument, and that he can do so only when authorized by a sealed instrument. (*b*) Yet it is equally well settled that such instrument executed by one partner in the name of the firm, and in the presence of the copartners, who do not object, binds the firm. (*c*) And so all the partners are bound by such instrument if they assent to it before its execution, or afterwards ratify it and adopt it; and such previous authority, ratification, or adoption may be by parol. (*d*) And in Gram *v.* Seton, 1 Hall, 262, it was held that one partner may execute, in the name of the firm, an instrument under seal, necessary in the usual course of business, which will bind the firm, if the partner had previous authority; and that such authority needs not to be under seal, nor in writing, nor specially communicated for the specific purpose, but may be inferred from the subsequent conduct of the copartners implying an assent to the act. But the doctrine of these decisions is denied by the court, in Tennessee and in Delaware. (*e*)

(*a*) Holden *v.* Bloxum, 35 Miss. 381. Patch *v.* Wheatland, 8 Allen, 102. By Maule, J., 3 C. B. 794.

(*b*) Harrison *v.* Jackson, 7 T. R. 207. Blackburn *v.* McCallister, Peck, 371. Anon. 1 Taylor, 113. Doe *v.* Roe, 4 Smedes & Marsh. 261. Drumright *v.* Philpot, 16 Georgia, 424. Wilson *v.* Hunter, 14 Wis. 683, and other cases cited in the various treatises on partnership.

(*c*) Ball *v.* Dunsterville, 4 T. R. 313. Burn *v.* Burn, 3 Ves. 578. Mackay *v.* Bloodgood, 9 Johns. 285.

(*d*) Cady *v.* Shepherd, 11 Pick. 400. Swan *v.* Stedman, 4 Met. 548. Bond *v.* Aitkin, 6 Watts & Serg. 165. Skinner *v.* Dayton, 19 Johns. 513. Smith *v.* Kerr, 3 Comstock, 144. Anthony *v.* Butler, 13 Peters, 433. Halsey *v.* Fairbanks, 4 Mason, 206, 232. McDonald *v.* Eggleston, 26 Verm. 154. Pike *v.* Bacon, 21 Maine, 280. Price *v.* Alexander, 2 Greene (Iowa) 432. Day *v.* Lafferty, 4 Pike, 450. Henderson *v.* Barbee, 6 Blackf. 26. Lowery *v.* Drew, 18 Texas, 786. Darst *v.* Roth, 4 Wash. C. C. 471.

(*e*) Turbeville *v.* Ryan, 1 Humph. 113. Little *v.* Hazzard, 5 Harrington, 291. And see the opinion of Henderson, J. in Person *v.* Carter, 3 Murph. 324.

When one partner may lawfully execute a specialty that will bind the firm, one seal is sufficient and is deemed the seal of each partner, whether the name of the firm or the several names of the partners be used. (*a*) And one seal is sufficient, not only when used by partners, but by other joint obligors, or grantors of real estate. (*b*) But when a deed is executed under the authority of a power requiring it to be made under the hands *and seals* of the parties, they must use separate seals. (*c*)

It has been repeatedly decided, in this country, that one partner may bind the firm by a sealed conveyance of its personal property which he might have conveyed by simple contract. (*d*) So of his assignment of a chose in action due to the firm. (*e*) *Aliter* when he makes a contract respecting real estate of the firm; as if he executes a sealed lease that would be valid if made by oral or other parol demise. (*f*)

There is one class of sealed instruments, to wit, releases, by which one partner has implied authority to bind his copartners. It is a doctrine as old as the Year Books, that a release by one of two or more obligees bars all. 2 Rol. Ab. 410. The case of copartners in trade forms no exception to this rule. Each partner (as has been seen) is competent to sell, or to compound or discharge the demands of the firm.

(*a*) Ball *v.* Dunsterville, 4 T. R. 313. Lambden *v.* Sharp, 9 Humph. 224. Halsey *v.* Fairbanks, 4 Mason, 206, 232. Day *v.* Lafferty, 4 Pike, 450. Mackay *v.* Bloodgood, 9 Johns. 285. Potter *v.* McCoy, 26 Penn. State Rep. 458. Latouche *v.* Whaley, Hâyes & Jones, 43. 3 Kent Com. (11th ed.) 53, 54.

(*b*) Perkins, § 134. 3 Dev. 420. 5 Pick. 497, by Morton, J. Tasker *v.* Bartlett, 5 Cush. 359. 2 Washburn on Real Property (1st ed.) 570, (2d ed.) 595.

(*c*) The King *v.* Inhabitants of Austrey, 6 M. & S. 319.

(*d*) Anderson *v.* Tompkins, 1 Brock, 456. Deckard *v.* Case, 5 Watts, 22. Tapley *v.* Butterfield, 1 Met. 515. Milton *v.* Mosher, 7 Met. 244. McCullough *v.* Sommerville, 8 Leigh, 415. Robinson *v.* Crowder, 4 McCord, 519, 537. Price *v.* Alexander, 2 Greene, (Iowa) 427. Lasell *v.* Tucker, 5 Sneed, 33. Sweetzer *v.* Mead, 5 Mich. 107. 5 Hill, 113, by Cowen, J. And see *ante*, 110, note a.

(*e*) Everit *v.* Strong, 5 Hill, 163 and 7 Hill, 595.

(*f*) Dillon *v.* Brown, 11 Gray, 179.

And this he may do by deed of composition containing a release. (*a*) Such release, however, will be void when it is clearly proved to have been executed by collusion, for a fraudulent purpose, between the partner and debtor. (*b*)

There are partners who are denominated ostensible, nominal, dormant, or secret, who are thus defined in Collyer on Part. § 4: "An ostensible partner is he whose name appears to the world as that of a partner. A nominal partner is an ostensible partner having no interest in the firm. A dormant partner is he whose name and transactions as a partner are professedly concealed from the world. When he is actually unknown to the world, he is, more strictly speaking, a secret partner." See also Story on Part. § 80. Chit. on Con. (10th Amer. ed.) 262, 263. Slightly different definitions of dormant and secret partners are sometimes found, but none which affect the acknowledged law, that such partners, when discovered, are equally liable with those who are held out as partners. (*c*) In Pitts *v.* Waugh, 4 Mass. 424, recognized by Story, J. in Smith *v.* Burnham, 3 Sumner, 470, it was held that this law respecting dormant partners does not extend to partnerships

(*a*) 3 Kent Com. (6th ed.) 48, (11th ed.) 55. Watson on Part. (Amer. ed.) 165. Colly. on Part. § 468. Story on Part. § 115. Bisset on Part. (Amer. ed.) 44. And see Pierson *v.* Hooker, 3 Johns. 68. Emerson *v.* Knower, 8 Pick. 66. Morse *v.* Bellows, 7 N. Hamp. 567. Bulkley *v.* Dayton, 14 Johns. 387. United States *v.* Astley, 3 Wash. C. C. 511. Elliott *v.* Holbrook, 33 Alab. 667. Smith *v.* Stone, 4 Gill & Johns. 310. Bruen *v.* Marquand, 17 Johns. 58. Dudgeon *v.* O'Connell, 12 Irish Eq. Rep. 573. Forsyth on Composition, 15, 16. Angell on Assignments, 189.

(*b*) Colly. on Part. § 636. Bisset on Part. (Amer. ed.) 45. Gow on Part. (Amer. ed.) 97. See Gram *v.* Cadwell, 5 Cowen, 489. Eastman *v.* Wright, 6 Pick. 316. Burrill on Assignments (2d ed.) 588. 1 Story on Eq. § 681.

That when a person colludes with one partner to enable him to injure the others, they may maintain a joint action of tort against him who so colludes, see Longman *v.* Pole, Mood. & Malk. 223.

(*c*) Beckham *v.* Drake, 9 Mees. & Welsb. 79 and 11 ib. 315. Robinson *v.* Wilkinson, 3 Price, 538. Wintle *v.* Crowther, 1 Crompt. & J. 316. Cases cited *ante*, 123, as to partnerships carried on in the name of one partner only. 3 Kent Com. (11th ed.) 29–31. That a dormant partner may sue as well as be sued, see Cothay *v.* Fennell, 10 Barn. & Cres. 671. Hilliker *v.* Loop, 5 Verm. 116. 1 Lindley on Part. (Amer. ed.) 338.

formed for speculations in the purchase and sale of lands. See Brooke *v.* Washington, 8 Grattan, 248, that a dormant partner is liable for lands purchased by the acting partners, in their name, for partnership uses.

As to nominal partners, that is, those who are not really partners, but allow their names to be used, or represent themselves to be partners, the law is stated, *ante*, 113.

More will be found hereafter concerning the liabilities of dormant partners, when the dissolution of a partnership and the effects thereof are reached. *Post.* 137.

Real estate purchased with partnership funds for partnership purposes is held to be partnership property, and is to be applied, so far as is necessary, to the payment of the partnership debts, unless there is an agreement by the partners that it shall be holden for their separate use. (*a*) And this is so in this country, generally, (*b*) whether the estate is conveyed to the firm, or to a single partner or to a stranger, and whether conveyed to the firm as joint tenants or tenants in common. In whosoever's name or names the legal title may be, the estate will be treated, in equity, as belonging to the partnership; and those in whose name it stands will be held as trustees of the partnership, and accountable to the partners, according to their several shares, rights and interests in the partnership, as *cestuis que trust* and beneficiaries. (*c*) And this rule extends to the purchaser of such real estate from him in whom is the legal title, if he has notice, actual or constructive, that it is partnership property. (*d*)

(*a*) In Moran *v.* Palmer, 13 Mich. 367, the law was so held as to real estate received in payment of debts due to the firm.

(*b*) It is so now in Tennessee, Boyers *v.* Elliott, 7 Humph. 204, though the contrary was formerly held, in Yeatman *v.* Woods, 6 Yerg. 20. But in Louisiana, real estate purchased in the name of a firm becomes the joint property of the individual partners, and not partnership property liable first to the partnership debts. Bernard *v.* Dufour, 17 Louis. 359.

(*c*) Story on Part. § 92. 2 Story on Eq. § 1207. Gow on Part. (1 Amer. ed.) 49 *& seq.* 1 Sumner, 182. 4 Met. 541. 5 Met. 577, 585. 2 Humph. 459. Saxton Ch. 441. Newfoundland Rep. 396. 10 Cush. 458.

(*d*) Hoxie *v.* Carr, 1 Sumner, 192. Sigourney *v.* Munn, 7 Conn. 324.

Upon the death of one partner, the partnership is *ipso facto* dissolved; and the question has often arisen, how the real estate of the firm is thereupon to be treated. And the prevailing American doctrine is, that at law, the deceased partner's share of it descends to his heirs, with the incidents of intestate estate in other cases, as to dower of his widow, liability for his separate debts, and for the debts of his heirs, but primarily subject to the paramount right of the surviving partner to apply it, if needed, in payment of the debts of the firm, due at the time of his copartner's death, including the balance found against him at that time, on a settlement of the accounts of the firm. After the estate has been so applied, the residue thereof, if any, remains to his heirs. And if, before it is so applied, the widow has dower assigned to her, or the heirs convey it, or separate creditors of the deceased, or creditors of the heirs, levy on it, the surviving partner's rights are not thereby affected. The estate still remains subject to his disposal thereof for payment of the partnership debts. If objection is interposed to an application of the widow for dower, or of a separate creditor of the deceased, or (it is presumed) of a creditor of his heirs, for judgment, and execution to be levied on the estate, the court will not allow such application, before the surviving partner's claim is satisfied. (*a*) And when the surviving partner was insolvent, his assignees, under the insolvent law of Massachusetts, maintained a bill against the administrator, heirs and widow of the deceased partner, to compel them to transfer to them (the assignees) his share of such real estate, to be disposed of by them, for the benefit of the creditors of the firm, who might prove their demands against the surviving insolvent partner; (*b*) and the assignees were also held entitled, as against the heirs and widow of the deceased partner, to all the partnership real estate, and to the rents and profits thereof received by them, to be applied in payment of the debts of the firm. (*c*)

(*a*) Dyer *v.* Clark, 5 Met. 562. Howard *v.* Priest, ib. 582. Peck *v.* Fisher, 7 Cush. 386. And see Jarvis *v.* Brooks, 7 Foster, 37. Winslow *v.* Chiffelle, Harp. Eq. 25. Gilmore *v.* North Amer. Land Co., Peters C. C. 460.

(*b*) Burnside *v.* Merrick, 4 Met. 537.

(*c*) Howard *v.* Priest, *supra.*

That the foregoing is, in substance, the law of the several States of the Union, see, in addition to the cases already cited, those referred to in the margin. (*a*)

One partner, as seen *ante*, 119, has implied authority to sell to a *bonâ fide* purchaser all the personal property of the firm. But, like other tenants in common, he can sell and convey, or demise, no more of its real estate than his individual share thereof, unless specially authorized by his copartners. And only his individual share is transferred, though he undertakes, by the form of his contract, to transfer the whole. (*b*)

In England, "the result of all the cases," says Mr. Bisset, "is clearly this: That in the absence of a specific agreement to the contrary, (*c*) real estate purchased with partnership funds for partnership purposes is converted out and out into personal estate, and therefore goes to the personal representative, and not to the heir of a deceased partner." (*d*) As to the personal property of the firm, such is the established law, both in England and in the United States; but first subject to the payment of the debts of the firm, at the time of the deceased

(*a*) Buchan *v.* Sumner, 2 Barb. Ch. 200, 201. Abbott's Appeal, 50 Penn. State Rep. 234. Goodburn *v.* Stevens, 5 Gill, 1. Pierce's Adm'r *v.* Trigg's Heirs, 10 Leigh, 406. Sumner *v.* Hampson, 8 Ohio, 328, 365. Andrews' Heirs *v.* Brown's Adm'r, 21 Alab. 437. Arnold *v.* Wainwright, 6 Min. 358. Divine *v.* Mitchum, 4 B. Monroe, 488. Loubat *v.* Nourse, 5 Florida, 350. Sigourney *v.* Munn, 7 Conn. 11. Crooker *v.* Crooker, 46 Maine, 250. Piatt *v.* Oliver, 3 McLean, 27.

(*b*) 1 Brock. 463, by Marshall, C. J. 5 Met. 518, 519, by Shaw, C. J. Mussey *v.* Holt, 4 Foster, 248. Dillon *v.* Brown, 11 Gray, 180. Jackson *v.* Stanford, 19 Georgia, 14. Story on Part. § 101.

(*c*) It may happen, says Chief Justice Shaw, (5 Met. 579) that real estate is so purchased as to indicate that the parties intended to purchase it to be held by them separately for their separate use; as when there is an express agreement at the time of the purchase, or a provision in the articles of partnership, or where the price of such purchase is charged to the partners respectively, in their several accounts with the firm. This would operate as a division and distribution of so much of the funds, and each would take his share divested of any implied trust.

(*d*) Bisset on Part. (Amer. ed.) 33, where, and in the previous and subsequent pages, the authorities are collected. See also Colly. on Part. (3d Amer. ed.) §§ 133 *& seq.* Story on Part. §§ 92, 93. 1 Lindley on Part. (Amer. ed.) 463.

partner's death. The grounds of this doctrine are these: That partnership property is to be first applied to the payment of partnership debts, and only what remains thereof, after such payment, is liable for the separate debts of the partners, or is distributable among the legal representatives or heirs of a deceased partner, and that the share of one partner is only the balance that may be found in his favor, after a settlement of the concerns of the partnership. (*a*) In England, after the death of one partner, both the real and personal estate of the firm is taken by the surviving partner, and all disposed of as personalty; (*b*) in this country, so much of the real estate, as is not required for payment of partnership debts, is disposed of like other real estate of the deceased partner.

An action at law cannot be maintained by one partner against the firm to recover a debt due to him from the firm; for in an action against the firm all the known partners must be made defendants, and no one can be plaintiff and defendant in a suit at law. (*c*) For the same reason one firm cannot have an action against another, if there be one or more persons partners in both firms. (*d*) But if a firm gives to one of the partners a negotiable instrument, he may indorse it to a third person who may maintain an action thereon against the firm; for, says Shaw, C. J., "it is the promise of all to the order or appointment of one, and when the appointment is made by indorsement, it is a valid contract with the

(*a*) 1 Lindley on Part. (Amer. ed.) 463. Mart. & Yerg. 309. 5 Met. 575, 576, 585. 4 Wis. 102. 4 McLean, 186, 236.

(*b*) That is, it is converted into money. Story on Part. § 350. Gow on Part. (1st Amer. ed.) 316. 3 Kent Com. (11th ed.) 73, 74. "It is a principle that all property, whether real or personal, is subject to a sale on a dissolution of the partnership." By Sir John Leach, Tamlyn, 261. This probably is true only when there is not an agreement between the representatives of the deceased partner and the survivor, that the latter may retain the property *in specie*, on paying them therefor the true value of their adjusted share.

(*c*) Story on Part. § 221. 1 Lindley on Part. (Amer. ed.) 181, 182. Addison on Con. (2d Amer. ed.) 728.

(*d*) Ib. Bosanquet *v.* Wray, 6 Taunt. 597 and 2 Marsh. 319. Portland Bank *v.* Hyde, 2 Fairf. 196.

indorsee." (*a*) And such indorsement may be made after the partnership is dissolved. Temple *v.* Seaver, 11 Cush. 314. So if one or more persons be partners in two firms, and one firm give a negotiable note to the other, the firm to which the note is given may indorse it to a third party, who may enforce payment. Fulton *v.* Williams, 11 Cush. 108.

As to actions at law between partners concerning the accounts of the firm, it is the established general rule, not only in England but also in this country, that they cannot be maintained; that the question whether, on the state of the accounts of the firm, one or more partners be indebted to a copartner, is to be determined only by a court of equity; and the assigned reason is, that a court of law cannot do effectual justice between the parties. (*b*) The action of account, however, where that action exists, is still open to one partner against another, but is almost entirely disused. 1 Montagu on Part. 45. 3 Johns. Ch. 360, 361. 1 Story on Eq. § 662. (*c*) But there are exceptions to the above-mentioned general rule. It is not applied to cases where partners have finally balanced all their accounts and a certain sum has been found due to one of them; but in such cases he may sue at law the partner

(*a*) Thayer *v.* Buffum, 11 Met. 399. See also Blake *v.* Wheadon, 2 Haywood, 109. Smith *v.* Lusher, 5 Cowen, 688. Richards *v.* Fisher, 2 Allen, 527.

(*b*) Colly. on Part. § 264. Bisset on Part. (Amer. ed.) 78. 2 Lindley on Part. (Amer. ed.) 585–589. Chit. on Con. (10th Amer. ed.) 270. 1 Story on Eq. c. xv. Chase *v.* Garvin, 19 Maine, 211. Beach *v.* Hotchkiss, 2 Conn. 425. Williams *v.* Henshaw, 11 Pick. 79. Shattuck *v.* Lawson, 10 Gray, 405. Young *v.* Brick, Pennington, (2d ed.) 490. Robinson *v.* Green's Adm'rs, 5 Harrington, 115. Westerlo *v.* Evertson, 1 Wend. 532. Kennedy *v.* McFadon, 3 Har. & Johns. 194. Ozeas *v.* Johnson, 4 Dallas, 434 and 1 Binn. 191. Lamalere *v.* Caze, 1 Wash. C. C. 435. Gouldsborough *v.* McWilliams, 2 Cranch C. C. Rep. 401. Lawrence *v.* Clark, 9 Dana, 257. Austin *v.* Vaughan, 14 Louis. Ann. Rep. 43. Philips *v.* Lockhart, 1 Alab. 521. Frink *v.* Ryan, 3 Scammon, 322. Lower *v.* Denton, 9 Wis. 268. Bailey *v.* Starke, 1 English, 191. And such was the law of Indiana until the distinction between law and equity was abolished in that State. Duck *v.* Abbott, 24 Ind. 349. See Halderman *v.* Halderman, Hempstead, 559.

(*c*) In Massachusetts the action of account is abolished by statute. Rev. Sts. c. 118, § 43. Gen. Sts. c. 129, § 1.

against whom such balance has been struck. Bisset on Part. (Amer. ed.) 83. 2 Lindley on Part. (Amer. ed.) 582. 19 Ohio, 44. 13 Alab. 214. 3 Ired. 300. 3 Pick. 423. 11 ib. 81. 10 Iowa, 332, and numerous other books. And it is held that an action may, in such cases, be maintained by one partner against another, when the judgment will be an entire termination of the partnership concerns, although every item of the accounts of the firm is not included in the balance struck or agreed upon in his favor. Thus, where it appeared in such case, that there was one debt of the firm which had not been paid, and the plaintiff released to the defendant the amount of that debt, (*a*) and where outstanding demands of the firm, which were not brought into the settlement of their accounts, were shown not to be collectible, an action was sustained. (*b*)

The decisions are not uniform on the question whether a suit at law can be maintained by one partner against another, on a balance of the partnership accounts, upon the other's promise of payment implied by law, or only on his express promise. In England, an express promise is not required; (*c*) nor in New Jersey; (*d*) nor in Massachusetts. (*e*) *Contra* in New York; (*f*) in South Carolina, (*g*) and in Illinois. (*h*) In Pennsylvania, opposite extrajudicial opinions have been expressed, (4 Watts & Serg. 16 and 4 Barr, 283,) but it is not known that the question has been decided.

There are various other cases in which one partner may maintain a suit at law against a copartner. See 2 Lindley on Part. (Amer. ed.) 578–585.

(*a*) Brinley *v.* Kupfer, 6 Pick. 179. Sikes *v.* Work, 6 Gray, 433. See also Musier *v.* Trumpbour, 5 Wend. 274. Clark *v.* Dibble, 16 Wend. 601. Byrd *v.* Fox, 8 Missouri, 574. Robinson *v.* Curtis, 1 Stark. R. 78, 79.

(*b*) Williams *v.* Henshaw, 11 Pick. 79.

(*c*) Rackstraw *v.* Imber, Holt N. P. 368. Wray *v.* Milestone, 5 Mees. & Welsb. 21.

(*d*) Jaques *v.* Hulit, 1 Harrison, 38, 41.

(*e*) Fanning *v.* Chadwick, 3 Pick. 420.

(*f*) Casey *v.* Brush, 2 Caines, 293. Westerlo *v.* Evertson, 1 Wend. 532.

(*g*) Course *v.* Prince, 1 Rep. Const. Ct. 416.

(*h*) Chadsey *v.* Harrison, 11 Illinois, 151.

Such action is maintainable, when stipulations contained in the articles of partnership are violated by one partner. (*a*) As where, in their articles, partners stipulate to settle periodically and to make a final adjustment of their concerns at the expiration of the partnership, and one partner refuses so to do, (*b*) or where one partner engages to furnish a certain amount of money or stock, for the purposes of the partnership, and fails to furnish it. (*c*) So where one partner gives to another a promissory note for payment of part of the capital stock, he is liable to the other in an action at law on the note. (*d*) Where one partner received money to the separate use of a copartner and wrongfully carried it to the partnership account, he was held liable to his copartner in an action for money had and received. (*e*) And where one partner gave a note of the firm for his private debt, which note the firm were compelled to pay, it was held that the copartners might recover of him, in an action for money paid, the amount paid on the note. Cross *v.* Cheshire, 7 Exch. 43. See the same rule applied in the earlier case of Osborne *v.* Harper, 5 East, 225. Where one partner, after the partnership was dissolved, paid the debts of the firm and took a note of his copartners in payment thereof, it was held that he might maintain an action on the note, though he had received the books and accounts of the firm for collection and settlement; it not appearing that he did not pay those debts with his separate funds. (*f*) And where two partners are about closing their concerns, and it is manifest that on a final settlement a balance will be against one of them, though the exact

(*a*) Watson on Part. (Amer. ed.) 292. Murphy *v.* Crafts, 13 Louis. Ann. Rep. 519.

(*b*) Foster *v.* Allanson, 2 T. R. 482, by Buller, J. Duncan *v.* Lyon, 3 Johns. Ch. 362. Cary on Part. (Amer. ed.) 29.

(*c*) Venning *v.* Leckie, 13 East, 7. Gale *v.* Leckie, 2 Stark. R. 107. Addison on Con. (2d Amer. ed.) 729, 730. Vance *v.* Blair, 18 Ohio, 532. Ellison *v.* Chapman, 7 Blackf. 224. Terrill *v.* Richards, 1 Nott & McCord, 20. See also Thomas *v.* Pyke, 4 Bibb, 418.

(*d*) Grigsby's Ex'r *v.* Nance, 3 Alab. 347.

(*e*) Smith *v.* Barrow, 2 T. R. 476.

(*f*) Lyon *v.* Malone, 4 Porter, 497.

amount of that balance cannot be ascertained, and he gives to the other a promissory note, not exceeding the amount of the balance that will be due from him on a final settlement, he is liable on such note. (*a*)

There are also cases in which one partner may sue another at law respecting matter which, though it relates to the partnership business, is separated by special agreement of the partners from all other matters in question between them, and should be determined without reference to the accounts of the firm. Broom on Parties, § 76. Bisset on Part. (Amer. ed.) 84. 2 Lindley on Part. (Amer. ed.) 582. Story on Part. § 219. See Wiggin *v.* Cumings, 8 Allen, 353. Chamberlain *v.* Walker, 10 Allen, 429. Thus where upon the dissolution of a partnership between two only, it was agreed by them to divide the materials of the firm, each taking one half in value, article by article, according to a valuation to be made, and after the valuation was made, one of them agreed to take the whole at the valuation, and took possession thereof, it was decided that he was liable to the other, in an action for goods sold and delivered, for one half the value of those materials. (*b*) And where one partner promised his copartner to repay him from the partnership funds, if he would accept and pay certain bills of exchange drawn on the firm, and he did so, it was held that the money in the other partner's hands became separated from the partnership account, and that his copartner might maintain an action against him for money had and received. (*c*) And where two partners had a controversy concerning the settlement of a part of the concerns of the firm, and they submitted the matter to arbitrators, who awarded that one should pay the other a certain sum, which he promised to pay, it was decided that he was liable to the other in an action on the award, upon his refusal to pay. (*d*) And when partners, during the continuance of the partnership, make up an account of their concerns

(*a*) Rockwell *v.* Wilder, 4 Met. 556.
(*b*) Jackson *v.* Stopherd, 2 Crompt. & Mees, 361 and 4 Tyrw. 330.
(*c*) Coffee *v.* Brian, 3 Bing. 54 and 10 Moore, 341.
(*d*) Gibson *v.* Moore, 6 N. Hamp. 547.

at intervals, and one of them gives to the other a note for the true balance then found in his favor, and such balance is not carried forward to a new account, but is treated as a liquidation of accounts existing at the date of such accounts, he is held liable to an action on such note. (*a*)

Dissolution of a partnership is effected by various causes which are set forth in the several treatises on partnership, and which will not be here enumerated. Only the main incidents and effects of a dissolution are now to be stated.

Partners, after a voluntary dissolution, have the same power which they before had to perform any act relating to their debts and contracts that existed at the time of dissolution, and they remain jointly liable for all debts and engagements contracted by them before that time. (*b*) And upon dissolution by the death of one partner, all the previous rights, duties and liabilities of the firm attach to the survivor. (*c*) But, after dissolution, one partner cannot, unless specially authorized, bind his copartner, by any new contract in the name of the firm, even to pay an acknowledged debt of the firm; (*d*)

(*a*) Preston *v.* Strutton, 1 Anstr. 50. Copley *v.* Richardson, 4 Louis. Ann. Rep. 512. See also Brierly *v.* Cripps, 7 Car. & P. 709. There is, however, a *dictum* of Best, C. J. in 2 Bing. 172, that it is only on a final balance of all the partnership accounts, that one partner can maintain an action against another to recover the balance found in his favor; that "a balance during the continuance of the concern will not do."

(*b*) Bisset on Part. (Amer. ed.) 59 *& seq.* 1 Lindley on Part. (Amer. ed.) 298, 299. Story on Part. c. xiv. 3 Kent Com. (11th ed.) 72, 73.

(*c*) Cary on Part. (Amer. ed.) 50. 5 Met. 576. Shields *v.* Fuller, 4 Wis. 102. Major *v.* Hawkes, 12 Illinois, 298.

(*d*) Bisset, *supra.* Fisk *v.* Mead, 18 Louis. 568. White *v.* Tudor, 24 Texas, 639. Burr *v.* Williams, 20 Ark. 171. Cunningham *v.* Bragg, 37 Alab. 436. Humphries *v.* Chastain, 5 Georgia, 166. Bank of S. Carolina *v.* Humphreys, 1 McCord, 388. Fowler *v.* Richardson, 3 Sneed, 508. Merrit *v.* Pollys, 16 B. Monroe, 355. Hamilton *v.* Seaman, 1 Carter (Ind.) 185. Palmer *v.* Dodge, 4 Ohio State Rep. 21. Hurst *v.* Hill, 8 Maryl. 399. Bell *v.* Morrison, 1 Peters, 370, 371. Lockwood *v.* Comstock, 4 McLean, 383. National Bank *v.* Norton, 1 Hill (N. Y.) 572. Parker *v.* Macomber, 18 Pick. 505. Fellows *v.* Wyman, 33 N. Hamp. 351. Perrin *v.* Keene, 19 Maine, 355. But in Kemp *v.* Coffin, 3 Greene (Iowa) 190, it was held that after a dissolution, the settling partner might give a note in the name of the firm to liquidate a partnership debt.

nor, by a new promise, render them liable to pay a debt barred by the statute of limitations. (*a*) But he may indorse a note given to him by the firm before dissolution, so as to enable the indorsee to maintain an action thereon against the firm. *Ante*, 131.

Not only are partners, after dissolution, generally entitled to the rights, and subject to the liabilities of the firm, as to matters preceding the dissolution, but they are sometimes held liable on contracts made after the dissolution, to the same extent as they would have been if the partnership had not been dissolved. For it is established law that, as to the public, a dissolution of partnership does not avail the firm, unless notice thereof be given; and in England such notice is required to be given in the *Gazette*, published in London. Hence, when one partner retires without such notice being given, and the name of the firm is afterwards continued, he who deals with the firm, afterwards, has a legal remedy against all the original partners, unless he had actual notice or knew that one of them had retired. And this, as seen *ante*, 63, 64, is so in case of an infant as well as of an adult partner. But if such public notice is given, it will exonerate the retiring partner from liability on contracts made by the firm, after dissolution, with those who were not formerly their customers; even though the remaining partners continue business under the name of the old firm, if done without the retiring partner's consent. Notice, however, or knowledge of the dissolution, is necessary to the discharge of a retiring partner from liability on the subsequent contracts of the firm with those who dealt with and trusted them, before the dissolution. (*b*)

(*a*) Powell on Ev. (2d ed.) 157, 158. 1 Taylor on Ev. 611, 612. Angell on Lim. (3d. ed.) c. xxiii. 1 Greenl. on Ev. § 112 and note. Story on Part. § 324 and note. Brewster *v.* Hardeman, Dudley, (Georgia) 139.

(*b*) Colly. on Part. (3d Amer. ed.) §§ 120, 530–535, 690. 1 Lindley on Part. (Amer. ed.) 294, 295. Bisset on Part. (Amer. ed.) 66–68. Story on Part. § 320 *& seq.* Chit. on Con. (10th Amer. ed.) 285 *& seq.*, and American cases there cited. Kirkman *v.* Snodgrass, 3 Head, 370. Lowe *v.* Penny, 7 Louis. Ann. Rep. 356. In Reilly *v.* Smith, 16 Louis. Ann. Rep. 31, it was held that notice of the retirement of a partner, published in a newspaper to

After a voluntary dissolution, of which one who had previous dealings with the firm and held its promissory note had no knowledge, it was held that part payment of the note by one of the partners, within six years from its date, took it out of the operation of the statute of limitations, as it would if the payment had been made during the continuance of the partnership. (*a*)

Notice of a dormant partner's retirement from the firm is not generally necessary to exonerate him from subsequent liabilities incurred by the firm. (*b*) But such notice must be given to those, if any, who knew him to be a partner. (*c*)

The death of a partner is held to be "a public fact." Notice thereof is, therefore, not required to be given by the surviving partners, in order that they may avoid liabilities in consequence of the subsequent misuse of the partnership name by one of them. Thus, where J., H., C. and L. were partners, and the style of the firm was J., H. & Co., and C. died, and L. afterwards signed a note in the name of J., H. & Co., without the consent or knowledge of J. and H., and the payee of the note brought an action thereon against the surviving partners, it was decided that J. and H. could not be held to pay it, although they had not given notice of the dissolution of the partnership by the death of C. (*d*)

which a customer of the firm was a subscriber, was not of itself legal notice to him of the dissolution of the partnership; that actual notice must be brought home to him. And see Vernon *v.* Manhattan Co., 17 Wend. 524. Colly. on Part. § 532. When no notice of a dissolution has been published, nor knowledge thereof brought home to a party who is to be affected by it, evidence of the mere notoriety of the dissolution is not admissible to prove such notice. Pitcher *v.* Barrows, 17 Pick. 361.

(*a*) Sage *v.* Ensign, 2 Allen, 245. Tappan *v.* Kimball, 10 Foster, 136.

(*b*) Colly. on Part. § 536. By Patteson, J. 4 B. & Ad. 177. Kelley *v.* Hurlburt, 5 Cowen, 534. Scott *v.* Colmesnil, 7 J. J. Marsh. 423. Armstrong *v.* Hersey, 12 Serg. & R. 315. Grosvenor *v.* Lloyd, 1 Met. 19. In Scotland, however, notice must be given to a party dealing with the firm, as well in cases of a dormant partner's retiring, as in other cases. Hay *v.* Mair, 3 Ross's Lead. Cas. (Amer. ed.) 440.

(*c*) Bisset on Part. (Amer. ed.) 67, 68. Evans *v.* Drummond, 4 Esp. R. 89. Park *v.* Wooten's Ex'rs, 35 Alab. 242.

(*d*) Marlett *v.* Jackman, 3 Allen, 287. In this case, Bigelow, C. J. said:

13. *Executors and Administrators.*

Executors and administrators have no power to charge the decedent's estate by any contract originating with themselves;

"It is remarkable that no case can be found, either in this country or in England, in which the question has been adjudicated, whether in case a partnership is dissolved by death, the surviving partners are bound to give notice of such dissolution in order to avoid a liability occasioned by the subsequent misuse of the partnership name by one of the firm. The adjudged cases have gone no further than to hold that neither the estate of the deceased partner nor his heirs or personal representatives can be held on a contract entered into in the name of the firm subsequently to his death, although no notice of the dissolution of the firm has been given. Vullamy *v.* Noble, 3 Meriv. 614. Webster *v.* Webster, 3 Swanst. 490, note. Caldwell *v.* Stileman, 1 Rawle, 212. Washburn *v.* Goodman, 17 Pick. 519, 526. Two text writers, however, of great learning and authority, have laid down the rule, that where a copartnership is dissolved by the death of one of the copartners, no notice of the dissolution is necessary, and that the surviving members are not bound by any new contract entered into by one of the firm, in the copartnership name after such dissolution, although it is made with a person who had previously dealt with the firm and had no notice or knowledge that it was terminated by the death of one of the members. 3 Kent Com. (6th ed.) 63, 67. Story on Part. §§, 319, 336, 339. The same doctrine is stated by the American editor of Colly. on Part. (3d Amer. ed.) §§ 120, 538. Certain it is, that the reason of the rule which requires, in cases of the dissolution of a firm caused by the voluntary act of the parties, or by circumstances which would necessarily come within the knowledge of the copartners, but might be unknown to third persons, that notice of it should be given, in order to relieve the members from future responsibility, does not apply where the copartnership is terminated by death. The true doctrine on this point is well stated by Mr. Bell, in his learned Commentaries on the Laws of Scotland. 'The opinion has certainly prevailed very generally, that no notice is necessary; that the partnership, according to the common course of the law, is dissolved by death; that those who deal with the company are held to know the state of their debtor; and that the publication of all deaths, according to the common custom of the world, places this sort of information within the reach of ordinary care and diligence.' 2 Bell Com. (4th ed.) § 1234. The same principle is stated in a case adjudicated by the Court of Session in Scotland subsequently to the publication of Mr. Bell's treatise. 'Death operates a dissolution of itself; and being a public fact all men are bound to know it.' Christie *v.* Royal Bank, 1 Cases in Court of Session (1839) 745, 765. In this respect, the consequences of a dissolution by death are the same as one occasioned by war between two countries of which copartners are respectively citizens. No notice is required to be given when a fact is of a public nature. Griswold *v.* Waddington, 15 Johns. 57. S. C. 16 Johns. 438."

but their contracts in the course of administration, or for payment of the decedent's debts, render themselves personally liable, if made on sufficient consideration. If, therefore, they give promissory notes for his debts, or, on selling his real estate, under license granted by the proper authority, they covenant concerning the title thereto, although they profess to do it as executors or administrators, or in their capacity as such, they are personally liable to an action thereon, and to a judgment, *de bonis propriis*, whether they have or have not assets. (*a*) The assets of persons deceased cannot be lawfully affected by the contracts of their personal representatives, except in case of an executor, by provision in his testator's will.

Though executors and administrators, who have sufficient assets, are legally bound, without any express promise, to pay the decedent's debts, yet if they, on sufficient consideration, expressly promise payment, they may be held personally on such promise. But a general promise by them to pay a claim against the decedent is void, unless there be assets or some other legal consideration for the promise. (*b*) Forbearance to sue was early held to be a sufficient consideration for an executor's express promise to pay a demand on the testator's estate. (*c*) "If" says Lord Eldon, "an executor or administrator think fit to refer generally all matters in dispute to arbitration without protesting against the reference being taken as an admission of assets, it will amount to an admission." (*d*) And a bond given to the judge of probate, by an executor, to pay

(*a*) By Buller, J. 1 T. R. 479. Goring *v.* Goring, Yelv. 11. Childs *v.* Monins, 5 Moore, 282 and 2 Brod. & Bing. 460. Sumner *v.* Williams, 8 Mass. 162. See also Aven *v.* Beckom, 11 Georgia, 1. McDonald *v.* McDonell, 6 Queen's Bench Rep. (Upper Canada,) 109.

(*b*) Reech *v.* Kennegal, 1 Ves. Sen. 123, 126. Pearson *v.* Henry, 5 T. R. 6. 2 Lomax on Ex'rs, (2d ed.) 453. Williams *v.* Chaffin, 2 Dev. 333.

(*c*) 1 Rol. Ab. 28. Fish *v.* Richardson, Yelv. 55 and Cro. Jac. 47. Davis *v.* Wright, 1 Vent. 120 and 2 Lev. 3. 2 Williams on Ex'rs, (4th Amer. ed.) 1513 *& seq.* Concerning forbearance, as a consideration for a promise, see *post.* c. iii.

(*d*) 2 Rose, 50, 51. See also 7 T. R. 453. 5 Bing. 200 and 2 Moore & Payne, 345.

the testator's debts and legacies, is an admission of assets, which he is estopped to deny. (*a*)

An express promise by an administrator to pay a groundless claim on the intestate's estate is void. (*b*) He has no authority to enter into any arrangement to bind the estate to pay claims thereon which the intestate was under no legal obligation to pay. (*c*)

If an action on a claim upon the decedent's estate is brought against an executor or administrator, after the time limited by statute for the bringing of such action, he is bound to interpose the statute in defence. He cannot lawfully bind the estate, and affect the heirs, by suffering a judgment in such action. By so doing, without the heirs' consent, he may render himself liable to them for unlawful administration. (*d*) A license granted to him to sell real estate of the decedent to pay a debt barred by such statute is void as against the heirs and legatees. (*e*)

But an executor or administrator is not bound to interpose the general statute of limitations in bar of a demand against the decedent, which is otherwise well founded, and his omission to do so does not render him liable for waste. (*f*) And

(*a*) Stebbins *v.* Smith, 4 Pick. 97. See also Jones *v.* Richardson, 5 Met. 247. Alger *v.* Colwell, 2 Gray, 404. Colwell *v.* Alger, 5 Gray, 67.

(*b*) Shepherd *v.* Young, 8 Gray, 152.

(*c*) By Shaw, C. J. 10 Pick. 373.

(*d*) Brown *v.* Anderson, 13 Mass. 201. Dawes *v.* Shed, 15 Mass. 6. Emerson *v.* Thompson, 16 Mass. 429. Lamson *v.* Schutt, 4 Allen, 360. Terry *v.* Briggs, 12 Cush. 319. Wiggins *v.* Adm'r of Lovering, 9 Missouri, 259. Heard *v.* Meader, 1 Greenl. 156. And see remarks of Jackson, J. 13 Mass. 165.

(*e*) Heath *v.* Wells, 5 Pick. 140 and previous decisions there cited. Thayer *v.* Hollis, 3 Met. 369. In this last case the executor, who obtained the license, was one of the testator's heirs, and it was held that the sale under the license was valid as against him and his heirs.

(*f*) By Lord Hardwicke, 1 Atk. 526. By Lord Eldon, 15 Ves. 498. By Lord Lyndhurst, 3 Y. & Coll. Exch. 211, note. By Wood, Vice-Chancellor, 4 Kay & Johns. 169, denying a *dictum* to the contrary by Bayley, J. in 9 Dowl. & Ryl. 43. By Jackson, J. 13 Mass. 164. 16 Mass. 431. By Coulter, J. 4 Barr, 152. 1 Eq. Cas. Abr. 305, pl. 13. Miller *v.* Dorsey, 9 Maryl. 317. Batson *v.* Murrell, 10 Humph. 301. Smith's Estate, 1 Ashm.

if he is a creditor of the decedent, inasmuch as he cannot have an action to recover his claim, he is allowed, upon a settlement and distribution of the estate, to retain the amount justly due to him, though it is barred by the statute. (*a*) The contrary, however, was decided in Rogers *v.* Rogers, 3 Wend. 503, where the claim was barred by the statute during the decedent's life. And where a residuary legatee brought a suit in chancery for the purpose of having the testator's property duly administered, and the trusts of the will executed, and the court decreed that an account of the debts should be taken by a master, and a creditor offered to prove a claim that was barred before the testator's death, and the executor did not object to the proof thereof, but the residuary legatee interposed the objection, and the master disallowed the claim, it was decided, upon the creditor's appeal, that when there has been a decree taking possession of a decedent's estate and vesting it in the court for distribution, and the accounts are directed to be taken by a master and the assets distributed by him, the objection that a claim is barred by the statute of limitations may be taken by any person interested. (*b*) To the like effect are the decisions in Batson *v.* Murrell, 10 Humph. 301, and in Hoch's Appeal, 21 Penn. State Rep. 280, as to the right of creditors and legatees to prevent an executor or administrator from retaining assets to pay his own claim which is barred by the statute.

By the law of New York, as stated in Willard on Executors,

352. Ritter's Appeal, 23 Penn. State Rep. 95. Hodgdon *v.* White, 11 N. Hamp. 208. See *contra*, Patterson *v.* Cobb, 4 Florida, 481, and Tunstall *v.* Pollard's Adm'r, 11 Leigh, 1, 38.

(*a*) Matthews on Ex'rs, (Amer. ed.) 66. 2 Williams on Ex'rs, (4th Amer. ed.) 903, 904. 1 Lomax on Ex'rs, (2d ed.) 654. Stahlschmidt *v.* Lett, 1 Smale & Giffard, 415. Hill *v.* Walker, 4 Kay & Johns. 166. Knight's Distributees *v.* Godbolt, 7 Alab. 304.

(*b*) Shewen *v.* Vanderhost, 1 Russ. & Myl. 347 and 2 ib. 75. Warren *v.* Paff, 4 Bradford, 265. See also Peck *v.* Wheaton's Heirs, Mart. & Yerg. 360. Moore *v.* Hardison, 10 Texas, 467. In Alabama, a license will not be granted to an administrator to sell the intestate's land to pay his debts that are barred by the statute if the heirs object. Heirs of Bond *v.* Smith, 2 Alab. 660.

317, (citing Willcox *v.* Smith, 26 Barb. 316 and other cases, and the revised statutes of that State) the admission, by an executor or administrator, of a claim against the decedent, which is barred by the statute, shall not be deemed to revive the same, so as in any way to affect his real estate. And see opinion of Chancellor Kent, in 6 Johns. Ch. 373.

It has long been held that an executor or administrator, by an express promise to pay a claim against the decedent, to which the statute of limitations might be well pleaded in bar, may charge his estate with payment. And while a promisor's mere acknowledgment that a claim once due was unpaid was regarded as sufficient evidence of a new promise, and was held to take a case out of the operation of the statute, it also seems to have been held by some of the courts in this country, that such mere acknowledgment by his executor or administrator would have the like effect. (*a*) But since the effect formerly given to such bare acknowledgment has almost universally ceased to be allowed, and only his express promise, or what is tantamount, will now charge him, it is believed that his personal representative cannot bind his estate in any other manner. (*b*) By the English law, nothing short of an express promise of payment, by such representative, will avoid the statute bar. (*c*) It is also there held, though there are extrajudicial *dicta* to the contrary, that if there are two or more executors or administrators, the express promise of all is necessary to the avoidance of the statute. (*d*) In this country there are cases in which the promise of one only is held sufficient, (*e*) and there are cases to the contrary. (*f*)

(*a*) See the Treatises on the Statute of Limitations.

(*b*) Oakes *v.* Mitchell, 15 Maine, 360. Bunker *v.* Athearn, 35 Maine, 364. Peck *v.* Botsford, 7 Conn. 172. Knox *v.* McCall's Adm'r, 1 Brevard, 531.

(*c*) Tullock *v.* Dunn, Ry. & Mood. 416. 2 Williams on Ex'rs, (4th Amer. ed.) 1659. But see opinion of Booth, C. J. in 4 Harrington, 373, 374.

(*d*) Ry. & Mood. *supra*. Scholey *v.* Walton, 12 Mees. & Welsb. 514.

(*e*) 2 Haywood, 7. Emerson *v.* Thompson, 16 Mass. 429. Hord *v.* Lee, 2 Monroe, 131 and 4 ib. 36. Head's Ex'r *v.* Manners' Adm'rs, 5 J. J. Marsh. 255. Johnson *v.* Beardslee, 15 Johns. 3. Lomax *v.* Spierin, Dudley, (S. C.) 365. By Nelson, J. 19 Wend. 493.

(*f*) See 5 Hill, 239. 14 Wend. 90. 5 Barb. 407. 3 Alab. 599.

And where one of two joint and several makers of a promissory note died, and his executor paid a part thereof (which had the effect of a new promise,) it was held that this did not take the debt out of the statute, as to the survivor. (*a*) But part payment by an administrator takes a case out of the statute, as to the intestate's estate. (*b*)

A distinction is made in some courts between a claim against a decedent which is barred by the statute, at the time of his death, and a claim not then barred; and it is decided that though the executor's or administrator's promise will avoid the statute bar in the latter case, it will not in the former. It was on this distinction that the court in Pennsylvania decided the two cases of Fritz *v.* Thomas, 1 Whart. 66 and Forney *v.* Benedict, 5 Barr, 225. (*c*) And in Richmond's Case, 2 Pick. 567, it was decided that an administrator could not revive a debt which the intestate owed him, but which was barred when the intestate died; because he could not show a renewal of the promise.

In Fritz *v.* Thomas, *supra*, where the debt was barred when the intestate died, it was decided that an administrator, sued in his capacity as such, for a debt of the intestate, might plead the statute of limitations in bar of the action, and successfully defend, although he had made such acknowledgment of the debt as would, if made by the intestate, have taken the case out of the statute. And see Scott *v.* Hancock, 13 Mass. 165 and Haselden *v.* Whitesides, 2 Strobhart, 353. Sanders *v.* Robertson, 23 Miss. 389. If an administrator were sued personally on a promise to pay a debt thus barred, he

(*a*) Slater *v.* Lawson, 1 B. & Ad. 396. See also Atkins *v.* Tredgold, 2 Barn. & Cres. 23 and 3 Dowl. & Ryl. 200. Smith *v.* Townsend, 9 Richardson, 44. Root *v.* Bradley, 1 Kansas, 437. Disborough *v.* Heirs of Bidleman, Spencer, 275 and 1 Zab. 677.

(*b*) Niemcewicz *v.* Bartlett, 13 Ohio, 271. Foster *v.* Starkey, 12 Cush. 324.

(*c*) See also 6 Foster, 497. 1 Harrington, 209. 17 Georgia, 96. Harper, 305. Dudley (S. C.) 118. 11 Smedes *v.* Marsh. 20. 4 Florida, 487. 10 Texas, 467. In Ram on Assets, (Amer. ed.) 296, the law of England is thus stated: "An executor may, it is certain, take a case out of the statute of limitations, by his acknowledgment of, and promise to pay, the particular debt sought to be recovered, out of the assets; and whether the debt was barred at the testator's death, or six years have expired since that time."

could not be charged, unless his promise should be shown to have been made on some consideration sufficient to make the debt his own.

It is the general rule that executors and administrators are liable, so far as they have assets, on all personal contracts of the decedent, upon which he might have been sued in his lifetime, and also on such contracts of his, for the doing of future acts, as are not broken until after his death. (*a*) But when his contract requires, from its nature or for other reasons, to be performed by him or to him personally; as if he promises to marry, or compose a book or make a painting, or engages to pay another, during a specified time, for attending on his person, and for no other service, and dies before that time expires, his personal representatives are held liable for breaches of his contract during his life, and not for breaches thereof after his death. His death ends such contracts, and those who contracted with him can recover of his representatives only *pro rata* damages, or *pro rata* compensation. (*b*)

Personal representatives of a decedent are liable for reasonable expenses of his funeral. The law raises a promise by them to pay such expenses, though the funeral may not have been ordered by them, but by others. (*c*) And if they occupy

(*a*) Bac. Ab. Executors and Administrators, P. Matthews on Ex'rs, (Amer. ed.) c. xiv. Toller on Ex'rs, (4th ed.) 462. 2 Williams on Ex'rs, (4th Amer. ed.) 1464 *& seq.* Wentworth *v.* Cox, 10 Ad. & El. 42 and 2 P. & Dav. 251. Davis *v.* Pope, 12 Gray, 193. Parker *v.* Coburn, 10 Allen, 82.

(*b*) Addison on Contracts, (2d Amer. ed.) 1061. 2 Williams on Ex'rs, (4th Amer. ed.) 1467. 2 Redfield on Wills, 253. Fenton *v.* Clark, 11 Verm. 563. Knight *v.* Bean, 22 Maine, 536. Dickinson *v.* Calahan, 19 Penn. State Rep. 227. White's Ex'r *v.* Commonwealth, 39 ib. 167. Harrison *v.* Conlan, 10 Allen, 85.

(*c*) 2 Bl. Com. 508. Ram on Assets, c. xix. Matthews on Ex'rs, (Amer. ed.) 29, 30. 2 Williams on Ex'rs, (4th Amer. ed.) 829–832. 2 Redfield on Wills, 224–228. Tugwell *v.* Heyman, 3 Campb. 298. Rogers *v.* Price, 3 Y. & Jerv. 28. Lucy *v.* Walrond, 3 Bing. N. R. 841, 5 Scott, 46 and 3 Hodges, 215. Hapgood *v.* Houghton, 10 Pick. 156. Parker *v.* Lewis, 2 Dev. 21. In 3 Nev. & Man. 518, 519, Patteson, J. said: "It has been decided, by several cases, that an executor is liable upon an implied promise, at

real estate that was demised to him for a term longer than he lived, they are deemed his assignees, and are liable for the rent. (*a*) In this country an executor is liable, after demand, for legacies, whether pecuniary or specific, bequeathed by the testator. (*b*) But in England an action at law cannot be maintained for the recovery of a legacy, (*c*) though it was formerly held otherwise. (*d*)

The question, whether judgment against an executor or administrator should be *de bonis propriis* or against the property of the decedent, is now decided on a rule different from that which once prevailed. 2 Redfield on Wills, c. xi. 2 Williams on Ex'rs, (4th Amer. ed.) 1507 *& seq.* It seems to have been formerly held, that when he was sued as executor or administrator, (in his representative capacity,) a judgment recovered against him must be against the property of the decedent; and that when he was sued in his own right, as for a demand on him personally, (though it related to his transactions in his representative character,) and not as executor or administrator, *eo nomine*, judgment must be *de bonis propriis*. See opinion of Lord Mansfield, Cowp. 289. 5 Binn. 33. 9 Leigh, 357. It is now held that he may be charged *de bonis propriis*, though he is sued in his representative capacity, when the nature of the debt is such as necessarily made him personally liable; as where the declaration is against him for money had

common law, to pay reasonable expenses for the funeral of his testator, where no other person is liable upon an express contract, although he does not give orders for it. But there is no case which goes the length of deciding that if the funeral be ordered by a person to whom credit is given, the executor is liable at law." And in 12 C. B. N. S. 347, Willes, J. is reported to have said that "an executor is only liable when he has assets, or when he gives the order himself." And see 1 Hawks, 394.

(*a*) Buck *v.* Barnard, 1 Show. 348 and Holt, 75. Rubery *v.* Stevens, 4 B. & Ad. 241 and 1 Nev. & Man. 182. Claydon on Land. and Ten. 123, 124.

(*b*) Clark *v.* Herring, 5 Binn. 33. Kayser *v.* Disher, 9 Leigh, 357. Miles *v.* Boyden, 3 Pick. 213. Jones *v.* Richardson, 5 Met. 247. Colwell *v.* Alger, 5 Gray, 67. Worten *v.* Howard, 2 Smedes & Marsh. 527. McNeil *v.* Quince's Adm'rs, 2 Haywood, 153. Payne *v.* Smith, 12 N. Hamp. 34. Lamb *v.* Smith, 1 Root, 419. Smith *v.* Lambert, 30 Maine, 137.

(*c*) Deeks *v.* Strutt, 5 T. R. 690.

(*d*) Hawkes *v.* Saunders, Cowp. 289.

and received by him as executor, or for money lent to him as such, or on an account stated of money received by him personally. By Gibbs, C. J. 7 Taunt. 585, 586. It appears to be the present law, that whenever the consideration of his alleged promise (express or implied) arose after the decedent's death, he is to be charged *de bonis propriis*, whether he is sued personally, or as executor or administrator: As on a count for goods sold to him, as such, or work done for him, as such, or for expenses of the decedent's funeral. (*a*)

It is not a necessary consequence of a judgment *de bonis propriis*, that the defendant is not entitled to indemnity from the decedent's estate. In all cases, where justice requires it, he will doubtless be allowed repayment from the estate, on a settlement of his account of administration, by the court to which such account must be rendered. (*b*)

By the statute of frauds, both in England and in the several States of the Union, no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

In Browne on Statute of Frauds, § 186, the law is thus stated: "The special promise intended by the statute is such as raises an obligation to pay out of the promisor's own estate. Whether a bare promise by an executor or administrator to pay a debt of the decedent will be regarded as a promise to answer from his own estate, or not, seems to depend upon his having or not having assets from the estate at the time of promising. If he have not assets, his promise must be

(*a*) Luscomb *v.* Barrett, 5 Gray, 405. Conner *v.* Shew, 3 Mees. & Welsb. 350. Livermore *v.* Rand, 6 Foster, 85. In Hapgood *v.* Houghton, 10 Pick. 154, judgment *de bonis propriis* was ordered in a suit against an executor, where one of the counts was on his promise to pay expenses of the testator's funeral. But see remark of Thomas, J. 5 Gray, 405.

(*b*) 5 Gray, *supra*. 22 Conn. 323. 9 Co. 94 a. 2 Dickens, 587. 3 Madd. 275.

fulfilled, if at all, out of his own estate, and the statute would require it to be in writing. If he have assets, he would have a right to charge them with damages recovered against him upon such promise; and so, though the judgment might be against him personally, the damages would ultimately be answered out of the estate of the decedent, not out of his own, and the statute would not require it to be in writing." And in Stebbins *v.* Smith, 4 Pick. 97, where an executor had given bond to pay the testator's debts and legacies, (which, as stated *ante*, 140, is an admission of assets, that he is estopped to deny) it was held that his oral promise, made on a consideration sufficient to bind him personally, was not required by the statute to be in writing; and judgment was rendered against him on that oral promise. So in Pratt *v.* Humphrey, 22 Conn. 317, where administrators were sued on a promise, made on a consideration like that in 4 Pick. *supra*, and they pleaded in bar that their promise was not made in writing, it was held, on demurrer to the plea, that it was insufficient as a bar, because it was not therein averred that they had not assets. See also Templeton *v.* Bascom, 33 Verm. 132.

A special promise by an executor or administrator to pay a debt of the decedent, though made in writing, is void, unless made on a sufficient consideration. Rann *v.* Hughes, 4 Bro. P. C. (2d ed.) 27 and 7 T. R. 350, note. (*a*) And it is said in 2 Williams on Executors (4th Amer. ed.) 1517, that "if an executor or administrator promises, in writing, that in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on this promise, in his individual capacity, and the judgment against him will be *de bonis propriis*." And so it was held in Hawkes *v.* Saunders, Cowp. 289, as to an executor's promise to pay a legacy. But in Rann *v.* Hughes, in an action against an administratrix, it was decided, (on a motion in arrest of judgment because the declaration did not show sufficient matter to warrant a judgment against her in her personal capacity,) that a promise by her, in consideration of assets *left* by the intestate, was

(*a*) See also Ten Eyck *v.* Vanderpoel, 8 Johns. 120. Davis *v.* French, 20 Maine, 21. Walker *v.* Patterson, 36 Maine, 273.

insufficient and void. (*a*) That case has often been supposed to be inconsistent with Atkins *v.* Hill, Cowp. 284, and Hawkes *v.* Saunders, *supra;* but when duly examined, it will be found entirely consistent with them. See the distinction between the cases, as stated by Lord Mansfield, Cowp. 291.

Actions may be maintained by executors and administrators on contracts made by them concerning the decedent's affairs, when by such contracts the nature of the debt due to him is changed; as when they take security to themselves for such debt, (*b*) or recover judgment against the debtor. (*c*) So, of course, on contracts of sale, made by them, of the decedent's goods. (*d*) (Questions of pleading, that are generally raised in this class of cases, are not here considered; to wit, whether the actions should be brought, by executors or administrators, in their personal or in their representative capacity, and whether two or more counts in the declaration are rightly joined). (*e*) So if they complete the performance of a contract made by the decedent, which he left unfinished, they may maintain an action to recover payment. (*f*) If an executor or administrator, believing the decedent's estate to be solvent, pays a debt before the time when he could be sued therefor, and it is afterwards found that the estate is insolvent, he may recover back so much of the money so paid by him as exceeds the amount awarded to the creditor on the final

(*a*) The declaration, in 7 T. R. 350, note, did not allege that assets *came to the defendant's hands.*

(*b*) Hosier *v.* Arundell, 3 Bos. & Pul. 11. Partridge *v.* Court, 5 Price, 412. Kendall *v.* Lee, 2 Pennysl. 482. Helm *v.* Van Vleet, 1 Blackf. 342. Gayle *v.* Ennis, 1 Texas, 184. 2 Redfield on Wills, 192–194.

(*c*) Crawford *v.* Whittal, 1 Doug. 4, note. Talmage *v.* Chapel, 16 Mass. 71. Biddle *v.* Wilkins, 1 Peters, 686. 1 Lomax on Exr's, (2d ed.) 524.

(*d*) Cowell *v.* Watts, 6 East, 405. Aspinall *v.* Wake, 10 Bing. 51 and 3 Moore & Scott, 423. Kline *v.* Guthart, 2 Pennsyl. 491, 492. By Lord Tenterden, 9 Barn. & Cres. 669.

(*e*) See Bac. Ab. Ex'rs and Adm'rs, O. 2 Selw. N. P. (11th ed.) 804, (7th Amer. ed.) 803, 804, note. Chit. on Con. (10th Amer. ed.) 296, 297. 2 Lomax on Ex'rs, (2d ed.) 597 *& seq.* 2 Redfield on Wills, 183, 184.

(*f*) 2 Redfield on Wills, 182, 183. Crosthwaite *v* Gardner, 18 Ad. & El. N. S. 640. Sullivan *v.* Murray, Jones & Carey, 34.

settlement of the estate under the proceedings prescribed by statute when the estate of a deceased person is insolvent. (*a*)

In 1 Williams on Executors, (4th Amer. ed.) 664, it is said that "with respect to such personal actions as are founded upon any obligation, contract, debt, covenant, or other duty, the general rule has been, from the earliest times, that the right of action, on which the testator or intestate might have sued in his lifetime, survives his death and is transmitted to his executor or administrator." (*b*) And though a contract with the decedent may not be broken until after his death, his personal representative may maintain an action for the breach of it; as on a note not payable, or on a bond of which the condition is not broken, before the decedent died. (*c*)

It has long been held by the English courts of chancery that the personal representative of a mortgagee of real estate is entitled to the mortgage money; (*d*) and that, if it be paid to the heir of the mortgagee, such representative may recover it from him. (*e*) And this doctrine is applied and enforced by action at law, under the statute provisions of some of the States of the Union. In Massachusetts, and in several of the other States, (*f*) it is provided by statute, that the personal representative of a mortgagee may take possession of the mortgaged premises, or maintain an action to recover them, as the decedent might have done, if living. (*g*) And after

(*a*) Walker *v.* Hill, 17 Mass. 380. Walker *v.* Bradley, 3 Pick. 261. Bliss *v.* Lee, 17 Pick. 83. Heard *v.* Drake, 4 Gray, 514. Richards *v.* Nightingale, 9 Allen, 149. And see Rogers *v.* Weaver, 5 Ohio, 536.

(*b*) See, as to an action for breach of a contract to marry, Chamberlain *v.* Williamson, 2 M. & S. 408. Stebbins *v.* Palmer, 1 Pick. 71. Smith *v.* Sherman, 4 Cush. 408. Lattimore *v.* Simmons, 13 Serg. & R. 183. 1 Williams on Ex'rs, (4th Amer. ed.) 677, 682.

(*c*) Toller on Ex'rs, (4th ed.) 436.

(*d*) Patch on Mortg. 146. Fisher on Mortg. § 224. Ram on Assets, (Amer. ed.) 130. 1 Williams on Ex'rs, (4th Amer. ed.) 574, 575. Saxton Ch. 18.

(*e*) Tabor *v.* Tabor, 3 Swanst. 636.

(*f*) See 1 Washburn on Real Property, (1st ed.) 534, (2d ed.) 574.

(*g*) Smith *v.* Dyer, 16 Mass. 18, 23. Fay *v.* Cheney, 14 Pick. 399. Taft *v.* Stevens, 3 Gray, 504. Dewey *v.* Van Deusen, 4 Pick. 19. By statute in Massachusetts (Rev. Sts. *c.* 65, § 13, Gen. Sts. *c.* 96, § 11,) when an executor

having obtained judgment, and possession for foreclosure, he may maintain trespass against the heir for cutting and carrying away wood and timber from the mortgaged premises. (*a*) So if he levy on land to satisfy a judgment recovered by him for a debt due to the decedent, he may maintain trespass for an ulawful entry on the land, while it is under his administration. (*b*)

As to covenants in conveyances of real estate, termed covenants real, the decisions are not uniform respecting the authority of an executor of the grantee to maintain an action for the breach of them. When the breach and the actual damage arising therefrom both occur in the lifetime of the testator, the action is properly brought by the executor. (*c*) But in Kingdon *v.* Nottle, 1 M. & S. 355, it was decided that an executor could not maintain an action on a covenant that the grantor was seized in fee and had a right to convey, without showing some special damage to the testator in his lifetime. It was there said by Bayley, J., that "the testator might have sued in his lifetime; but having forborne to sue, the covenant real and the right of suit thereon devolved, with the estate, upon the heir." And it was afterwards decided, (4 M. & S. 53), that the devisee of the testator might maintain an action for the breach of those covenants; that though they were broken in the testator's lifetime, yet it was a continuing breach in the time of the devisee. And this doctrine has been adopted in Indiana, Ohio, and Missouri. (*d*) But,

or administrator recovers judgment for any debt due to the decedent and levies execution on real estate, he shall be seized thereof in trust for the same persons who would have been entitled to the money, if the judgment had been satisfied in money; and the estate so taken in execution shall be considered as personal assets, and shall be accounted for as such, by the executor or administrator; and if redeemed, the money shall be received by him, and he shall thereupon release the estate.

(*a*) Palmer *v.* Stevens, 11 Cush. 147.

(*b*) Smith *v.* Smith, 11 N. Hamp. 459. See Tebbetts *v.* Estes, 52 Maine, 566.

(*c*) Lucy *v.* Levington, 2 Lev. 26 and 1 Vent. 175. Cunningham *v.* Scoullar, 4 Allen, (N. B.) 385.

(*d*) Martin *v.* Baker, 5 Blackf. 232. Backus's Adm'rs *v.* McCoy, 3 Ohio,

as said by Mr. Rawle, in his Treatise on the Law of Covenants for Title, (3d ed.) 342, "the weight of American authority is in favor of the position, that the covenant for seizin, being broken, if at all, at the instant of its creation, is thereby turned into a mere right of action incapable of assignment, and consequently of being exercised by any but the covenantee or his personal representative." And so are the decisions, cited by him, in Vermont, Massachusetts, Connecticut, New York, New Jersey, North Carolina, Kentucky, Wisconsin, and Arkansas. To which Illinois and Iowa may be added. Brady *v.* Spurck, 27 Illinois, 478. Brandt *v.* Foster, 5 Iowa, 287. 10 ib. 586. The law was such in Maine, until altered by statute. (*a*) Mr. Rawle also says, page 347, that according to the weight of American authority, the law is the same as to the covenant against incumbrances, (*b*) unless it is either so expressed in itself, or so linked to another covenant, as to have a prospective operation, and not be a covenant *in præsenti.* (*c*)

An executor may maintain an action on a covenant to repair, for a breach thereof committed in the testator's lifetime; (*d*) and for a breach, during the testator's life, of his

211. Devore *v.* Sunderland, 17 ib. 60. Dickson *v.* Desire's Adm'r, 23 Missouri, 164, 165.

(*a*) 8 Greenl. 228. By the Revised Statutes of Maine, (1857,) page 517, "the assignee of a grantee, or his executor or administrator, after eviction by an older and better title, may maintain an action on a covenant of seizin or freedom from incumbrance contained in absolute deeds of the premises between the parties, and recover such damages as the first grantee might, upon eviction, upon filing, at the first term in court, for the use of his grantor, a release of the covenants of his deed and of all causes of action thereon. The prior grantee shall not, in such case, have power to release the covenants of the first grantor, to the prejudice of his grantee." This is a substitute for the Revised Statutes of 1841, title x. c. 115, §§ 16, 17. See 24 Maine, 383. 30 ib. 345. 34 ib. 422. 36 ib. 175.

(*b*) See Mitchell *v.* Warner, 5 Conn. 497. Davis *v.* Lyman, 6 ib. 249. Clark *v.* Swift, 3 Met. 390. Garrison *v.* Sandford, 7 Halst. 261. Jeter *v.* Glenn, 9 Richardson, 376. Potter *v.* Taylor, 6 Verm. 676.

(*c*) See further, as to these covenants, 4 Kent Com. (11th ed.) 555 *& seq.* 1 Smith Lead. Cas. (6th Amer. ed.) 201 *& seq.* 2 Washburn on Real Property, (1st ed.) 650 *& seq.* (2d ed.) 706 *& seq.*

(*d*) Morley *v* Polhill, 2 Vent. 56. Ricketts *v.* Weaver, 12 Mees. & Welsb. 718.

lessee's covenant not to fell or lop timber trees excepted out of the demise; (*a*) and on the covenant of seizin and right to convey, if the testator was evicted; no estate or possession, in such case, passing to the heir. (*b*)

It is a general doctrine of the common law, that no action can be maintained by or against an executor or administrator, in his representative capacity, in the courts of any country besides that from which he derives his authority. If he wishes to maintain an action in another country he must obtain new letters of administration in that country. Story on Conflict of Laws, §§ 513 *& seq.* So when an executor or administrator is appointed in a State of the Union, he cannot sue or be sued in another State, unless ancillary administration is first obtained there. (*c*)

The right of executors and administrators to maintain an action for torts done to a decedent, and their liability to actions for torts done by him, are not here stated. That right and that liability are wholly of statute origin, in England and in this country. And the extent of them is not the same in the statutes of the several States of the Union. As to the right to sue for torts done *to* the decedent, see 1 Saund. Pl. & Ev. (2d ed.) 1113–1115. 2 Selw. N. P. (7th Amer. ed.) 799, 800. 2 Williams on Executors (4th Amer. ed.) 667 *& seq.*

When there are several executors or administrators, "they are regarded in the light of individual persons," and have a joint and entire interest in the effects of the decedent, which is incapable of being divided; and the acts of any one of

(*a*) Raymond *v.* Fitch, 2 Crompt. Mees. & Rose. 588 and 5 Tyrw. 985. 1 Williams on Ex'rs, (4th Amer. ed.) 682, 683.

(*b*) Beck *v.* Barlow, 1 Allen, (N. B.) 465, 475. By Lord Ellenborough, 1 M. & S. 363.

(*c*) See 1 Cranch, 259. 3 Mass. 514. 2 Met. 114. 10 Cush. 172. 4 Mason, 32. 3 Day, 74. 7 Johns. Ch. 45. 10 Paige, 556. 1 Foster, 382. 2 Blackf. 247. 1 A. K. Marsh. 88. 4 Greene, (Iowa) 144. 11 Illinois, 211. 5 Greenl. 262, 263. 17 Louis. Ann. Rep. 15. 24 Georgia, 370. 2 Gill & Johns. 506. 4 Randolph, 158. *Aliter* in Pennsylvania, Alabama & Arkansas. 1 Binn. 63, 64. 23 Alab. 821. 16 Ark. 263.

them, in respect to the administration of those effects are deemed to be the acts of all. (*a*) This is now held, as well in regard to administrators as to executors; the distinction between them, which was formerly made, having been overruled. (*b*)

One of them may, therefore, sell the goods or securities of the decedent, or indorse a promissory note, or assign a mortgage made to him, (*c*) or discharge such mortgage; (*d*) or release a debt due to him, (*e*) or submit a claim against him to referees, whose award will bind the estate. (*f*) But when a note is given to two or more executors jointly, as executors, the indorsement of it, by one of them only, will not transfer the title to the indorsee. (*g*) So when a bond and mortgage are given to them jointly, as executors, one cannot assign them. (*h*) Nor can one bind the others personally, nor bind the decedent's estate, by confessing judgment, without the others' consent or knowledge. (*i*) Nor will the confession by one of a debt due from the testator be allowed to affect the others, in a suit against them to recover such debt. (*j*) As to the promise of one to pay a claim barred by the statute of limitations, see *ante*, 142.

(*a*) Shep. Touch. 484. Wentworth on Ex'rs, (Wilson's ed.) 99. Com. Dig. Administration, B. 12. Toller on Ex'rs, (4th ed.) 243, 359. Bac. Ab. Ex'rs and Adm'rs, D. 1. 2 Williams on Ex'rs, (4th Amer. ed.) 810 *§ seq.*

(*b*) 2 Ves. Sen. 267, 268. 11 Johns. 21, 22. 1 Wend. 617. 8 Blackf. 172. 1 McCord, 492. 8 Georgia, 405.

(*c*) Besides the books cited *supra*, see 1 Crompt. Mees. & Rosc. 174 and 4 Tyrw. 563. 7 J. J. Marsh. 587. 15 Illinois, 333. 1 Aik. 28. 1 Wend. 583. Thomson (Nov. Scotia) 265.

(*d*) George *v.* Baker, 3 Allen, 326, note. Stuyvesant *v.* Hall, 2 Barb. Ch. 151. Weir *v.* Mosher, 19 Wis. 311.

(*e*) Hoke's Ex'rs *v.* Fleming, 10 Ired. 263.

(*f*) Grace *v.* Sutton, 5 Watts, 540. Lank *v.* Kinder, 4 Harrington, 457.

(*g*) Smith *v.* Whiting, 9 Mass. 334. Sanders *v.* Blain's Adm'rs, 6 J. J. Marsh. 446. And see Regina *v.* Winterbottom, 1 Denison, 52 and 2 Car. & Kirw. 45. *Contra*, Bogert *v.* Hertell, 4 Hill, 492.

(*h*) Hertell *v.* Bogert, 9 Paige, 52. See 16 Serg. & R. 329.

(*i*) Elwell *v.* Quash, 1 Strange, 20. Heisler *v.* Knipe, 1 Browne, 319. Hall *v.* Boyd, 6 Barr, 267, 270.

(*j*) Hammon *v.* Huntley, 4 Cowen, 493.

The authority of one, or of a majority, of several executors to act for all, did not, by the common law, extend to the sale of land which the testator, by his will, directed to be sold by them. On this subject, see 13 Met. 225, 226. 1 Chance on Powers, 239 *& seq.* Sugden on Powers, (1st Amer. ed.) 162 *& seq.* (8th ed.) c. iv. §§ 71–74. 4 Kent Com. (11th ed.) 359 *& seq.* and the American decisions there cited.

14. *Guardians.*

Guardians of minors, insane persons, and spendthrifts, have not the legal estate of their wards which is placed in their hands, but have only a naked power not coupled with an interest. The proper discharge of their duties does not require them to subject themselves to any personal liability for which an action can be maintained against them. The debts of a ward remain his; and though he has no power to pay them, yet he, and not the guardian, must be sued upon them, and the guardian must defend in the ward's name, and not in his own. 10 Allen, 464. He may make contracts in his own name, as guardian, respecting the ward's affairs; but such contracts bind himself, and not the ward nor his estate. Hence if he gives a note for his ward's debt, or covenants for the title to the ward's real estate, on selling it under authority legally granted, he is thereby personally bound. (*a*) He is not liable to an action for supplies furnished to the ward for support and maintenance, except on an express promise of payment; (*b*) nor for the debts of the ward. (*c*) Nor is he liable to an action by the ward, after the termination of the guardianship, to recover money received on a sale of the

(*a*) Thacher *v.* Dinsmore, 5 Mass. 299. Forster *v.* Fuller, 6 Mass. 58. Whiting *v.* Dewey, 15 Pick. 428. Donahue *v.* Emery, 9 Met. 63. Stevenson *v.* Bruce, 10 Ind. 397. Gibson *v.* Irby, 17 Texas, 174, 175. Young *v.* Lorain, 11 Illinois, 641.

(*b*) Cole *v.* Eaton, 8 Cush. 587. Spring *v.* Woodworth, 4 Allen, 326. Inhabitants of Raymond *v.* Sawyer, 37 Maine, 406. Penfield *v.* Savage, 2 Conn. 386. State *v.* Cook, 12 Ired. 67. Tucker *v.* McKee, 1 Bailey, 344. Overton *v.* Beavers, 19 Ark. 623. See Hutchinson *v.* Hutchinson, 19 Verm. 437. Fessenden *v.* Jones, 7 Jones, (N. C.) 14.

(*c*) Conant *v.* Kendall, 21 Pick. 36.

ward's property and not paid to him. (*a*) In these and like cases, the claimant's remedy, generally, is by action on the bond given by the guardian, conditioned that he shall rightly discharge his duties as guardian. It has, however, been recently decided in Massachusetts, that in a suit against the ward, his guardian may legally be summoned to answer in the trustee (foreign attachment) process. (*b*) If he advance his own money for the erection of buildings on the ward's land, without the order of court, he cannot recover the amount from his ward. (*c*)

A guardian is not answerable for a breach of a covenant, in an indenture by which he binds his ward as an apprentice, that the ward "shall faithfully serve his master and not absent himself from his service;" such covenant being held to be that of the ward only. (*d*)

One who has applied for and obtained an appointment in Massachusetts, as guardian of minor children who have thence been under his care, with the consent of their guardian appointed in another state, may maintain an action against him for their support and education, after the time of his own appointment. (*e*)

The rights and powers of guardians are considered, in the United States, as strictly local, and as not entitling them to exercise any authority over the person or property of their wards in other states, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators. (*f*)

(*a*) Brooks *v.* Brooks, 11 Cush. 18.

(*b*) Hicks *v.* Chapman, 10 Allen, 463. But see Davis *v.* Drew, 6 N. Hamp. 399.

(*c*) Hassard *v.* Rowe, 11 Barb. 22. See also Guy *v.* Dü Uprey, 16 Cal. 196.

(*d*) Blunt *v.* Melcher, 2 Mass. 228. Holbrook *v.* Bullard, 10 Pick. 68. Woodruff *v.* Corey, Pennington, (2d ed.) 406. Ackley *v.* Hoskins, 14 Johns. 374. Chapman *v.* Crane, 20 Maine, 172. Valde *v.* Levering, 2 Rawle, 269. Sacket *v.* Johnson, 3 Blackf. 61. *Contra*, Paddock *v.* Higgins, 2 Root, 316, 482. Hewit *v.* Morgan, ib. 363. Clement *v.* Wheeler, ib. 466.

(*e*) Spring *v.* Woodworth, 2 Allen, 206. And see Pedan *v.* Robb's Adm'r, 8 Ohio, 227.

(*f*) Story on Conflict of Laws, §§ 499, 504, 504 *a*. Morrell *v.* Dickey, 1

Contracts between guardians and wards, made soon after the guardianship ceases, have always been viewed with jealousy by courts of chancery; and the interest of wards is protected by those courts against the advantage taken by guardians of their influence over those who have been under their care. (*a*) And this is also done in this country by courts of probate, and in actions at law. (*b*)

15. *Corporations.*

Corporations, like individuals, have power to make contracts, and of course are liable in law for the breach of them. One of the incidents of these bodies, connected with the subject of contracts, is the right to have a common seal. And the old doctrine was, that they could not act and speak except by their corporate seal, because they are invisible bodies and incapable of manifesting their intentions by any personal or oral discourse. But this doctrine does not now prevail. For many purposes, a vote of a corporation, recorded in its books, is allowed to have the same effect which was formerly given only to its seal. Of late, and especially in this country, where corporations are greatly multiplied, it has been repeatedly decided that they may be bound, without either deed or vote, by implication from corporate acts, as individuals may be. (*c*) And the authority of their agents to contract for them may be shown by the like implication. (*d*) It followed from this

Johns. Ch. 153. Himes *v.* Howes, 13 Met. 80. Potter *v.* Hiscox, 30 Conn. 515. Burnet *v.* Burnet, 12 B. Monroe, 324.

(*a*) Reeve Dom. Rel. 329, 330. 1 Story on Eq. §§ 317–319. Dawson *v.* Massey, 1 Ball & Beatty, 219. Forbes *v.* Forbes, 5 Gill, 29. Richardson *v.* Linney, 7 B. Monroe, 571. Fish *v.* Miller, Hoffman, 267.

(*b*) Wright *v.* Arnold, 14 B. Monroe, 646. Sullivan *v.* Blackwell, 28 Miss. 737. Kittredge *v.* Betton, 14 N. Hamp. 401. Gale *v.* Wells, 12 Barb. 84. Elliot *v.* Elliot, 5 Binn. 8. Say's Ex'rs *v.* Barnes, 4 Serg. & R. 114, 115. Somes *v.* Skinner, 16 Mass. 359.

(*c*) 2 Kent Com. (11th ed.) 348. Chit. on Con. (10th Amer. ed.) 298. Angell & Ames on Corp. § 237. In the case of Bank of United States *v.* Dandridge, 12 Wheat. 64, Chief Justice Marshall dissented from the other judges on this point and held that a corporation could evince its assent in no other way than by writing.

(*d*) Badger *v.* Bank of Cumberland, 26 Maine, 428. Melledge *v.* Boston

change in the law that a corporation might be held answerable in an action of assumpsit, (*a*) which could not be maintained on a contract under seal.

One established exception, in England, to the rule that corporations can contract only under seal, is the power of those, that are chartered for purposes of trade, to bind themselves by bills of exchange and promissory notes; as the Bank of England, and the East India Company; the object of which institutions requires that they should have this power. By Best, C. J., 4 Bing. 288. "But this indulgence," he said, "is not extended beyond cases of necessity." Hence a corporation established in England, not for purposes of trade, but for supplying towns with water, or any purpose so disconnected with trade, has not power to issue bills or notes, unless expressly authorized by its charter, or by implication from its terms. (*b*) Where the charter of a water-works company authorized the directors of the company to "make contracts, agreements, and bargains with the workmen, agents, undertakers, and other persons employed or concerned in making, completing, or continuing the works belonging to the said undertaking, and all and every part or parts thereof;" it was decided that an agreement not under seal, for the fabrication and supply of pipes at certain stated periods, was not valid; that the bargains which the charter authorized the directors to make must be made "in the usual way, in the mode prescribed by law, by a writing under the common seal." (*c*)

But such is not the law in this country. Every corporation, unless prohibited by its charter, has the necessary incidental power to incur debts in the course of its legitimate business, and may bind itself by bills of exchange or promissory notes

Iron Co. 5 Cush. 175. Buncomb Turnpike Co. *v.* McCarson, 1 Dev. & Bat. 312.

(*a*) Danforth *v.* Schoharie and Duanesburgh Turnpike Road, 12 Johns. 227. Hayden *v.* Middlesex Turnpike Corp. 10 Mass. 397. And see Beverly *v.* Lincoln Gas Light & Coke Co. 2 Nev. & P. 290, 6 Ad. & El. 829 and Willm. Woll. & Dav. 521.

(*b*) Broughton *v.* Manchester Water Works Co. 3 B. & Ald. 1. Slark *v.* Highgate Archway Co. 5 Taunt. 794, 795. Grant on Corp. 276.

(*c*) East London Water Works Co. *v.* Bailey, 4 Bing. 283.

given for such debts. (*a*) And as to other contracts besides bills and notes, it is not held necessary that they should be under seal. Baron Parke was well warranted in saying, (6 Mees. & Welsb. 818) that "the American law has entirely abrogated the old doctrine." There were a few early decisions, made by state courts, conformably to the old English law; but they have been overruled by the same courts. (*b*)

As corporations are mere creatures of the law, and are established for special purposes, they have only the powers which their charters confer upon them, either expressly or as incidental to their existence, and can exercise those powers only by such officers, and in such manner as their charters authorize. (*c*)

It has sometimes been said by judges and writers, that the incidental powers of a corporation created for a specified purpose, that is, the powers implied in its charter, are such only as are "necessary" to carry into effect the rights and powers expressly granted. But this is not so. The English doctrine now is, that when corporations are created by an act of parliament, for particular purposes, with special powers, their contracts will bind them, unless it appears by the express provisions of the act creating them, or by necessary and reasonable inference from its enactments, that their contracts are *ultra vires*, or that the legislature meant that such contracts

(*a*) See Clarke *v.* School District, 3 R. I. 199. Moss *v.* Oakley, 2 Hill (N. Y.) 265. Kelley *v.* Mayor, &c. of Brooklyn, 4 ib. 263. Rockwell *v.* Elkhorn Bank, 13 Wis. 653. Lucas *v.* Pitney, 3 Dutcher, 221. Regents of University *v.* Hart, 7 Min. 61. Came *v.* Brigham, 39 Maine, 35. Smead *v.* Indianapolis, &c. Railroad Co. 11 Ind. 104. Clark *v.* Titcomb, 42 Barb. 122.

(*b*) Angell & Ames on Corp. § 219. Chit. on Con. (10th Amer. ed.) 298, note c. 2 Kent Com. (11th ed.) 348, 349. 1 Parsons on Notes and Bills, 163.

(*c*) Dartmouth College *v.* Woodward, 4 Wheat. 636. Head *v.* Providence Ins. Co. 2 Cranch, 167. Bank of Augusta *v.* Earle, 13 Peters, 587. Bank of United States *v.* Dandridge, 12 Wheat. 68. Rock River Bank *v.* Sherwood, 10 Wis. 230. And see East Anglian Railways Co. *v.* Eastern Counties' Railway Co. 11 C. B. 775. Munt *v.* Shrewsbury & Chester Railway Co. 13 Beavan, 1. Attorney General *v.* Andrews, 2 Macn. & Gord. 225 and 2 Hall & Twells, 431.

should not be made. (*a*) In Massachusetts it has been decided that a manufacturing corporation might keep a shop for the sale of goods, and sell them, as "the legislature did not intend to prohibit the supply of goods to those employed in the manufactory." (*b*) And in Wisconsin, the court held that if the means employed by a corporation are reasonably adapted to the ends for which it was created, they are within its implied powers; that it is not restricted to the means usual and necessary in carrying on the business and objects for which it was chartered. (*c*)

Corporations that have power to purchase property may give promissory notes therefor, if not expressly prohibited by statute. (*d*) So corporations may take and negotiate promissory notes in the ordinary course of their authorized business. (*e*)

A corporation established for the purpose of making insurance has been held to have no implied power to lend money on the discount of notes, and that if it so lend money, it cannot maintain an action on notes so made or indorsed; "the power of lending money on discount not being necessary to effectuate the business of insurance." (*f*) By exercising such

(*a*) Bateman *v.* Mayor, &c. of Ashton-Under-Lyne, 3 Hurlst. & Norm. 323. By Baron Parke, 9 Exch. 84.

(*b*) Chester Glass Co. *v.* Dewey, 16 Mass. 94.

(*c*) Madison, &c. Plank Road Co. *v.* Watertown, &c. Plank Road Co. 5 Wis. 173. Clark *v.* Farrington, 11 ib. 323. In Dana *v.* Bank of St. Paul, 4 Min. 385, it was held that an act or contract of a corporation must clearly appear not to be within its chartered powers, before the court will declare such to be its character. And see Brown *v.* Winnissimmet Co. 11 Allen, 326. Mayor, &c. of Baltimore *v.* Baltimore & Ohio Railroad Co. 21 Maryl. 50.

(*d*) Moss *v.* Averill, 6 Selden, 449.

(*e*) Frye *v.* Tucker, 24 Illinois, 180. Farmer's Bank *v.* Maxwell, 32 N. Y. Rep. 579.

(*f*) New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560, 569. Same parties, 2 Cowen, 678. Utica Ins. Co. *v.* Scott, 19 Johns. 1. Utica Ins. Co. *v.* Hunt, 1 Wend. 56. It was decided in Utica Ins. Co. *v.* Kip, 8 Cowen, 20, and in one or two other cases in New York, that though the notes taken in such cases by the corporation were void, yet that the corporation might recover the money in an action for money lent. But this was questioned by Nelson, C. J. in 25 Wend. 650. See Angell & Ames on Corp. §§ 265, 274.

power, such corporation usurps a franchise, and judgment of ouster will be rendered against it upon information in the nature of a *quo warranto*. (*a*) A corporation that is authorized to lend money only on bond and mortgage cannot recover money lent, unless a bond and mortgage be taken for its payment; and every other security, as well as the contract itself, is void. (*b*)

In Bank of Genessee *v.* Patchin Bank, 3 Kernan, 309, it was held that a bank has no power to engage as surety for another, in a business in which it has no interest, and is not liable on its accommodation indorsement.

There is this distinction between corporations and individuals: An individual may make and enforce the performance of any contract which the law does not forbid. A corporation can make and enforce no contract which the law does not expressly authorize it to make, or which is not fairly incident to the authority expressly conferred.

(*a*) People *v.* Utica Ins. Co. 15 Johns. 358. And see The State *v.* Stebbins, 1 Stew. 299. People *v.* River Raisin, &c. Railroad Co. 12 Mich. 390.

(*b*) Life & Fire Ins. Co. *v.* Mechanic Fire Ins. Co. 7 Wend. 31. North River Ins. Co. *v.* Lawrence, 3 Wend. 482.

In 2 Bulst. 233, it is reported that "the opinion of Manwood, Chief Baron, was this as touching corporations; that they were invisible, immortal, and that they had no soule, and, therefore, no subpœna lieth against them, because they have no conscience nor soule; a corporation is a body aggregate; none can create soules but God; but the king creates them, and, therefore, they have no soules; they cannot speak nor appear in person, but by attorney. And this was the opinion of Manwood, Chief Baron, touching corporations."

CHAPTER III.

Of the Consideration of Contracts.

Mr. Chitty's description of a contract not under seal (it will be recollected) is "a mutual assent of two or more persons competent to contract, founded on a sufficient and legal consideration," &c. Mutual assent and parties having been considered, the consideration of a simple contract is next in order.

What is called, in the common law, the consideration of a contract, is denominated, in the civil law, the cause; *causa contractus*, *conventio cum causa*, &c.

"Consideration is the material cause, or *quid pro quo* of a contract, without which it will not be effectual or binding;" (*a*) "a cause or meritorious occasion, requiring a mutual recompense, in fact or in law." (*b*)

On principles of mere natural law, every gratuitous undertaking, if deliberately and fairly assumed, forms the basis not only of an honorary but of a moral obligation. But moral duties and legal obligations are not made coextensive by any municipal code. The common law, especially, gives effect only to contracts that are founded on the mutual exigencies of men, and does not compel the performance of any merely gratuitous engagements, unless those engagements are made under seal; and even then, a fiction is adopted. A seal, it is said, imports a consideration, which the party shall not be permitted to deny. By local usage, however, in some of the States of the Union, and by statute in others, the

(*a*) Termes de la Ley. (*b*) Dyer, 336 b. Finch, 34.

want or failure of consideration is a valid defence to a suit on a sealed contract. (*a*) And courts of chancery will not enforce specific performance of such contracts, if they are without consideration.

Mr. Justice Wilmot expressed a strong opinion, 3 Bur. 1670, 1671, that if a contract were reduced to writing, the doctrine of nude pacts, which was introduced from the civil law, would not apply. Blackstone also says, a promissory note, "from the subscription of the drawer, carries with it an internal evidence of a good consideration," and that "he shall not be allowed to aver the want of a consideration, in order to evade the payment." (*b*)

It was, however, decided by the House of Lords, in the case of Rann *v.* Hughes, (*c*) as seen *ante*, 147, that whatever may be the rule of the civil law, simple contracts, by the law of England, whether oral or written, must be founded on a consideration. (*d*) Nor is a promissory note an exception to this rule. While such note is in the hands of the payee, want of consideration is a good defence. So also as between indorser and indorsee. (*e*) When a negotiable note is negotiated, and comes into the hands of a third person, *bona fide*, and without notice, the want of consideration for originally giving or indorsing it is not a defence against the holder. The same is true of negotiated bills of exchange.

It is not, however, the form of a bill or note, nor its being in writing, that gives it efficacy without consideration. This efficacy is given by the law, in order to facilitate commercial intercourse, which is carried on through the medium of these species of contracts, and which would be greatly retarded and embarrassed if every holder of these kinds of paper were

(*a*) See 1 Bay, 278. 2 Bay, 11. 1 Dallas, 17. 5 Binn. 232. 11 Wend. 106. 1 Blackf. 172. 1 Bibb, 500. And by the common law, a bond given in partial restraint of trade, may be shown to be void for want of consideration. *Post*, c. iv.

(*b*) 2 Bl. Com. 450. (*c*) 7 T. R. 350, note.

(*d*) See also Cooke, 499. 4 Taunt. 117. 1 Saund. 211, note 2.

(*e*) Kyd on Bills, (3d ed.) 276. 2 Ves. jr. 111. 5 Taunt. 553. 6 Mass. 434. 3 T. R. 421. 17 Johns. 301.

obliged to inquire into the original consideration, or incur the risk of losing his property on account of a defect in their concoction. Another reason is given in some of the books, namely, that these instruments are governed by the law-merchant, which is founded on the law of nature and nations, by which want of consideration is not an essential defect in a contract.

It is not necessary that the consideration of an agreement should be adequate in actual value. No means are provided by which this point can be determined in a court of law. Inadequacy of price is sometimes a ground of relief in chancery; not, however, on the principle of controlling or revising the judgment of the parties, when freely and fairly exercised; but upon the evidence, thereby furnished, of the incompetency of one party to contract, or of fraud and imposition practised by the other, in the instance brought into question. (*a*)

A consideration, it is said, must include some benefit to the party promising, or some trouble, prejudice, or inconvenience to the party to whom the promise is made. (*b*) And with reference to the rules of pleading, it is probably true that a consideration must include some benefit to the promisor, or to a third person, or some damage, loss, or inconvenience to the promisee, at the instance of the party promising. In stating the consideration of an agreement, in a declaration in *special assumpsit*, it doubtless is necessary, as a general rule, to allege the instance or request of the promisor that he or a third person should receive a benefit, or that the promisee should incur a damage, inconvenience, or loss. In many cases, however, this request may be, and is, implied, as well as the promise thereupon made; and like the promise itself, it is also sometimes to be implied directly against the actual fact. The fiction is as obvious, and, on original principle, as unnecessary, in this stage of the contract, as in that where a promise by the same party is implied. The real ground, in both cases, as has heretofore been suggested (*ante*, 5, 6,) as to the promise,

(*a*) See Evans *v.* Brown, Wightwick, 109. Newland on Contracts, Chapter xxi. George *v.* Richardson, Gilmer, 230.

(*b*) Com. Dig. Assumpsit, B. 1. Smith on Con. (4th Amer. ed.) 166.

is duty and obligation, moral and legal. There often needs to be, and is, in fact, no request and no promise. (*a*)

However slight the benefit to the promisor, if of any legal value, and however slight the damage, loss, or inconvenience to the promisee, if of any legal estimation, it is sufficient to support a contract. 17 Conn. 511.

There are cases in which it seems doubtful whether the consideration, which sustains what is treated as a contract, is regarded in law as a benefit to the promisor, or a damage, &c., to the promisee. Thus where goods are delivered on a promise to redeliver them to the bailor, when no use is to be made of them by the bailee, nor anything paid or promised by the bailor, and where goods or moneys are delivered by the owner to a bailee, on his undertaking to deliver them to a third person, the bailment being gratuitous, it is held that the bailor has a remedy, in an action *ex contractu*, if the bailee do not perform his undertaking, and that there is a sufficient consideration to support a contract. Wheatley *v.* Low, Cro. Jac. 668 and Palmer, 281. Graves *v.* Ticknor, 6 N. Hamp. 537. Robinson *v.* Threadgill, 13 Ired. 39. It is also held that such action is maintainable against a gratuitous bailee for misperformance of his undertaking, (*b*) or for loss, by gross

(*a*) A suggestion may not be useless, in this connection, respecting the practice of putting books on the Law of Nisi Prius (Buller, Espinasse, Selwyn) into the hands of students, in the early stages of their pupilage. The doctrines of the law, in these works, are set forth, in a great measure, with reference to the actions of which the compilers treat, and the rules of pleading applicable to those actions. But when (in former days) were students advised of this fact? When were they cautioned not to take, as the real truth of the matter, the elementary doctrine of the law, the positions laid down by these writers in reference to the forms of actions and of pleading? The writers themselves do not give this caution, and young students do not always distinguish between the body and the dress, the substance and the form. With regard to pleading, nearly the whole doctrine treated of under the title of Assumpsit is founded on fictions, that no book, which the writer has seen, has attempted to explain or arrange. He hopes, however, that others have never been confused and misled as he has been by lack of knowledge on these points.

(*b*) Whitehead *v.* Greetham, McClel. & Y. 205, 10 Moore, 183 and 2 Bing.

negligence, of the thing bailed. (*a*) According to Palmer's report of Wheatley *v.* Low, Ley, C. J. considered the damage ultimately sustained by the bailor, as the consideration on which the contract rested. But this is no legal consideration; for it did not exist at the time the alleged contract was made. The same might be said of every gratuitous promise where an injury arises from a neglect to perform it. Lord Holt said, "there is, in that case, no benefit to the defendant, nor no consideration but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration." 2 Ld. Raym. 920. And this, according to Croke's report, was the ground on which the court put the case. In a prior case, (*b*) the bailee's possession of the property was regarded as a benefit to him. And these cases are classed, by Comyns and by Comyn, with those of benefit to the promisor. (*c*)

It cannot be doubted that, in some of these cases, the bailor must have requested the bailee to take the property, and that (whether benefit to the latter, or damage to the former, were the ground of the consideration) it was not in fact, however it might be in legal intendment, at the instance and request of the promisor. And so in all other gratuitous bailments, where the actual advantage accrues only to the bailor.

In all these cases, and others like them, it is admitted and adjudged, that if the party sought to be charged had merely promised to receive the goods and redeliver them to the bailor, or deliver them over to a third person, or to do any other act, and had afterwards refused or omitted to fulfil such promise, he could not have been made responsible in law for the

464. See Dartnall *v.* Howard, 4 Barn. & Cres. 345 and 6 Dowl & Ryl. 438.

(*a*) Doorman *v.* Jenkins, 2 Ad. & El. 256 and 4 Nev. & Man. 170. Beauchamp *v.* Powley, 1 Mood. & Rob. 38. See Beardslee *v.* Richardson, 11 Wend. 25.

(*b*) Riches *v.* Bridges, Cro. Eliz. 883 and Yelv. 4. This case was reversed, but was restored by the decision in Wheatley *v.* Low, *supra*. Story on Bailm. § 98. 2 Ld. Raym. 920.

(*c*) Com. Dig. Assumpsit, B. 10. Comyn. on Con. (1st ed.) 14.

non-performance, either in an action *ex contractu* or *ex delicto*. (*a*) But if the bailee enters upon the performance of a gratuitous undertaking, and fails to perform it according to the terms of the undertaking, he is answerable in damages. (*b*)

The fictitious nature of the consideration, as to the incidents of "benefit," &c., is still more manifest in that class of cases where a mere legal obligation is the ground of an implied promise, than in the cases already mentioned. In such cases, the obligation is held to be a sufficient consideration. (*c*) The action of debt is founded on a contract, express or implied; yet debt lies for the recovery of a penalty affixed by statute to the commission of an act therein forbidden, or the omission of an act therein enjoined, unless some other mode of recovery is prescribed by the statute itself. The penalty, when incurred, is by the law regarded as a debt thereupon due to the party authorized to sue for it. And if a consideration is required to support an implied contract to pay such a debt, it is to be sought in the legal obligation to pay it. If the penalty be given to the party injured by the act or omission by which it is incurred, and he be regarded as the party with whom the delinquent contracted, there would be no difficulty, perhaps, in ascertaining whether the consideration included a benefit to the one or a damage to the other. But when the penalty is given to a common informer, and the notion of a contract is still retained, as it must be, the difficulty, as to the benefit or damage included in the consideration, is not so readily removed. Debt also lies (in England and in some of the states of the American Union) against a

(*a*) Addison on Con. (2d Amer. ed.) 11, 532. Thorne *v.* Deas, 4 Johns. 84. Stephens *v.* White, 2 Wash. (Va.) 211, 212. McGee *v.* Bast, 6 J. J. Marsh. 455.

(*b*) By Lord Holt, 2 Ld. Raym. 919. Elsee *v.* Gatward, 5 T. R. 143. Wilkinson *v.* Coverdale, 1 Esp. R. 75. Balfe *v.* West, 13 C. B. 466. Ferguson *v.* Porter, 3 Florida, 38. Walker *v.* Smith, 1 Wash. C. C. 152. French *v.* Reed, 6 Binn. 308. Rutgers *v.* Lucet, 2 Johns. Cas. 95. Kirtland *v.* Montgomery, 1 Swan, 457, 458. Alexander *v.* Motlow, 1 Sneed, 253. Story on Bailm. §§ 169–171. Edwards on Bailm. 100. 2 Kent Com. (11th ed.) 760.

(*c*) Belfast *v.* Leominster, 1 Pick. 127. See also 7 Conn. 57.

sheriff for the escape of a prisoner in execution. This, however, is by an old English statute, and not by the common law. A debt to the creditor is incurred by the officer guilty of the escape. Here again, damage to the creditor is sufficiently obvious as the consideration of this fictitious contract.

In all these and similar cases, the "instance and request" of the party liable by law to pay, that the other party should incur a damage, &c., must be implied, if at all, not only against the fact, but against all the principles by which mankind are actuated. Such cases are to be regarded as anomalies; the law authorizing the enforcement of a remedy in the form appropriated to actual contracts. They are, in truth, no more properly contracts than are assault and battery, slander, or larceny. And on strict principle, the collection of a penalty for breach of a statute is no more easily reconciled with the doctrine of contracts, than would be the recovery of damages for any injury inflicted on persons or property; and the law might as well imply a promise to repair all injuries which a party commits, as to pay a penalty prescribed by statute, or the debt of a prisoner escaping from an officer.

So in the case of a mere legal obligation, where there is no antecedent moral duty, the notion of a contract is wholly fictitious. By a fiction, indeed, the protection of government may be deemed a consideration for an implied promise to pay the expenses of administering it. And this fiction may be extended to the cases of municipal charges, as for the support of the poor, &c. But in these instances of mere positive institution, though the law may rank with actual contracts the obligation of contributing, yet there is only an imaginary resemblance, and it is only by fiction, and for legal conformity's sake, that a consideration is to be sought.

The cases in which a slight benefit to the party promising, and a slight damage, loss, or inconvenience to the other party, has been held sufficient to sustain a contract, are collected in Comyns's Digest, Action upon the Case upon Assumpsit, B, 1 Comyn on Contracts, part I., chapter 2, and 1 Powell on Contracts, 330 *et seq.* Upon a careful examination of the earlier cases on this subject, some confusion and contradiction

will be perceived; and it probably is impossible to reconcile them. In most instances, however, it will be found that the misapplication of acknowledged principles, rather than the assumption of contradictory ones, has caused the discrepancies in the adjudications on this topic. In the modern decisions, there is hardly an instance in which judges have differed in their views on the subject of consideration.

In sales, exchanges, loans, and most other contracts, there is no difficulty in at once perceiving the consideration. But in some cases it is not so readily discerned. And after hesitation as to the expediency or the profit of so doing, a few examples, illustrative of the principles on which much of the law on this point now rests, are here cited.

Slight benefit to the promisor.

A promise, in consideration of so much money received, to pay the like sum into court, and appear. "For here he has benefit for the use of the money." (*a*) A promise to cancel a bond, in consideration that the obligor will pay the single sum, at the day of payment. "For peradventure the non-payment at that time would be more prejudicial to him than the forfeiture of the bond would be of advantage." "He had benefit, namely, to be sure of the performance." (*b*) So of a promise by a judgment creditor to assign the bond and judgment against the principal to the bail, in consideration of his paying the amount of the judgment, after *scire facias* brought against him. (*c*) A promise by an executor to accept £150 in satisfaction of a debt to the testator of £205. For the nature of the debt is changed, and the executor may sue for it in the *debet*, i. e. as for his own proper debt; whereas, before, he must have sued in the *detinet*, i. e. in his representative capacity. (*d*) This action was against the debtor on his promise to pay the smaller sum, and was sustained. But there was no consideration for this promise, unless the executor was bound to discharge the original debt. And on the

(*a*) 2 Vent. 45.

(*b*) Hutton 76 and Cro. Car. 8. See also Coke *v.* Hewit, cited Cro. Eliz. 194. (*c*) Gouldsb. 156. (*d*) Yelv. 11.

same principle an action would have been supported against the executor, if he had refused to fulfil his engagement to receive the smaller sum in full satisfaction. A promise to acknowledge satisfaction of a judgment for five pounds, upon the payment of four pounds, was held to be binding; for "it is a benefit unto him to have it without suit or charge; and it may be there was error in the record, so as that the party might have avoided it." (*a*) This case, however, would not, probably, be now considered as rightly adjudged. A contract of which a lease at will is the consideration, has been adjudged to be void, because the tenancy may be determined immediately; (*b*) but if it be doubtful whether the tenant have a right to hold, *i. e.* if it be doubtful whether he be tenant at will, the assignment of such a lease or interest will support a promise. (*c*) The relinquishment of a doubtful right is therefore a good consideration for a promise. (*d*) Where the plaintiff orally bargained with A. for a house, and sold the bargain to the defendant for £40, and A., at the defendant's request, conveyed to B., it was held, in a suit for the £40, that the consideration was sufficient. (*e*) The only true ground of this decision seems to be, that the defendant had a chance of receiving a benefit. That the defendant actually received a benefit, through the plaintiff's means, though mentioned by the court, was no consideration for the original promise; though it might perhaps have supported a promise made after the conveyance to B. If the decision be correct, on the existing facts, it must have been the same, though A. had refused to convey the house.

In Schnell *v.* Nell, 17 Ind. 29, it was held that a promise, in consideration of one cent, to pay six hundred dollars, was unconscionable and void on its face. So of a promise, in con-

(*a*) Cro. Eliz. 429 and Moore, 412.

(*b*) Kent *v.* Prat, 1 Brownl. 6.

(*c*) 1 Vin. Ab. 309. 2 Bing. 244.

(*d*) See *post.* 177.

(*e*) Seaman *v.* Price, 2 Bing. 437. On a writ of error, the King's Bench affirmed this judgment, upon the ground that A.'s promise must be taken after verdict, to have been a valid one, *i. e.* in writing. 4 Barn. & Cres. 528 and 7 Dowl. & Ryl. 14.

sideration of one dollar, to pay upwards of a thousand dollars. Shepard *v.* Rhodes, 7 R. I. 470.

Slight damage, &c., to the promisee.

A promise to pay a sum of money, if the promisee will procure an order from a third person, directing the payment, is binding, if the condition is performed. (*a*) So of a promise to pay rent in arrear to an assignee of a leasehold estate, if a deed be shown proving that the rent is due. (*b*) So of a promise to pay the bond of a third person, if the obligee will go before a magistrate and make oath that it was rightly read to the obligor before he executed it. "The travail of coming before the mayor is a very good consideration." (*c*) In the cases cited in the margin, (*d*) proof of a debt, in various agreed modes, was held to be a sufficient consideration for a promise to pay. "For it is a charge to the plaintiff." So of an undertaking to endeavor to perform an act at another's request; (*e*) and of a promise to indemnify, if the plaintiff will enter into land of a third person which the defendant claims as his own. (*f*) So of a promise to pay a certain sum of money if the plaintiff will call for it at a particular time, and he call accordingly; the calling for the money being an inconvenience to the plaintiff. (*g*) Where A., at B.'s request, consented that B. might weigh A.'s boilers, and B. thereupon promised that after the weighing he would leave and give them up in as good condition as they were in at the time of the consent so given, it was held that there was a good

(*a*) 2 Vent. 71, 74.

(*b*) Cro. Eliz. 67.

(*c*) Cro. Eliz. 469. T. Ray. 153. 2 Sid. 123. 18 Johns. 337. But see 1 Freeman, 133 and 1 Mod. 166, where Vaughan, C. J. denied that extrajudicial oaths were lawful, or of any legal effect, and said they were punishable by setting the party in the stocks, under the statute of James I. against profane swearing.

(*d*) 1 Sid. 57, 283, 369. T. Ray. 32. 7 Mod. 13. 1 Freeman, 53. 1 Littell, 121, 123.

(*e*) Hob. 105. T. Ray. 400.

(*f*) 2 Johns. Cas. 52.

(*g*) By Wilde, J. 5 Pick. 384. And see 11 Met. 171, 172.

consideration for the promise; that A. might have sustained some damage by complying with B.'s request. (*a*)

Benefit to a third person at the instance of the promisor.

All sureties for the debts, or performance of duties, covenants, &c., of others, come under this head. The surety, by legal intendment, requests that the principal may be accommodated with a loan, or may have credit at another's shop, &c. The consideration of his undertaking is the benefit received by the principal, at his request, express or implied. Guaranties, and all other forms of collateral obligation assumed for others, come within the same principle. (*b*)

In Minet's case, (*c*) Lord Eldon said, "the undertaking of one man for the debt of another does not require any consideration moving between them." And undoubtedly it is not necessary, in order to hold a surety, that there should be any consideration, as between him and the principal. Any person may promise as surety, without the principal's knowledge; and if there be a consideration for the promise it will be binding. Otherwise, he will not be bound, though he promise at the express request of the principal.

Where the whole is one agreement, where the principal and surety, or guarantor, unite, at the same time, in making a promise, that agreement is obligatory on the surety, or guarantor; and the consideration for that agreement attaches to him as well as to the principal. Principal and surety, in such case, are joint contractors, and the benefit to the principal, or the damage, &c., to the promisee, is the consideration which supports the contract of both promisors. (*d*)

When a promise is made to pay the already existing debt of another, there must be some new consideration, or the promise will be void. The original consideration, which

(*a*) Bainbridge *v.* Firmston, 1 P. & Dav. 2, 8 Ad. & El. 743 and Willm. Woll. & Hodges, 600. And see 3 Kerr, (N. B.) 212.

(*b*) See Brown *v.* Garbrey, Gouldsb. 94. Kirkby *v.* Coles, Cro. Eliz. 137. Stadt *v.* Lill, 9 East, 348. Leonard *v.* Vredenburgh, 8 Johns. 29. Hunt *v.* Adams, 5 Mass. 361.

(*c*) 14 Ves. 189.

(*d*) See Tenney *v.* Prince, 4 Pick. 385. Samson *v.* Thornton, 3 Met. 279.

supports the principal's contract, cannot be made to operate on the new promise. Such promise it *nudum pactum.* (*a*)

Forbearance.

Forbearance to sue, or surceasing a suit or suspending a right, is a sufficient consideration. (*b*) Thus where an obligor had commenced proceedings in chancery, on the ground that he had paid the bond which still remained in the obligee's hands, a promise by the latter to give up the bond, in consideration that the obligor would desist from his suit in chancery, was held to be valid. (*c*) An agreement to forbear, for a certain or reasonable time, to sue, or adopt legal proceedings, for a legal cause of action, at the request of the party liable, is a sufficient consideration to support a promise. (*d*) Forbearance to sue, &c., is a good consideration for the promise of a third person, as well as of the person liable to suit. (*e*) In some of the foregoing cases, the forbearance was given by an assignee of a debt, who could not have sued in his own name; and the consideration was held to be sufficient. It was held, in older cases, that the consideration was not sufficient, unless the assignee had a letter of attorney to sue and release. (*f*) As seen, *ante* 139, a promise by an executor or administrator, in consideration of forbearance to sue, is upon

(*a*) Packard *v.* Richardson, 17 Mass. 129. Parker *v.* Carter, 4 Munf. 273. Bixler *v.* Ream, 3 Pennsyl. 282.

(*b*) May *v.* Alvares, Cro. Eliz. 387. Com. Dig. Assumpsit, B. 1. 2. 2 Bibb, 30. 1 Saund. 211 note. Templeton *v.* Bascom, 33 Verm. 132. As to the evidence of an agreement to forbear, see 7 Conn. 528. 11 Met. 172. 8 Cush. 88. 5 Gray, 553.

(*c*) Dowdenay *v.* Oland, Cro. Eliz. 768. And see Pooly *v.* Gilberd, 2 Bulst. 41.

(*d*) 2 Saund. 137 c. d. note. Bidwell *v.* Catton, Hob. 216. Rippon *v.* Norton, Yelv. 1. Harris *v.* Richards, Cro. Car. 272. Elting *v.* Vanderlyn, 4 Johns. 237. King *v.* Weeden, Style, 264.

(*e*) Reynolds *v.* Prosser, Hardr. 71. Davison *v.* Hanslop, T. Ray. 211 and 2 Lev. 20. Quick *v.* Copleston, 1 Sid. 242. Edwards *v.* Kelly, 6 M. & S. 204. Jennison *v.* Stafford, 1 Cush. 168. Robinson *v.* Gould, 11 Cush. 55. Rood *v.* Jones, 1 Doug. (Mich.) 188.

(*f*) See 1 Rol. Ab. 20, pl. 11, 12. Reynolds *v.* Prosser, Hardr. 74, and Pet *v.* Bridgwater, there cited.

sufficient consideration, and will bind him personally, though he has not assets. (*a*)

In Moore, 854, it is said that the executor's "promise implies assets." This, however, cannot be the true ground of these decisions; for a mere promise to pay, without any new consideration, is void, if there be no assets. And yet the promise implies assets in this instance as much as in the other. (*b*)

The usual consideration of the guaranty of a note or other engagement, when undertaken after the note, &c., is made, is the forbearance extended to the original promisor. And (as before stated) unless there be some new consideration, such undertaking is *nudum pactum*. (*c*)

The cases already cited, and many others, show that not only forbearance to sue, but also forbearing to insist upon payment when it would be made without suit, if demanded, forbearing to levy an execution, or to take out or execute other process, is a good consideration for a promise, either by the party to whom the forbearance, &c., is given, or by a third person. (*d*) So of withdrawing objections to the probate of a will, (*e*) and forbearing to protest a bill of exchange drawn on the party promising. (*f*)

Lord Mansfield and Ashhurst, J., are reported (*g*) to have held that a promise by a judgment debtor to pay debt and cost, in consideration of a stay of execution, was not sufficient to support an action; as it was turning a judgment debt into a debt upon simple contract. This was an extrajudicial opinion, and contrary to an adjudged case (*h*) in the reign of Elizabeth. In the case of Tanner *v.* Hague, also, (*i*) a

(*a*) 1 Saund. 210, note (1). Treford *v.* Holmes, Hutton, 108. Palmer's case, Hetley, 62. Porter *v.* Bille, 1 Freeman, 125. 2 Saund. 137 c. note.

(*b*) See Pearson *v.* Henry, 5 T. R. 8. Browne's case, 1 Freeman, 409.

(*c*) See King *v.* Upton, 4 Greenl. 387. Ulen *v.* Kittredge, 7 Mass. 233.

(*d*) Style, 395, 440. Cro. Eliz. 868, 909. Godb. 159, pl. 220. 1 Sid. 38. Hutton, 63. 2 Keble, 200. 1 Salk. 28. 1 B. & Ad. 603. 10 Mass. 230. Yelv. 20. See also Newsom's case, Clayton, 139.

(*e*) 5 Pick. 393, 394, by Parker, C. J.

(*f*) Pinchard *v.* Fowke, Style, 416.

(*g*) Cowp. 129.

(*h*) Tisdale's case, Cro. Eliz. 758.

(*i*) 7 T. R. 420.

defendant was discharged from execution on his undertaking to pay the debt on a future day, and counsel admitted that there was a remedy on the new promise.

It was said by Jackson, J., 14 Mass. 99, that if an obligor, on being called upon to pay his bond, should promise to pay at a future day, assumpsit would not lie on this promise. The contrary, however, was adjudged in the case of Ashbrooke *v.* Snape, Cro. Eliz. 240. And if the promise in such case were made in consideration of forbearance expressly given, the foregoing cases leave no room to doubt that such promise is a good ground of action. So if the promise were made on condition that the obligee should make oath that the sum secured by the bond was due, or should call again upon the obligor for payment, and the obligee had performed the condition.

Forbearance, it is said, must be for a certain time, or for a reasonable time. And the weight of authority is, that forbearance *per breve* or *paululum tempus*, is not a consideration of any value in law; for a suit may be immediately brought, notwithstanding the brief forbearance of an hour or a day. And the forbearance promised must be sufficient at the time of the promise, and not depend on the promisor's subsequent conduct. (*a*)

For the same reason, forbearance *aliquo tempore* is insufficient. (*b*) "*Pro aliquo parvo tempore*, viz. some fortnight or thereabouts," was held sufficient, in the case of Baker *v.* Jacob. (*c*)

Forbearance for a reasonable or convenient time is a sufficient consideration. *Id certum est quod certum reddi potest;* and the court is to decide, when the suit is brought, whether the party has forborne for such a time. (*d*) Indefinite

(*a*) 1 Rol. Ab. 23. Marshe's case, Hetley, 8. Tricket *v.* Mandlee, 1 Sid. 45. Lutwich *v.* Hussey, Cro. Eliz. 19. 4 Wash. C. C. 151. 1 Pennsyl. 385. *Contra*, Whorwood *v.* Gybbons, Gouldsb. 48. Gill *v.* Harewood, 1 Leon. 61. Cooks *v.* Douze, Cro. Car. 241. Palmer's case, Hetley, 62.

(*b*) 1 Sid. 45. Cro. Car. 438. 1 Selw. N. P. (11th ed.) 45, 46.

(*c*) 1 Bulst. 41.

(*d*) 3 Bulst. 207. Moore, 853. 1 Sid. 45, 294. 1 Lev. 188. 2 M. & S. 50, by Lord Ellenborough.

forbearance was, at first, held to be insufficient; (*a*) but it is now well settled that such is a good consideration; that total and absolute, or at least reasonable, forbearance is thereby intended. (*b*)

The distinction between a "little time" or "some time," a "reasonable" or "convenient" time, or an indefinite forbearance, though somewhat subtle, is sufficiently intelligible. A consideration must be sufficient when the contract is made, and must not depend on subsequent events. (*c*) Forbearance for a "little time," &c, is wholly uncertain, and the courts cannot decide what is a little time, within the meaning of the parties. And though a reasonable or a long time may be afterwards given to the promisor, yet it does not render the original consideration sufficient. Whereas, general forbearance, or for a convenient or reasonable time, is a subject of judicial understanding, and must import, at the time of the contract, such a forbearance as the courts will hold to be sufficient.

In declaring on a promise made upon such consideration, the plaintiff must allege the time of forbearance actually given, and he must prove it; and if it be judged reasonable and sufficient, the action will be sustained. (*d*)

Forbearance is not a good consideration to support a promise, unless there is a good cause of action. It must be a forbearance of what might be legally enforced. Therefore, where an obligee released one of the joint obligors, and the other promised payment, in consideration of forbearance, it was held to be *nudum pactum;* for a release of one is a discharge of both. (*e*) So of a promise by an heir to pay the

(*a*) Philips *v.* Sackford, Cro. Eliz. 455.

(*b*) Cowlin *v.* Cook, Latch, 151 and Noy, 83. Anon. 1 Freeman, 66. Therne *v.* Fuller, Cro. Jac. 397. Beven *v.* Cowling, Poph. 183. Mapes *v.* Sidney, Cro. Jac. 683 and Hutton, 46. Maynell *v.* Mackallye, Style, 459. Barnehurst *v.* Cabbot, Hardr. 5. Clark *v.* Russel, 3 Watts, 213. Hamaker *v.* Eberley, 2 Binn. 506. Lonsdale *v.* Brown, 4 Wash. C. C. 151. See Semple *v.* Pink, 1 Exch. 74, as to the language which imports forbearance for a reasonable time.

(*c*) By Dodderidge, J., Poph. 183.

(*d*) Hardr. 5. 4 Johns. 237. 4 Greenl. 387.

(*e*) Hammon *v.* Roll, March, 202. Herring *v.* Dorell, 8 Dowl. P. C. 604.

bond of his ancestor when he is not expressly bound in the bond; (*a*) and of a widow to pay a note given by her while under coverture, or her husband's debts; (*b*) and of a husband, after his wife's death, to pay a debt contracted by her before marriage, (*c*) or a debt which she owed as executrix or administratrix. (*d*) So of a promise in consideration of a discharge from a wrongful arrest. (*e*) Nor is forbearance to sue a good consideration for a promise, where it does not appear that there was any person, *in rerum natura*, liable to be sued. (*f*) There are cases, however, in which forbearance, without mentioning the person to be forborne, is said to be forbearance of everybody; and in these cases, if there be any person liable to pay, the promise will be binding, though the defendant be not himself liable. (*g*)

An agreement by a surety to forbear a suit against the principal, after he shall have paid the principal's debt, is a good consideration for a promise of reimbursement by a third person, though the surety had no cause of action at the time of the agreement. (*h*) "Forbearance to sue after the cause of action attached would be as great an injury to the plaintiff, as the immediate forbearance to sue a cause of action existing at the time of the promise." (*i*) This decision is within the principle of the other cases, and not an exception to it. It stands on the same ground with other prospective contracts. If there had been no cause of action against the principal, on the surety's paying the debt, or if the surety had himself been fully indemnified, the decision would have been different.

(*a*) Barber *v.* Fox, 2 Saund. 136, and note to that case.

(*b*) Loyd *v.* Lee, 1 Strange, 94. Goodwin *v.* Willoughby, Latch. 142 and Poph. 177. See *post.* 181.

(*c*) Smith *v.* Jones, Yelv. 184, 1 Bulst. 44, Owen 133 and Cro. Jac. 257.

(*d*) Lea *v.* Minne, Yelv. 84 and Cro. Jac. 110.

(*e*) Willes, 482. Godb. 358. Palmer, 394.

(*f*) Jones *v.* Ashburnham, 4 East, 455. Rosyer *v.* Langdale, Style, 248. And see Gould *v.* Armstrong, 2 Hall, 266.

(*g*) Hume *v.* Hinton, Style, 305. By Twisden, J., T. Ray. 32.

(*h*) Hamaker *v.* Eberley, 2 Binn. 506. (*i*) By Tilghman, C. J.

Surceasing Suit and Compromise.

Surceasing a suit at law or in equity is a sufficient consideration of a promise to pay a stipulated sum. (*a*) And this is so when a suit is instituted to try a question respecting which the law is doubtful, or when the parties suppose the fact, which is the subject of the agreement, is doubtful. (*b*) So the withdrawing of a defence to a suit is a sufficient consideration of a promise to accept a smaller sum in satisfaction of a larger. (*c*) So the withdrawing by an heir of a caveat to the proving of the will of his ancestor, is a sufficient consideration to support a promise by the devisees to pay him a specified sum. (*d*) But it must appear that there is some reasonable ground for contesting the probate of the will. (*e*) A note given by a defendant, on the plaintiff's ending an action of slander against him, was held to be on a legal consideration, though the words sued for were not actionable. (*f*) So of an agreement not to make defence to an instituted suit, but to let it abide the result of another case depending on the same facts, upon a promise of an abatement of the claims in suit. (*g*)

The compromise of a claim may be a good consideration for a promise, although litigation has not been actually commenced. But, in that class of cases, when a suit is brought on the promise, it may be shown in defence that there was no legal ground for the claim that was thus compromised, and

(*a*) Stephens *v.* Squire, 5 Mod. 205 and Comb. 362. Smith *v.* Monteith, 13 Mees. & Welsb. 437, 441. Pooly *v.* Gilberd, 2 Bulst. 41.

(*b*) Longridge *v.* Dorville, 5 B. & Ald. 117. 13 Mees. & Welsb. *supra.* Russell *v.* Cook, 3 Hill, 504. Perkins *v.* Gay, 3 Serg. & R. 327. Zane's Devisees *v.* Zane, 6 Munf. 406. Trigg *v.* Read, 5 Humph. 529. Taylor *v.* Patrick, 1 Bibb, 168. Blake *v.* Peck, 11 Verm. 483. Durham *v.* Wadlington, 2 Strobhart Eq. 258. 1 Story on Eq. § 131. 2 Mich. 145.

(*c*) Cooper *v.* Parker, 14 C. B. 118 and 15 ib. 822.

(*d*) Seaman *v.* Seaman, 12 Wend. 381.

(*e*) Ib. Busby *v.* Conoway, 8 Maryl. 55. Allen *v.* Prater, 35 Alab. 169.

(*f*) O'Keson *v.* Barclay, 2 Pennsyl. 531. And see 1 Vroom, 323.

(*g*) Barlow *v.* Ocean Ins. Co. 4 Met. 270. See also Union Bank of Georgetown *v.* Geary, 5 Peters, 99, 114. Fish *v.* Thomas, 5 Gray, 45.

the promise will thereupon be held void. "Unless," said Blackburn, J. (1 Best & Smith, 569) "there was a reasonable claim on the one side, which it was *bona fide* intended to pursue, there would be no ground for a compromise." See 13 Illinois, 140. A note or bill given in consideration of what is supposed to be a debt is without consideration, if it appears that there was a mistake in fact, as to the existence of the debt; (*a*) or if a note is given on the payee's misrepresentation, though not fraudulent, that the maker is indebted to him in the sum for which the note is given; whether that misrepresentation is in matter of fact or of law. (*b*)

Where each party agreed to give up and withdraw his claim against the other, in consideration whereof one promised to pay to the other an annuity, it was held that this promise was on a sufficient consideration. (*c*)

See, on this subject, 3 White & Tudor's Lead. Cas. in Equity (3d Amer. ed.) 406 *& seq.*

Moral Obligation.

It is frequently asserted in the books, that a moral obligation is a sufficient consideration for an express promise, though not for an implied one. The terms "moral obligation," however, are not to be understood in their broad ethical sense. The present law on this subject is generally acknowledged, in England and this country, to be as stated in a note to Wennall *v.* Adney, 3 Bos. & Pul. 352, namely, that "an express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been

(*a*) Bell *v.* Gardiner, 4 Scott N. R. 621 and 4 Man. & Grang. 11. In this case, the defendant had given a note in satisfaction of a bill of exchange which he had accepted for another's accommodation, not knowing that the bill had been altered and that he therefore was not liable thereon, though he had the means of knowing that fact. And see 4 Denio, 189.

(*b*) Southall *v.* Rigg and Forman *v.* Wright, 11 C. B. 494, 495.

(*c*) Llewellen *v.* Llewellen, 3 Dowl. & Lowndes, 318.

enforced at law, though not barred by any legal maxim or statute provision." Hence it is held that an express promise to pay a witness for loss of time more than his legal fees for travel and attendance will not bind the promisor. (*a*) Nor a promise by a father to pay expenses incurred in relieving his adult son suddenly taken sick at a distance from his friends; (*b*) nor a promise by a son to pay for support furnished to his father. (*c*) Nor the promise of a grandfather to pay for services that have been rendered to his grandchild. (*d*) Nor a promise to pay damages for detaining money, beyond the amount of interest thereon. (*e*) And when a deed is given of land described as of a certain number of acres, which, upon being measured, is found to be less, a promise by the grantor to pay back a proportional part of the price, will not sustain an action. (*f*) A promise to pay for labor on land entered upon and claimed by the plaintiff as his own, but recovered from him by the defendant in a suit at law, will not support an action. (*g*) Nor a promise by one to pay a demand which he had voluntarily released, for the purpose of rendering himself a competent witness. (*h*)

(*a*) Willis *v.* Peckham, 1 Brod. & Bing. 515 and 4 Moore, 300. And see 1 B. & Ad. 956.

(*b*) Mills *v.* Wyman, 3 Pick. 207. In Besfich *v.* Coggil, Palmer, 559, the court were equally divided on the question whether a father was liable on an express promise to pay expenses, incurred in Spain, for the burial of his son.

(*c*) Cook *v.* Bradley, 7 Conn. 57. Parker *v.* Carter, 4 Munf. 273.

(*d*) Elicott *v.* Peterson's Ex'r, 4 Maryl. 476, 492.

(*e*) Phetteplace *v.* Steere, 2 Johns. 442.

(*f*) Smith *v.* Ware, 13 Johns. 259. Williams *v.* Hathaway, 19 Pick. 387.

(*g*) Frear *v.* Hardenbergh, 5 Johns. 272. Society *v.* Wheeler, 2 Gallis. 143. See also McFarland *v.* Mathis, 5 English, 560. Carson *v.* Clark, 1 Scammon, 113. Hutson *v.* Overture, ib. 170. Carr *v.* Allison, 5 Blackf. 63.

(*h*) Valentine *v.* Foster, 1 Met. 520. The distinction, taken in this case, between the validity of a promise to pay a claim that is discharged by operation of positive law, and a claim that is released or otherwise discharged by the voluntary act of the claimant, has been recognized and applied by other courts. See Ex parte Hall, 1 Deacon, 171. Stafford *v.* Bacon, 1 Hill's (N. Y.) Rep. 532. Warren *v.* Whitney, 24 Maine, 562. Lewis *v.* Simons, 1 Handy, 82. Montgomery *v.* Lampton, 3 Met. (Ky.) 519. Shepard *v.* Rhodes, 7 R. I. 474. *Contra*, Willing *v.* Peters, 12 Serg. & R. 177.

Other express promises, called gratuitous, are held to be void, as will hereafter be seen, merely for want of consideration, though the moral obligation of the promisor, in its ethical sense, is most clear.

Among the cases sometimes cited to prove that a moral obligation, in its extended sense, is a sufficient consideration for an express promise, is Watson *v.* Turner, Bul. N. P. 129, 147. That was an action against the overseers of a parish to recover for supplies furnished to a pauper, settled in the parish, and boarding out of it, under an agreement made by the overseers and the plaintiff, and a promise by them, after the supplies were furnished, to pay therefor, was held to bind them. "For," says the book, "overseers are under moral obligation to support the poor." In Atkins *v.* Banwell, 2 East, 505, which was an action against overseers for supplies to a pauper in a parish where he was not settled, it was held, that as no express promise had been made, the action would not be sustained; and Lord Ellenborough said that the promise in the former case made all the difference; for a moral obligation was sufficient to support an express, but not an implied, promise. The ground, however, on which Watson *v.* Turner can be upheld, was the legal obligation of the defendants; for it is established law in England, that overseers are legally bound to supply paupers casually in the parish, and paupers settled there, if residents, or if residing elsewhere under their charge. (*a*) So the case of Lord Suffield *v.* Bruce (*b*) might, it is believed, have been sustained on the ground of legal obligation, though Lord Ellenborough, before whom the case was tried, spoke only of moral obligation as the consideration of the defendant's express promise.

The following are cases in which an express promise has been held sufficient to bind the promisor: A promise to pay a debt barred by the statute of limitations, (*c*) or discharged

(*a*) Simmons *v.* Wilmott, 3 Esp. R. 91. Lamb *v.* Bunce, 4 M. & S. 277. Newby *v.* Wiltshire, 4 Doug. 286 and Cald. 527. Wing *v.* Mill, 1 B. & Ald. 104. Paynter *v.* Williams, 1 Crompt. & Mees. 810.

(*b*) 2 Stark. R. 175. Chit. on Con. (10th Amer. ed.) 48.

(*c*) Chit. on Con. (10th Amer. ed.) 922.

under a bankrupt or an insolvent law. (*a*) So of an adult's promise to pay a debt contracted during his infancy, (*b*) and of a borrower's promise to pay principal and lawful interest of a sum lent to him on a usurious contract. (*c*) So of the promise by the drawer or indorser of a bill of exchange or the indorser of a promissory note, to pay it, though he has not received seasonable notice of the default of other parties, provided he is aware of the facts. (*d*) So of a promise by a lessor to pay for repairs made by his lessee, according to an agreement not inserted in the lease. (*e*) And where a debtor paid part of the debt and took a receipt, and the creditor afterwards recovered judgment for the whole debt, by reason of the debtor's omission to show the receipt in reduction of the claim sued for, the creditor's promise to refund the money before received by him, if the debtor had a receipt therefor, was held to be binding. (*f*) In Doty *v.* Wilson, 14 Johns. 381, a promise to a sheriff, by one whom he had voluntarily suffered to escape from his custody on final process, to repay to the sheriff the amount which he had been compelled to pay to the original creditor, was held valid.

In Lee *v.* Muggeridge, 5 Taunt. 36, a married woman gave a bond to repay money advanced to her son in law; and after her husband's death she made a written promise that her executors should settle the bond; and it was decided that an action at law was maintainable against her executors on that promise. That case clearly oppugns the rule in 3 Bos. & Pul. 252, note, inasmuch as there was no cause of action which could ever have been enforced at law; the contracts of a married woman being void; and as seen, *ante* 176, a promise by her, in consideration of forbearance, is therefore void. And that case is not affirmed by any subsequent English decision,

(*a*) Cowp. 544. 1 Chit. R. 609. 7 Johns. 36. 8 Mass. 127. 6 Cush. 241. Hayes, 484.

(*b*) *Ante*, 55–58.

(*c*) Barnes *v.* Headley, 2 Taunt. 184. Early *v.* Mahon, 19 Johns. 147.

(*d*) Treatises on Bills and Notes.

(*e*) Seago *v.* Deane, 4 Bing. 459 and 1 Moore & Payne, 227.

(*f*) Bentley *v.* Morse, 14 Johns. 468, approved in 2 Barb. 425, 426.

but has been virtually, though not in express terms, overruled by the cases of Littlefield *v.* Shee, 2 B. & Ad. 811, and Eastwood *v.* Kenyon, 11 Ad. & El. 438 and 3 P. & Dav. 276. And it has been denied by courts in this country. (*a*)

In Viser *v.* Bertrand, 14 Ark. 267, and in Wilson *v.* Burr, 25 Wend. 386, a promise by a woman, after she had obtained a divorce from her husband, to pay the fees of her counsel in obtaining the divorce, was held to bind her. And in Goulding *v.* Davidson, 26 N. Y. Rep. 604, where a married woman carried on trade in her own name as an unmarried woman, and bought goods of those who were ignorant of her coverture, it was decided that she was bound by her promise, after her husband's death, to pay for them. (*b*)

There are several cases in Pennsylvania, in which a moral obligation has been held, contrary to the generally adopted doctrine, to be a sufficient consideration of an express promise. (*c*)

Mutual Promises.

One promise is a good consideration for another. Even a voidable promise is sufficient, as has been seen in the case of a promise by an infant. *Aliter* of a void promise. Thus

(*a*) Watkins *v.* Halstead, 2 Sandf. 311. Kennerly *v.* Martin, 8 Missouri, 698. Waters *v.* Bean, 15 Georgia, 360. Shepard *v.* Rhodes, 7 R. I. 473. Watson *v.* Dunlap, 2 Cranch C. C. Rep. 14.

(*b*) In Lee *v.* Muggeridge, it appeared in the plaintiff's declaration that the wife had an estate settled to her separate use. And though the court, in giving judgment, took no notice of this fact, yet it has sometimes been suggested as a reason for supporting that judgment. But when the fact of a wife's having separate property does not appear on the pleadings, it is held that a promise to pay, made by her, after her husband's death, is not binding. Ferrers *v.* Costello, Longfield & Townsend, 292. Vance *v.* Wells, 8 Alab. 399. In the first of these cases, the court expressed no opinion on the question whether, if that fact had appeared on the pleadings, the promise would have bound the woman. But in the other case, it was said, extrajudicially, that if goods are furnished to a married woman, on the faith of her separate estate, or if she executes a note as surety for her husband, her promise, after his death, that she will make payment, binds her.

(*c*) Greeves *v.* McAllister, 2 Binn. 591. Willing *v.* Peters, 12 Serg. & R. 182. Hemphill *v.* McClimans, 24 Penn. State Rep. 367. But in Snevily *v.* Read, 9 Watts, 396, and in Kennedy *v.* Ware, 1 Barr, 445, the contrary was held.

reciprocal promises of marriage are valid. (*a*) So of wagers, where they are recognized as valid contracts. (*b*) So of promises to sell and deliver goods and to pay for them, (*c*) and of divers other mutual promises. (*d*)

Mutual promises must be made at the same time, or they are without consideration and void. (*e*)

In some of the cases above referred to, where the promise of one party was held to be the consideration of the other's promise, it would probably be held at this day, that the performance of the promise was the true consideration; and therefore the form of declaring there adopted would not now be sanctioned by the courts. (*f*) But this doctrine belongs to the subject of pleading.

Gratuitous promises and services.

Merely gratuitous promises, as before stated, are void. Thus natural affection is not a sufficient consideration to support a promise. (*g*) A promissory note given by a father to a son, on such consideration only, is void. (*h*) So of a note given to a sister, in consideration that her father had bequeathed to her a smaller portion of his estate than to the promisor. (*i*) So of a note given by a testator, in his last sickness, to his son in law, for the purpose of more effectually equalizing the distribution of his property among his children than he had

(*a*) Holcroft *v.* Dickenson, Carter, 233 and 1 Freeman, 95, 347. Harrison *v.* Cage, 5 Mod. 412 and 12 Mod. 214. Baker *v.* Smith, Style, 295, 303.

(*b*) Jackson *v.* Colegrave, Carth. 338. Martindale *v.* Fisher, 1 Wils. 88. 2 Chit. Pl. (6th Amer. ed.) 227 *& seq.*

(*c*) Bettisworth *v.* Campion, Yelv. 134. Nichols *v.* Raynbred, Hob. 88.

(*d*) Cro. Eliz, 543, 703, 888. 4 Leon. 3. Hardr. 102. Comb. 256. 8 Johns. 304.

(*e*) *Ante*, 21, 22. Livingston *v.* Rogers, 1 Caines, 583. Tucker *v.* Woods, 12 Johns. 190.

(*f*) See 1 Saund. 320, note 4.

(*g*) Plowd. 302. Harford *v.* Gardiner, 2 Leon. 30. Bret *v.* J. S. and wife, Cro. Eliz. 756. Chit. on Con. (10th Amer. ed.) 27, 50.

(*h*) Fink *v.* Cox, 18 Johns. 145. And see Holliday *v.* Atkinson, 5 Barn. & Cres. 501 and 8 Dowl. & Ryl. 163.

(*i*) Hill *v.* Buckminster, 5 Pick. 391.

done by a will previously executed. (*a*) So of a note given by a father to his son in consideration of his releasing his interest in the promisor's estate. (*b*) So of a note given by a father to his son in consideration of the son's ceasing to complain of the distribution which the father had made of his estate. (*c*) So of a note given by a sister, who inherited her brother's property, because she believed that if he had made a will, he would have left to the payee of the note as much as the amount thereof. (*d*)

Merely gratuitous services are no consideration for an implied promise to reward them: As voluntary assistance in saving property from fire, (*e*) and other services rendered without a precedent request. (*f*) The law is the same when one pays another's debt without request. (*g*) "Perhaps it is better for the public," said Eyre, C. J. 2 H. Bl. 259, "that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude."

An exception to this rule is found in the marine law of all civilized nations, in the recompense which is awarded, under the name of salvage, for the rescue of property from the perils of the sea. Salvors have a lien upon the property saved, and the amount of compensation is determined by a court of admiralty, according to the circumstances. (*h*) But those who secure property found afloat in a river, or beasts found astray, have no such lien thereon, and cannot lawfully withhold the property from the owner, on his refusal to compensate them

(*a*) Parish *v.* Stone, 14 Pick. 198. See Graves *v.* Graves, 7 B. Monroe, 214.

(*b*) Loring *v.* Sumner, 23 Pick. 98.

(*c*) White *v.* Bluett, 24 Eng. Law & Eq. 434.

(*d*) McCarroll *v.* Reardon, 4 Allen (N. B.) 261.

(*e*) Bartholomew *v.* Jackson, 20 Johns. 28.

(*f*) 1 McCord, 22. 5 Johns. 272. 2 Gallis. 143.

(*g*) Jones *v.* Wilson, 3 Johns. 434. Beach *v.* Vandenburgh, 10 ib. 361.

(*h*) Abbott on Shipping (5th Amer. ed.) 659 *& seq.* Maude & Pollock on Shipping, c. x. 2 Parsons on Maritime Law, 595 *& seq.* Sprague's Decis. 57, 91, 282, 499. Newberry, 329, 341, 412, 421, 438. Daveis, 20, 61.

for their services, but are answerable to him in an action of trover. (*a*) Yet though the finder has no lien for his services, it seems that he may recover of the owner payment therefor, in an action on an implied promise. (*b*)

Subscriptions.

Many actions have been brought, in this country, on subscription papers in which the defendants promised to contribute certain sums in aid of some public object; as the building of a church, college or academy, support of public worship, &c., and though there is not a uniformity in the decisions on the question whether there is a sufficient legal consideration of such promises, yet thus much is now the generally adopted doctrine, namely, that where "something has been done, or some liability or duty assumed, in reliance upon the subscription, in order to carry out the object, the promises are binding and may be enforced, although no pecuniary advantage is to result to the promisors." (*c*)

(*a*) Nicholson *v.* Chapman, 2 H. Bl. 254. Baker *v.* Hoag, 3 Barb. 203. Binstead *v.* Buck, 2 W. Bl. 1117.

(*b*) See Doctor & Student, c. 51. Addison on Con. (2d Amer. ed.) 444. Story on Bailm. § 121 *a*. Reeder *v.* Anderson's Adm'rs, 4 Dana, 193. Preston *v.* Neale, 12 Gray, 222.

(*c*) Underwood *v.* Waldron, 12 Mich. 73, 89. McDonald *v.* Gray, 11 Iowa, 508. Commissioners of Canal Fund *v.* Perry, 5 Ohio, 59. Peirce *v.* Ruley, 5 Ind. 69. Johnston *v.* Wabash College, 2 Carter, (Ind.) 555. Robertson *v.* March, 3 Scammon, 198. M'Auley *v.* Billinger, 20 Johns. 89. Reformed Protestant Dutch Church *v.* Brown, 29 Barb. 335. George *v.* Harris, 4 N. Hamp. 533. Farmington Academy *v.* Allen, 14 Mass. 172. Bryant *v.* Goodnow, 5 Pick. 228. Amherst Academy *v.* Cowls, 6 Pick. 438. Watkins *v.* Eames, 9 Cush. 537. Trustees of Church in Hanson *v.* Stetson, 5 Pick. 508. Ives *v.* Sterling, 6 Met. 310, 318. Mirick *v.* French, 2 Gray, 420. In several of the earlier of the above cited Massachusetts cases, it was held, that although something had been done towards effecting the object of the subscription, in reliance thereon, yet an action thereon could not be supported, but that an action for money paid might be maintained. In Boutell *v.* Cowdin, 9 Mass. 254, where there was a subscription for a fund to be applied towards the support of the pastor of a church, and one of the subscribers gave a note for the amount of his subscription, to the deacons of the church, "for the benefit of the church," it was decided that the note was void for want of consideration, and also because the deacons had no legal authority to receive and manage a fund

In Illinois, where one subscribed a paper promising to pay to the county commissioners a sum for the purpose of defraying, in part, the expense of a court house, provided it should be located and erected on a certain described lot, and the house was erected on that lot, it was decided that the commissioners could not maintain an action on that promise; because, among other reasons, it was a promise to pay them for an act which they were required by law to do, and was therefore void, being against public policy. (*a*)

Where one subscribed a sum towards building a meeting-house, and the subscription was in its nature provisional, depending upon the amount that should be subscribed by others, and the building of the house within a reasonable time, and there was a failure to raise the required amount of money, and the project was indefinitely abandoned, and nothing done for several years, it was held that the subscriber was under no legal or honorary obligation to pay his subscription. (*b*)

Fictitious subscriptions, obtained for the purpose of affecting other subscribers, render void those that are made afterwards. (*c*)

established for the support of a minister. And in Phillips Limerick Academy *v.* Davis, 11 Mass. 113, where persons agreed to pay certain sums for erecting an academy, but no promisee was named, it was decided that for this reason no action could be maintained on the promises, and also for the reason that there was no legal consideration therefor. These cases, and also the case of Bridgewater Academy *v.* Gilbert, 2 Pick. 579, were discussed in 6 Pick. 434–438, by Chief Justice Parker, who virtually admitted that the first two might be sustained on the other grounds therein taken besides the want of consideration; and he said: "We do not find that it has ever been decided that where there are proper parties to the contract, and the promisee is capable in law of carrying into effect the purpose for which it is made, and is in fact amenable to law for negligence or abuse of his trust, such contract is void for want of a consideration." These remarks show that he did not regard the last case (2 Pick. 579) as having been decided on the ground of want of consideration. And Dewey, J. in 6 Met. 316, said that the "change of the location of the edifice" towards the rebuilding of which he made his subscription, "might have been a material circumstance in the case."

(*a*) County Commissioners *v.* Jones, Breese, 103.

(*b*) Plunkett *v.* Methodist Episcopal Society, 3 Cush. 561, 566. And see Stewart *v.* Trustees of Hamilton College, 2 Denio, 403.

(*c*) Middlebury College *v.* Adm'rs of Loomis, 1 Verm. 189.

Assignment of a chose in action.

The assignment of a chose in action that is legally assignable is a good consideration of a promise. (*a*) Such assignment vests an equitable interest in the assignee, which courts of law protect. And though the mere assignment does not, by the common law, authorize the assignee to sue the assigned claim in his own name in a court of law, (*b*) yet it is regarded as an authority to sue in the name of the assignor; and the court will not permit him to interfere to the assignee's prejudice. (*c*) When a contract is in its nature negotiable and is expressly so made, (as a bill of exchange or promissory note payable to order or bearer,) the promisor may be sued thereon by the indorsee or bearer, and cannot be sued in the name of the original promisee without such promisee's consent. (*d*) In these cases, the original consideration, if there were one, and the policy of the law, if there were none, sustains the promise. But when the contract is not technically negotiable, a promise to pay the assignee is necessary to enable him to sue in his own name; and on such promise being made, he may thus sue. (*e*)

By the statutes or local usages of some of the States of the

(*a*) Loder *v.* Chesleyn, 1 Sid. 212 and 1 Keble, 744. Moulsdale *v.* Binchall, 2 W. Bl. 820. Edson *v.* Fuller, 2 Foster, 183, 191. Moar *v.* Wright, 1 Verm. 57.

(*b*) A court of chancery treats the assignee of a contract, which is not negotiable, as the party in interest, and allows him to pursue his rights in such court, in his own name.

(*c*) See Bac. Ab. Assignment, D. Addison on Con. (2d Amer. ed.) 982, 983. Legh *v.* Legh, 1 Bos. & Pul. 447. Welch *v.* Mandeville, 1 Wheat. 233 and 5 ib. 277. Littlefield *v.* Storey, 3 Johns. 425. Pass *v.* McRae, 36 Miss. 143. Dunn *v.* Snell, 15 Mass. 481. Riley *v.* Taber, 9 Gray, 373. Gardner *v.* Tennison, 2 Cranch C. C. Rep. 338.

(*d*) Mosher *v.* Allen, 16 Mass. 451.

(*e*) See Corderoy's case, 1 Freeman, 312. Fenner *v.* Meares, 2 W. Bl. 1269. Surtees *v.* Hubbard, 4 Esp. R. 204. Crocker *v.* Whitney, 10 Mass. 316. Mowry *v.* Todd, 12 ib. 281. Lamar *v.* Manro, 10 Gill & Johns. 64. Rollison *v.* Hope, 18 Texas, 446. Warren *v.* Wheeler, 21 Maine, 484. Clarke *v.* Thompson, 2 R. I. 146. Currier *v.* Hodgdon, 3 N. Hamp. 82. Moar *v.* Wright, 1 Verm. 57. Lang *v.* Fiske, 2 Fairf. 385.

Union, an assignment of bonds or other contracts enables the assignee to sue thereon in his own name. Such also is the law of Scotland; and the assignee of a Scotch bond may maintain assumpsit in the courts of England, upon the implied promise arising from the indorsement and assignment to him. (*a*) By a statute in Ireland a judgment by confession may be assigned; and an action by the assignee of such judgment may be maintained in his own name in the English courts. (*b*)

By statutes in England certain bonds and deeds are made assignable, and the assignee authorized to sue thereon in his own name, to wit, bail bonds taken by sheriffs, (*c*) replevin bonds, (*d*) railway bonds, (*e*) India bonds, (*f*) and administration bonds. (*g*) And by a statute in New York, all actions at law are required to be brought in the name of the real party in interest. (*h*) Railway bonds issued by corporations, with coupons payable to bearer, are held by the supreme court of the United States to be negotiable securities, and to pass by delivery. If coupons are drawn so that they can be separated from the bonds, they also are negotiable, and the owner can sue thereon, without producing the bonds or being interested in them. Thomson *v.* Lee County, 3 Wallace, 327. And see 21 Howard, 539, 575. 8 Gray, 575.

An assignment to the king empowers him to sue in his own name; and assignment by him empowers the assignee

(*a*) Innes *v.* Dunlop, 8 T. R. 595.

(*b*) O'Callaghan *v.* Thomond, 3 Taunt. 82.

(*c*) Petersdorff on Bail, 216. Hurlstone on Bonds, (Amer. ed.) 65. 4 Allen (N. B.) 182.

(*d*) Wilkinson on Replevin, 114, 115. Thompson *v.* Farden, 1 Man. & Grang. 535 and 1 Scott N. R. 275.

(*e*) Vertue *v.* East Anglian Railways Co. 5 Exch. 280. In this case it was held that an action on the bond, after it was assigned, could not be maintained in the name of the assignor.

(*f*) Hurlstone on Bonds, (Amer. ed.) 65.

(*g*) See Young *v.* Hughes, 4 Hurlst. & Norm. 76.

(*h*) See 4 Duer, 78. 2 Kernan, 626. 18 Barb. 512. But the same rights of action that were assignable before that statute was passed, and no others, are still assignable. By Brown, J. 18 Barb. 510.

to sue in his own name. (*a*) Of course, no promise is necessary to charge the party. The consideration is the original debt, which the law transfers to the assignee, and which, by legal intendment, the party promised to pay to him, because such is the party's liability. It follows that a promise by the original debtor, made to the king's assignor, to forbear suing out process, is without consideration and void; as the assignor has no power to retard the king's suit. (*b*)

The United States may sue in their own name on a claim assigned to the government. But such assignment of a claim barred by the statute of limitations gives it no new validity. (*c*)

Pay of officers in the British army and navy is not allowed to be assigned. (*d*) So of seamen's wages, by a statute passed in the reign of George the Second.

A note for a certain sum of money, "which may be discharged in pork," has been held to be assignable. (*e*) But in Green *v.* Williston, 3 Kerr, (N. B.) 58, it was held that the promisor in a note payable in lumber was not bound to recognize an assignment thereof, but that a delivery of the lumber to the assignee would discharge the note. A bond or note payable, in whole or in part, in personal services, is not assignable. (*f*)

(*a*) Bac. Ab. Prerogative, E. 3.

(*b*) Bowes *v.* Paulet, Cro. Eliz. 653 and Moore, 701.

(*c*) United States *v.* Buford, 3 Peters, 12.

(*d*) 2 Anstr. 533. 1 H. Bl. 627. 3 T. R. 682. 4 ib. 248.

(*e*) Thompson *v.* Armstrong, Breese, 23. See Chipman on Contracts for the Payment of Specific Articles, as to the place, &c., of payment.

(*f*) Bothick's Adm'rs *v.* Purdy, 3 Missouri, 60. Halbert *v.* Deering, 4 Littell, 9. Marcum *v.* Hereford, 8 Dana, 1. Henry *v.* Hughes, 1 J. J. Marsh. 453. Ransom *v.* Jones, 1 Scammon, 291. Davenport *v.* Gentry's Adm'r, 9 B. Monroe, 429. In Haskell *v.* Blair, 3 Cush. 534, a written promise to pay to H. "or bearer," on demand after a fixed day, a certain sum in work, was held to be assignable, and the promisor was held liable to the assignee (sueing in the assignor's name) who demanded payment of him, and he made no objection to the time when, nor to the place where, he was required to do the work, nor to the person for whom it was required to be done. And see Currier *v.* Hodgdon, 3 N. Hamp. 82. Carleton *v.* Brooks, 14 ib. 149. Gushee *v.* Eddy, 11 Gray, 505.

It seems to have been formerly supposed that a right of action for a tort was not assignable. It was so said by Savage, C. J., in Gardner *v.* Adams, 12 Wend. 297. And no assignment of such right voluntarily made by the assignor has been found in the English books. But it is held in New York, that a right of action for torts that would by the English statutes of 4 Edward 3d, c. 7, and 15 Edward 3d, c. 5, survive to executors and administrators, (*a*) may be voluntarily assigned; as conversion of goods, trespass for taking and carrying them away, &c. (*b*)

A right of action for a mere personal tort, as battery, slander, seduction of a wife or servant, &c., is not, by the statutes of Edward the Third, made to survive, and cannot be legally assigned. (*c*) But a judgment recovered in such action may be assigned. (*d*)

In Zabriskie *v.* Smith, 3 Kernan, 322, it was held that a right of action for damages, caused to a firm by a false and fraudulent representation of the solvency of a buyer of goods, was not assignable; as such right would not survive to the defrauded party's personal representatives. And in Thurman *v.* Wells, 18 Barb. 500, a mere right of action for an unliquidated and unrecognized claim against common carriers, arising *ex delicto*, was held not to be assignable.

(*a*) See Addison on Torts, 715, 1 Williams on Ex'rs, (4th Amer. ed.) 669 *& seq.* and 1 Saund. Pl. & Ev. (2d ed.) 1113, as to the injuries to personal property for which a right of action survives.

(*b*) McKee *v.* Judd, 2 Kernan, 622. Foy *v.* Troy & Boston Railroad Co. 24 Barb. 382. Purple *v.* Hudson River Railroad Co. 4 Duer, 74. Jackson *v.* Losee, 4 Sandf. Ch. 381. People *v.* Tioga Common Pleas, 19 Wend. 73. Hall *v.* Robinson, 2 Comstock, 293. Hudson *v.* Plets, 11 Paige, 183, 184. And see Weire *v.* City of Davenport, 11 Iowa, 52.

(*c*) Benson *v.* Flower, W. Jon. 215. Howard *v.* Crowther, 8 Mees. & Welsb. 601. Comegys *v.* Vasse, 1 Peters, 213, by Story, J. Whitaker *v.* Gavit, 18 Conn. 527, by Ellsworth, J. North *v.* Turner, 9 Serg. & R. 249, by Gibson, C. J. Rogers *v.* Spence, 12 Clark & Fin. 720, by Lord Campbell. Rice *v.* Stone, 1 Allen, 566. In this last case it was held that the Massachusetts statute which provides that a right of action for assault and battery shall survive did not render that right of action assignable.

(*d*) W. Jon. and 1 Allen, *supra.*

A right of action for a merely personal tort does not pass by an assignment of a debtor's effects, under a bankrupt or insolvent law. (*a*)

Accepting part in satisfaction of the whole.

A promise to take a less sum, in satisfaction of a greater, where the greater sum is fixed and liquidated, or is ascertainable by merely arithmetical calculation, is without consideration and void; and after taking it and agreeing to discharge the debtor, the creditor may recover the balance. (*b*) *Aliter*, if a sealed acquittance be given, in satisfaction of the whole, on receiving part, or if the debtor pays a less sum, either before the agreed day of payment, or at another place, and the creditor receives it in full satisfaction. (*c*) Or if the creditor receives some specific article, in satisfaction, though it is of much less value than the whole sum due; (*d*) or if he receives a negotiable security; (*e*) or the debtor's note indorsed by a third person, as further security; (*f*) or the note of a third person, (*g*) or an accepted draft on a third person. (*h*) Where a judgment was recovered for over $1700, against an insolvent debtor, and the judgment creditor agreed to receive $500 on the judgment and $100 for attorney's fees, which

(*a*) See Spence *v.* Rogers, 11 Mees. & Welsb. 191, affirmed in the House of Lords, 12 Clark & Fin. 700. Sommer *v.* Wilt, 4 Serg. & R. 28. Mann's Appeal, 18 Penn. State Rep. 249.

(*b*) Cumber *v.* Wane, 1 Strange, 426. Heathcote *v.* Crookshanks, 2 T. R. 24. Fitch *v.* Sutton, 5 East, 232. Harrison *v.* Close, 2 Johns. 450. Goodwin *v.* Follett, 25 Verm. 386. Hall *v.* Constant, 2 Hall, 185. Pearson *v.* Thomason, 15 Alab. 700. Harriman *v.* Harriman, 12 Gray, 341. Rising *v.* Patterson, 5 Whart. 319. Daniels *v.* Hatch, 1 Zab. 391. The cases of compromise, *ante*, 177, were all of unliquidated and unacknowledged claims.

(*c*) Co. Lit. 212 b. Dalison, 49, pl. 13. Bowker *v.* Childs, 3 Allen, 434.

(*d*) Littleton, § 344. Co. Lit. 212 b. Perkins, § 749. Pinnel's case, 5 Co. 117.

(*e*) Sibree *v.* Tripp, 15 Mees. & Welsb. 23, qualifying the decision in Cumber *v.* Wane, 1 Strange, 426.

(*f*) Boyd *v.* Hitchcock, 20 Johns. 76.

(*g*) Kellogg *v.* Richards, 14 Wend. 116. Brooks *v.* White, 2 Met. 283. Smith *v.* Ballou, 1 R. I. 496.

(*h*) Reid *v.* Hibbard, 6 Wis. 175.

sums were paid and a receipt in full given for the judgment, it was held that satisfaction of the judgment should be ordered to be entered. (*a*) "There must be some consideration," said Lord Ellenborough (5 East, 232) "for the relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim; otherwise the agreement is *nudum pactum*." And as the strict rule of law may be urged in violation of good faith, it is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral benefit received by the payee, which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due. By Dewey, J 2 Met. 285.

By statute in Maine, no action can now be maintained on a demand which has been settled by the payment of any sum of money, or other valuable consideration, however small. (*b*)

If, on the faith of a creditor's agreement to accept a part of his debt, in full satisfaction, a third person is induced to become surety for the debtor, on the ground that he will be discharged on easy terms; or other creditors are induced to relinquish their demands on the debtor; the creditor who thus agrees cannot recover the balance, as it would be a fraud on the surety or other creditors. In some of this class of cases, the plaintiff failed to recover the residue of his debt, because his agreement had induced the debtor to make an assignment of all his property, and a recovery would be a fraud on him. (*c*)

(*a*) Harper *v.* Graham, 20 Ohio, 105.

(*b*) Weymouth *v.* Babcock, 42 Maine, 42.

(*c*) On this whole subject see 1 Smith Lead. Cas. (6th Amer. ed.) 550 *& seq.* the note to the case of Cumber *v.* Wane. Steinman *v.* Magnus, 11 East, 390. Butler *v.* Rhodes, Peake, 238 and 1 Esp. R. 236. Reay *v.* White, 1 Crompt. & Mees. 748 and 3 Tyrw. 596. Good *v.* Cheesman, 2 B. & Ad. 328 Boyd *v.* Hind, 1 Hurlst. & Norm. 946. Watkinson *v.* Inglesby, 5 Johns. 386. Eaton *v.* Lincoln, 13 Mass. 424. Bac. Ab. (Bouvier's ed.) Accord and Satisfaction.

Executed Consideration.

There is, perhaps, no point of law, which students more universally regard as arbitrary and unreasonable, as they find it announced in the books, than the matter of executed consideration. It is asserted, as if it were elementary doctrine, that if the consideration be wholly executed and past, and do not go along with the contract, it will not support a promise, unless the consideration were executed at the request of the promisor: *Aliter*, of a consideration executed in part only. (*a*) The reason of this rule is seldom set forth with the proper clearness. The suggestion in a note, *ante*, 164, as to the positions laid down by certain writers in reference to pleading and the forms of action, as if they were the abstract doctrines of the law, is specially applicable to this point. And in the outset it may be well to say that this rule as to executed consideration is merely a rule of pleading, and is susceptible of an exposition which will show that it is reasonable, and that it is also a necessary part of the system of enforcing and defending the rights of parties in the action of assumpsit.

In the case of Hunt *v.* Bate (*b*) the declaration averred that the defendant promised to save the plaintiff harmless, in consideration that he *had* become bail for the defendant's servant. Judgment was arrested. So where the declaration alleged that the defendant promised to pay the plaintiff five pounds, in consideration that the plaintiff *had* delivered to him twenty sheep. (*c*) So of a promise by a lessor to give a new lease, in consideration that the lessee *had* incurred expense in defending his title under the old lease. (*d*) So of a promise to lend the plaintiff ten pounds upon request, in consideration that the plantiff *had* formerly lent the same sum to the

(*a*) Doctor & Student, c. xxiv. 1 Rol. Ab. 11. Bac. Ab. Assumpsit, D. 1 McCord, 515. 1 Lil. Ab. 299. 1 Dane Ab. 119. 10 Pick. 500. 3 Met. 158. 7 Cowen, 358. 2 Conn. 404. 1 Blackf. 247. 1 Greenl. 128. 11 Ad. & El. 438, 451.

(*b*) Dyer, 272, a.

(*c*) Jeremy *v.* Goochman, Cro. Eliz. 442.

(*d*) Moore *v.* Williams, Moore, 220.

defendant. (*a*) So of a promise to repay sixty pounds, in consideration that the plaintiff *had* before paid that sum to the defendant's creditor in satisfaction of the debt. (*b*) So of promises in consideration that the plaintiff *had* sold and delivered goods, lent money, &c., to the defendant, or *had* done work for him, or *had* sold and conveyed a farm to him. (*c*) All these were cases within the first part of the rule above mentioned, that is, cases where the consideration was wholly executed and past, and not at the request of the promisor.

If, however, the consideration be executed at the promisor's request, it is sufficient to support a promise. This was suggested as the remedy which would have cured the defect in the case of Hunt *v.* Bate, above cited from Dyer, 272, a; and in the next page of that book an anonymous case is reported, in which a promise to pay £20 "in consideration that the plaintiff, at the *special instance* of the defendant, had taken to wife the cousin of the defendant," was enforced at law, "although the marriage was executed and past before the undertaking and promise." These cases were determined in 10 Eliz. Seventeen years afterwards (27 Eliz.) the question arose in the very case of becoming bail for a third person at the defendant's request, and was decided for the plaintiff. (*d*) "The request" said Periam, J., "is a great help in the case."(*e*) Afterwards, it was settled by numerous decisions, that in all other cases, where the consideration was executed and past at the time of the promise, if it were executed (that is, if the services, &c., were rendered) at the promisor's request, it was sufficient to support the promise and maintain the action. (*f*)

(*a*) Dogget *v.* Vowell, Moore, 643.

(*b*) Barker *v.* Halifax, Cro. Eliz. 741.

(*c*) Oliverson *v.* Wood, 3 Lev. 366. Hayes *v.* Warren, 2 Strange, 933, W. Kelynge, 117 and 2 Barnard. B. R. 55, 71, 140. Comstock *v.* Smith, 7 Johns. 87. Parker *v.* Crane, 6 Wend. 649. Leland *v.* Douglass, 1 Wend. 492. Stanhop's case, Clayton, 65.

(*d*) Sydenham & Worlington's case, Godb. 31, Cro. Eliz. 42 and 2 Leon. 224.

(*e*) Godb. 32.

(*f*) Hardres *v.* Prowd, Style, 465. Lampleigh *v.* Braithwate, 1 Brownl. 7, Moore, 866 and Hob. 105. Bosden *v.* Thinn, Cro. Jac. 18 and Yelv. 40. Townsend *v.* Hunt, Cro. Car. 408. *Contra*, Sandhill *v.* Jenny, Dyer, 212 b. *in margin.*

There is not much of good sense or of equity in the abstract doctrine that an executed consideration will not support a promise. Wilmot, J., (*a*) said, "many of the old cases are strange and absurd; so also are some of the modern ones, particularly that of Hayes *v.* Warren." He also said that the doctrine "has been melting down into common sense, of late times." The case of Hayes *v.* Warren is questioned also by Mr. Lawes, (*b*) for the reason stated *post.* 199. It will be found, however, upon an examination of the history of the doctrine in question, that there has been no relaxation of it; and that the case of Hayes *v.* Warren stands on the same grounds as the other cases, and could not have been decided differently without violating long established principles, unless the declaration, as Mr. Lawes supposed, sufficiently showed the defendant's request. (*c*)

It is one of the elementary principles of pleading, in the action of assumpsit, that the declaration must state a valid consideration for the promise which the plaintiff seeks to enforce.

In most of the cases that have been cited, the plaintiff failed by reason of his bad pleading. His real case was meritorious and legal, but the cause stated in his declaration was without consideration. In Hunt *v.* Bate, there was in fact no consideration which the law regards. The plaintiff's becoming bail was a transaction *inter alios*, neither beneficial to the defendant nor inconvenient to the plaintiff, at the instance of the defendant. There was, therefore, nothing to support the promise. Indeed, the court that decided the case say, "there is *no* consideration wherefore the defendant should be charged for the debt of his servant, for he did never make request," &c. The case was decided, not on the ground of an executed consideration, but of no consideration.

(*a*) 3 Bur. 1671, 1672.

(*b*) Lawes Pl. in Assump. (Amer. ed.) 334, 335. And see 2 Binn. 592.

(*c*) The declaration, in Hayes *v.* Warren, as appears in 2 Barnard. B. R. 140 and W. Kelynge, 120, alleged that the plaintiff had done and performed divers works and labors for the defendant, who afterwards promised to pay for them as much as they were worth; there being no averment that the works were done at the defendant's request. The defendant was defaulted, but judgment was arrested on his motion.

The other cases that have been cited rest on the same ground. Some of the earliest of them were decided on the authority of Hunt *v.* Bate, and on the notion, not at all explained, of an executed consideration.

Cases mentioned *ante*, 183, 184, have settled the doctrine that a voluntary courtesy, or mere gratuitous service, is not a consideration that will support an implied promise. The law is the same, in many instances at least, in case of an express promise. (*a*)

The true and the only satisfactory reason for regarding as void a promise on an executed consideration, when there was no previous request, is, that it does not appear that there was any legal consideration for such promise. The consideration may have been a gratuitous service or voluntary courtesy. In declaring on a promise made upon such consideration, no valid consideration is stated, unless a previous request is alleged. But if the consideration is executed at the request of the promisor, the promise "is coupled to the consideration by the request," and is not merely a naked promise. The previous request is a sufficient consideration for the subsequent promise; the plaintiff has incurred a loss, damage, or inconvenience, at the instance of the defendant, which, as has been before seen, is (with reference to the rules of pleading) one of the requisites of a consideration for a promise. (*b*) The settled forms of pleading in assumpsit require, for this reason, that a declaration on a promise made upon a consideration wholly executed and past should allege that the debt was incurred, the service rendered, &c., at the defendant's request. A count for money had and received, money lent, and for goods sold and delivered, are exceptions to this rule. (*c*) "An executed consideration," said Baron Maule, 5 Mees.

(*a*) 3 Pick. 207. 7 Conn. 51. 4 Munf. 273.

(*b*) Lawes Pl. in Assump. 65, 66. 1 Saund. 264, note (1). Hob. 106. 1 Blackf. 247.

(*c*) Lawes Pl. in Assump. 334. 1 Saund. 264, note (1). 1 Man. & Grang. 266, note. 1 Dowl. & Lowndes, 984. Patteson & Williams note (*z*) 1 Saund. (5th ed.) 264, and opinion of Bridgman, C. J., and Page, J., in 2 Barnard. B. R. 71, as to a count for goods sold and delivered.

& Welsb. 249, "is no consideration for any other promise than that which the law would imply."

The ground of this doctrine of executed consideration, as stated in Bacon's Abridgment, and elsewhere, is this: "It is not reasonable that one man should do another a kindness, and then charge him with a recompense. This would be obliging him whether he would or not, and bringing him under an obligation without his concurrence." (*a*) This is a very satisfactory reason for not charging a party on an implied promise, in most cases of this kind; but it does not seem, at first sight, to reach the case of an express promise recognizing the services and their value to the promisor, nor those cases where there is a legal and moral duty antecedent and paramount to the will of the party, from which the law raises a promise even against his protestations. The form of declaring is, however, the same, whether an express or an implied promise is relied on; and it will presently be seen that a previous request may be implied or inferred from circumstances, as well as a subsequent promise. There are cases in which an express request is necessary to support the action, as there are cases in which an express promise must be shown. But as the summary forms of declaring in general assumpsit are the same in all cases, and as it does not necessarily appear, on the face of the declaration, that a promise on an executed and past consideration is legally binding, without a previous request, such declarations are held to be ill. (*b*) In declaring on a contract upon an executory consideration, it is not necessary to allege it to have been at the defendant's request; because, in all cases where a request is necessary, it is necessarily implied: As if A. promise B. to pay him $1000 if he will build a house, the promise implies that A. requested B. to build it; and so of similar cases. (*c*)

(*a*) Bac. Ab. Assumpsit, D. 1 Saund. 264, note. 1 Caines, 585. 1 Leigh's Nisi Prius, 36.

(*b*) See Stokes *v.* Lewis, 1 T. R. 20. Naish *v.* Tatlock, 2 H. Bl. 322. 3 Wooddeson, 142, 143.

(*c*) Lawes Pl. in Assump. 85. See the different forms of declaring, in general and special assumpsit, stated by Mr. Lawes in Pl. in Assump. 1, 2.

In Hicks *v.* Burhans (*a*) it is said, that "if a promise founded on a past consideration be not laid to have been on request, a request may be implied." And in Comstock *v.* Smith, (*b*) it is said that it does not seem requisite, in every case of executed consideration, to lay a request in the declaration. The same remark is repeated in Doty *v.* Wilson. (*c*) These, however, are *obiter dicta*, and are questioned in the notes to the second editions of 1 Caines, 585, and 7 Johns. 88.

It is laid down expressly by Serjeant Williams (*d*) that a request must be averred. It is strongly implied in what is said by Kent, J., 1 Caines, 585, and is regarded as essential by the authors of the able note in 3 Bos. & Pul. 249, and in 3 Morgan's Vade Mecum, 107, 122. Besides; the forms of pleading (which Buller, J., says (*e*) are evidence of what the law is) contain this allegation. (*f*)

In Church *v.* Church, cited in T. Ray. 260, and in Franklin *v.* Bradell, Hutton, 84, and perhaps one or two other ancient cases, this allegation was not deemed indispensable after verdict; and it was intimated by the court, in Hayes *v.* Warren, (*g*) which has already been referred to, that a verdict might have cured the defect in that case. (*h*) It is however to be observed, that in several of the earliest cases on this subject, the objection was raised after verdict, and was sustained. (*i*) There are cases in which it has been held that if the plaintiff declare that the defendant, *being indebted* to the plaintiff (for goods delivered, &c.) *in consideration thereof* promised, &c., it is sufficient, without alleging a request of the defendant; on the ground that the "being indebted" implies that the consideration was executed at the request of the

(*a*) 10 Johns. 243. (*b*) 7 Johns. 88.

(*c*) 14 Johns. 382.

(*d*) 1 Saund. 264, note. See also 1 Greenl. 128. 6 Wend. 649.

(*e*) 3 T. R. 161.

(*f*) See forms of declarations in actions of assumpsit in 2 Chit. Pl. (6th Amer. ed.) 37 *& seq.*

(*g*) 2 Strange, 933.

(*h*) In Pennsylvania, a verdict is held to cure this defect. Stoever *v.* Stoever, 9 Serg. & R. 434.

(*i*) Dyer, 272. Cro. Eliz. 412, 741.

defendant; or that the consideration is a continuing one, and not wholly executed and past. (*a*) Mr. Lawes (*b*) thinks that the present summary form of declaring, in most of the counts in indebitatus assumpsit, necessarily implies a request, or an assent to the debt contracted; and that as the old cases were decided before this form was adopted, they did not warrant the decision in Hayes *v.* Warren, where the declaration was in the modern form. Still he asserts on the preceding page, that "it is usual and proper in indebitatus assumpsit to state the cause of the debt as having taken place at the special instance and request of the defendant." And in page 65, he asserts the necessity of alleging a request, and gives the reason already stated, namely, otherwise "*non constat* that it was not done of the plaintiff's own accord, and without the defendant's order or desire, in which case it is no good consideration for a subsequent promise."

The law is probably thus: The allegation of "being indebted" is substantially good, without stating a request, but not technically and formally correct; there being no debt, by legal intendment, unless for something done by request. In a count for goods sold and delivered, or for money lent, it might perhaps be said that a sale or a loan necessarily imports a request; but the precedents all contain an averment of it. (*c*) In a count on an *insimul computassent*, the promise is alleged to be in consideration of being found in arrear and indebted upon an accounting with the plaintiff of and concerning moneys before owing and due, and in arrear and unpaid. (*d*) "The stating of an account is regarded as a consideration

(*a*) Hodge *v.* Vavisor, 1 Rol. R. 413 and 3 Bulst. 222. Lawes Pl. in Assump. 435, 440. Barton *v.* Shirley, 1 Rol. Ab. 12, pl. 16.

(*b*) Pl. in Assump. 335. But it does not appear that the words, "being indebted" were in the declaration in that case.

(*c*) Stephen on Pl. (1st Amer. ed.) 47. (9th Amer. ed.) 39. 1 Lil. Ent. (5th ed.) 29, 30. See Emery *v.* Fell, 2 T. R. 30, opinion of Buller, J. In Barton *v.* Shirley, 1 Rol. Ab. 12, pl. 16, a count for money lent and accommodated was supported, though no request was alleged. The form was, "being indebted," &c.

(*d*) 2 Chit. Pl. (6th Amer. ed.) 89, 90.

for the promise, and is in the nature of a new promise." (*a*) There is a practice in Massachusetts, and probably in some of the adjoining states, of declaring, in indebitatus assumpsit, that the defendant, being indebted, &c., according to the account annexed to the writ, in consideration thereof, promised, &c.; no request being alleged. (*b*) This seems to be sanctioned by long use. (*c*)

Though, for the reasons already given, a request must be averred, in declaring on a promise upon an executed consideration, or some terms used which are of equivalent legal import; yet in many cases it is not necessary to prove an express request. A request is frequently implied from the circumstances of the transaction. Where the party derives a benefit from the consideration, it is often tantamount to a request; and a jury will infer one, for the purpose of enforcing a meritorious legal claim, (*d*) The same doctrine is applied in cases of mere legal duty which the law enforces through the medium of a suit on an alleged promise, without regard to the will of the party; as for the support of a wife wrongfully discarded by a husband, &c. A previous request (as well as a promise) is here inferred by a jury, directly contrary to the fact, on the ground of legal obligation only. The case of Jenkins *v.* Tucker (*e*) was decided on this ground, where the expenses of the funeral of the defendant's wife, incurred and paid by her father, were recovered of the defendant, who was out of the country at the time of her death. (*f*) So of the

(*a*) By Spencer, J., 1 Johns. 36. See also 2 T. R. 483, note, by Buller, J., Regula Placitandi, (2d ed.) 11, 12. 2 Conn. 415, 416. Bullen & Leake's Precedents, 29.

(*b*) Rider *v.* Robbins, 13 Mass. 284.

(*c*) In Sheffield *v.* Rise, Moore, 367, "in consideration that the plaintiff had submitted to the arbitrament of J. S. the defendant *ad tunc et ibidem assumpsit*" was held a good declaration, on demurrer, as the words must be understood to allege a promise at the time of the submission.

(*d*) 1 Saund. 264, note. Oatfield *v.* Waring, 14 Johns. 192. Hatch *v.* Purcell, 1 Foster, 544. Wilson *v.* Edmonds, 4 ib. 546.

(*e*) 1 H. Bl. 90.

(*f*) See also Dyer, 272, b. *in margin*, note *b*. T. Ray. 260.

case of Tugwell *v.* Heyman, (*a*) where executors, who neglected to give orders for the funeral of the testator, were held liable to the person who furnished it.

In a majority of the cases where the plaintiff has failed for want of an averment of previous request, the jury, under the direction of the court, would have inferred a request, from the circumstances of the case, if it had been alleged in the declaration. In some of these cases, they found a verdict for the plaintiff, though no request was alleged.

The whole amount, then, of this doctrine of executed consideration is simply this; that one man cannot make another his debtor without his assent, expressly given or implied by law; and that the forms of pleading are such, that the mere statement of a promise on such a consideration does not show that there is any consideration for it, except a voluntary courtesy, which will not uphold an assumpsit.

If a consideration be "executed in part only," it will support a promise. Modern writers call this a "continuing consideration." The case of Cotton *v.* Wescott (*b*) may be taken to illustrate this doctrine. The plaintiff declared that the defendant married a maid who sojourned in the plaintiff's house, and "did then desire the plaintiff that his wife might still continue in the house a year longer, to which the plaintiff agreed; and afterwards, about the middle of the year the defendant promised, in consideration that the plaintiff would suffer the wife to continue in the house for the whole of the year, he would pay the plaintiff for the whole year, as well the past as the future." This, as alleged in pleading, is a clear case of an executory consideration. And if it had been an executed one, a previous request is alleged. But if it had been alleged that the defendant, in consideration that the plaintiff had permitted the wife to be in his house for six months, promised to pay therefor and for her subsequent residence there for six subsequent months, at the defendant's request, a good consideration would have appeared, namely, one

(*a*) 3 Campb. 298. See *ante*, 144.

(*b*) 3 Bulst. 187 and 1 Rol. Rep. 381. See also 1 Lil. Ab. 114. 3 Wooddeson, 144. Merriwether's case, Clayton, 43.

executed in part only, though that part was not at the request of the defendant.

In Pearle *v.* Unger (*a*) the plaintiff declared that the defendant, in consideration that the plaintiff had occupied his land, and paid him rent while he occupied it, promised to save the plaintiff harmless during the term, as well for the years past as to come, and alleged a distress of his cattle before the promise. The defendant was held liable, on the ground that as the defendant had paid and was to pay rent, there was a good consideration for the promise. Anderson, J., in Godb. 31, said that although where the contract is determined, a promise is void, yet it is "otherwise upon a consideration of marriage, for that is always a present consideration, and always a consideration, because the party is always married." Walmsley, J., in Cro. Eliz. 741, said, "an assumpsit in consideration that you had married my daughter, to give unto you £40 was good; for the affection and consideration always continue." These are *dicta* only; but the case of Marsh *v.* Kavenford (*b*) was adjudged on the same principle.

There are cases upon consideration executed in part only that are not very intelligible. The doctrine seems sometimes to have been misapplied, or at least greatly strained, for the purpose of maintaining an apparently meritorious action. It is not possible to ascertain, in every instance, what form of declaration was adopted. In some cases, the consideration seems to have been stated as wholly executed, but it further appeared from the facts alleged, or from necessary inference from them, that the whole benefit of the contract had not been enjoyed by the promisor, which circumstance was regarded as sufficient to take the case out of the rule applied to considerations wholly executed and past. In the summary form of declaring in indebitatus assumpsit, in use at this day, such cases cannot arise. The record would not furnish the court with the means of ascertaining that the consideration was executed in part only. A special declaration would be necessary, in order to enforce a promise in such case. (*c*)

(*a*) Cro. Eliz. 94 and 1 Leon. 102. See also Jones *v.* Clarke, 2 Bulst. 73.

(*b*) Cro. Eliz. 59 and 2 Leon. 111.

(*c*) See cases on this point collected in Com. Dig. Assumpsit, B. 12. Bac.

As the distinction between executed and executory considerations is a matter of pleading, and respects only the modes of averment in a declaration, the rule seems to be this, namely, if the consideration appears on the declaration to be a continuing consideration, it is substantially good, though a request of the party be not alleged; but if the consideration appears to be wholly executed and past (that is, if there is no continuing consideration, nor averment that the party is at present indebted) an averment of a request is indispensable; and if the consideration is executory, request and performance must both be alleged.

This, however, more properly belongs to the subject of pleading, and has been mentioned here only for the purpose of explaining the doctrine of executed consideration.

As there will probably be no occasion to advert hereafter to the fictions adopted in setting forth the plaintiff's claim in declarations in the action of assumpsit, it may not be amiss to present, in this place, a succinct view of those fictions, and of the reasons on which they are founded.

The usual action on a simple contract, in old times, was debt. The declaration, in that action, averred in substance that the defendant owed the plaintiff and thereupon an action had accrued, &c. No promise was alleged; for no promise was necessary. But the defendant was allowed to wage

Ab. Assumpsit, D. 1 Powell on Con. 349 *§ seq.* Warcop *v.* Morse, Cro. Eliz. 138. It may be worthy of notice, that Chief Baron Comyns, in his Digest, (*ubi sup.*) has placed under the head of "Consideration executed in part," not only the class of cases above referred to, but also those in which the consideration is alleged to be that the promisor had accounted and was found in arrear. The cases in which the consideration is the "being indebted," would seem, on the same principle, to fall into this class; and accordingly Comyn and Chitty place the case of Hodge *v.* Vavisor (above cited) under this head. 1 Comyn on Con. (1st ed.) 25. Chit. on Con. (1st Amer. ed.) 17, (10th Amer. ed.) 61. It is not easy, perhaps, to understand the reason of Chief Baron Comyns's arrangement, unless by "in part" he meant cases where the original consideration was executed, but there is a still continuing consideration for a promise, and so not wholly executed, in the sense generally attached to the words *functus officio.*

his law. To avoid this wager of law, a new form of action was devised, to wit, the action of assumpsit, (*a*) in which a promise of the defendant was alleged, and was indispensable. A declaration, which did not aver such promise, was insufficient even after verdict; and the law is the same at this day. The promise declared on is always taken to be express. In pleading, there is no such thing as an implied promise. But as no new rule of evidence was required in order to support the new action of assumpsit, it being necessary only to prove a debt, as was necessary when the action was debt, the fictitious doctrine of an implied promise was introduced; and for the sake of legal conformity, it was held, when the defendant's legal liability was proved, that the law presumed that he had promised to do what the law made him liable to do.

As no gratuitous promise binds the promisor, (a consideration being necessary to the validity of a simple contract,) and as a promise on an executed consideration does not show that it was not gratuitous, unless it be averred either in express or equivalent terms, to have been executed at the request of the promisor, it has always been held necessary to allege such request in the declaration. But here again no new rule of evidence was required in order to support the action. The defendant's request was therefore held to be implied in those cases where he was legally liable to the plaintiff as he would have been in the action of debt.

A single example will illustrate these two fictions. A husband is bound by law to support his wife; and if he wrongfully discard her, any person may furnish support to her, and recover pay therefor of the husband. In the action of debt, there would be no necessity to allege a promise in such case. But the husband might wage his law, and defraud the plaintiff. In the action of assumpsit, the furnishing of the supplies must be alleged to have been by the plaintiff at the husband's request, and a promise of the husband to pay must also be alleged. But proof of the actual facts supports both these allegations. The husband, being in law liable to

(*a*) Gilbert on Debt, 364. Gould Pl. c. iii. § 19. Comyn on Con. part iv. chap. iii.

pay, is held to have (impliedly) made both the request and the promise. In this instance, the legal maxim is well supported, *in fictione juris subsistit æquitas.*

In other instances, the request only, or the promise only is implied by law, according to the exigence.

Consideration arising from third persons.

The position is often found in the books, that where a promise is made to one for the benefit of another, he for whose benefit it is made may bring an action for the breach of it; and Com. Dig. Action upon the case upon Assumpsit, E. a. is repeatedly referred to, in this country, in support of that position. It will be found, however, that the decisions cited by Comyns (*a*) have ceased to be law in England. Thus, where H. was indebted to the plaintiff, and the defendant promised to pay H.'s debt to the plaintiff, if H. would assign his interest in a house to the defendant, and he assigned accordingly, (or offered to assign, which was tantamount in law,) yet it was held that the plaintiff could not recover on the promise, because he was a stranger to the consideration. (*b*) It had previously been decided, on similar ground, that the plaintiff could not recover in a case where P. was indebted to him and also to the defendant, and a stranger was indebted to P., and the defendant promised to pay P.'s debt to the plaintiff, if P. would allow him (the defendant) to sue the stranger; although the defendant did sue the stranger and recover the debt. (*c*) So where a declaration alleged that W. owed the plaintiff £15, and that in consideration thereof, and that W., at the defendant's request, had promised the defendant to work for him and leave the amount of his wages in the defendant's hands, the defendant promised to pay the plaintiff the said sum of £15, and the declaration also averred that W. performed his part of the agreement, it was held that the action could not be maintained, as the plaintiff was a

(*a*) Bafeild *v.* Collard, Aleyn, 1. Dutton *v.* Poole, 1 Vent. 318, 2 Lev. 211 and T. Jon. 102. Sadler *v.* Paine, Savile, 23. Oldham *v.* Bateman, 1 Rol. Ab. 31, pl. 8.

(*b*) Crow *v.* Rogers, 1 Strange, 592.

(*c*) Bourne *v.* Mason, 1 Vent. 6 and 2 Keble, 454, 457, 527.

stranger to the consideration, and the case must be governed by that of Crow *v.* Rogers. (*a*)

There are, however, many cases of simple contracts in which it has been decided, that where a person made a promise to another, for the benefit of a third, the third might maintain an action upon it, though the consideration did not move from him. But this was never allowed in cases of sealed contracts *inter partes*. In those, the action must be brought by the obligee or covenantee, though the contract be to pay, &c., a third person. (*b*) Courts of chancery formerly compelled the obligee, &c., to sue at law, if necessary for the benefit of the party in interest, and at his promotion; (*c*) but the party in interest, at this day, may himself sue in chancery on such contract. (*d*)

As to a simple contract, one of the earliest cases in which the party for whose benefit a promise was made maintained an action thereon, is Sadler *v.* Paine, Savile, 23, where the plaintiff had conveyed land to the defendant, who afterwards, on a valid consideration, promised D. (a kinswoman of the plaintiff, whom he employed to negotiate the contract) to reconvey the land to the plaintiff. It was held that the action was rightly brought by the plaintiff for a breach of this contract. The promise, however, was regarded by Barons Shute and Manwood, as made to the plaintiff himself, on the ground, in part at least, that D. was his agent previously authorized. So in Legat's case, Latch, 206, an action was sustained on a promise made, as was alleged in the declaration, "to the plaintiff's attorney, in behalf of the plaintiff." These cases were probably decided on the ground that the promisee in each was the agent of the plaintiff, and that the promise, in legal effect, was made to (the principal) the plaintiff.

(*a*) Price *v.* Easton, 4 B. & Ad. 433 and 1 Nev. & Man. 303. And see Williams on Pleading, 45.

(*b*) Scudamore *v.* Vandenstene, 2 Inst. 673. Rolls *v.* Yate, Yelv. 177 and 1 Bulst. 25. Offly *v.* Warde, 1 Lev. 235. Sandford *v.* Sandford, 2 Day, 559. Sanders *v.* Filley, 12 Pick. 554. Hinkley *v.* Fowler, 15 Maine, 285. Johnson *v.* Foster, 12 Met. 167. Northampton *v.* Elwell, 4 Gray, 81.

(*c*) Cary, 20.

(*d*) Ward *v.* Lewis, 4 Pick. 523. Crocker *v.* Higgins, 7 Conn. 342.

Mr. Hammond, in his Treatise on Parties to Actions, 7 *& seq.*, supposed that the only ground on which the decisions on this point can stand, is, that a promise to A. for the benefit of B. is made to A. as the agent of B., and thus the consideration moves from B., and that the action should therefore be brought in his name; and that all the cases, (hereafter to be cited) which do not conform to this view of the doctrine, are at variance with the original principle of law, that the party giving the consideration is the only person privy to a simple contract; or, in other words, that the legal interest in such contract resides only with the party from whom the consideration moves.

In the case of Bourne *v.* Mason, 1 Vent. 6, 7, the counsel for the plaintiff cited a case, in which a promise to a physician that if he did a certain cure, the defendant would give him a certain sum, and also another sum to his daughter; and it was held that the daughter might maintain an action for the sum promised to her. To which it is there said the court agreed; "for the nearness of the relation gives the daughter the benefit of the consideration performed by her father." Nearness of relation, as between parent and child, was also mentioned by the court in Dutton *v.* Poole, 2 Lev. 211, 212, and 1 Vent. 333, as giving the child a right of action on a promise made to a father for the child's benefit. And Shaw, C. J., in 2 Met. 402, said that this relation might have had some influence in the decision of the case of Felton *v.* Dickinson, 10 Mass. 287. But there were several cases, prior to that of Bourne *v.* Mason, in which a child maintained an action on a promise for his benefit, made to the father, (*a*) or a nephew on a promise, made for his benefit, to an uncle, (*b*) yet nearness of relation was not mentioned as a reason for such decisions. (*c*) And in Tweddle *v.* Atkinson, 1 Best & Smith, 393, it was held that nearness of relation, as between father and son, did not authorize a suit by the son, on a promise made for his benefit.

(*a*) Levet *v.* Hawes, Cro. Eliz. 619, 652. Pine *v.* Norish, cited in T. Jon. 103.

(*b*) Oldham *v.* Bateman, 1 Rol. Ab. 31, pl. 8.

(*c*) Thomas's case, Style, 461. Bell *v.* Chaplain, Hardr. 321. Provender *v.* Wood, Hetley, 30. Hadves *v.* Levit, ib. 176.

Wightman, J., there said, "it is now established that no stranger to the consideration can take advantage of a contract, although made for his advantage."

The leading English case on this subject is Dutton *v.* Poole, (*a*) where the defendant promised a father, who was about to fell timber for the purpose of raising a portion for his daughter, that if he would forbear to fell it, he (the defendant) would pay the daughter £1000. The daughter maintained an action on this promise. And, as already seen, that was not the first like adjudication of this point, though it was the first in which the point appears to have been fully discussed in argument. But since the cases of Price *v.* Easton and of Tweddle *v.* Atkinson, above cited, were decided, it seems that it must be understood that the case of Dutton *v.* Poole, and all like decisions are no longer law in England, and that the rule is there now settled, that no one can maintain an action upon a promise, unless the consideration thereof moved from him, except in certain cases of actions for money had and received, now to be mentioned.

Where A., the debtor of B., sent money to C., and afterwards informed him that it was intended to be paid to B., and C. promised so to pay it, and this was communicated to B., it was held that on C.'s failure so to pay, B. might maintain an action against him for money had and received. (*b*) Patteson, J., said, the rule of law required a consideration moving from the plaintiff in all cases, "though in an action for money had and received a direct consideration from the plaintiff is seldom shown." The English law on this subject is stated, in Addison on Con. (5th ed.) 633, 634, to be thus: "The mere circumstance of money having been paid by a principal to his agent, with directions to pay it to a third person, imposes no liability upon the agent to such third person, unless there is an express or implied assent on the part of the

(*a*) 1 Vent. 318, 332, T. Ray. 302, 2 Lev. 210, 3 Keble, 786, 814, 830, 836, T. Jon. 102, and 1 Freeman, (2d ed.) 471 and note.

(*b*) Lilly *v.* Hays, 5 Ad. & El. 548, 2 Har. & Woll. 338 and 1 Nev. & P. 26. And see Walker *v.* Rostron, 9 Mees. & Welsb. 411. Noble *v.* National Discount Co., 5 Hurlst. & Norm. 225.

agent to pay the money according to the directions he has received. The mere receipt of the money by the agent is no evidence of an implied assent to apply it to the purpose for which it was professedly remitted to him. He holds the money for the use of the remitter; the privity of contract is between him and his principal, and not between the agent and such third party, until by some act done, or by some engagement entered into with the person who is the object of the remittance, the agent has consented to appropriate the money to his use." And on page 951, it is said, that "in all cases where money is sent to one person to be paid by him to another, to enable the person who is the object of the remittance to maintain an action against the remittee to recover the amount transmitted to him, there must be an express promise or assent on the part of the latter to pay over the money to the former, or hold it for his use."

Though this English rule has been adopted and applied by the supreme court of Georgia, (*a*) yet a different rule has been repeatedly applied by other courts in this country. It has been held that when a principal puts money or property into an agent's hands, to be appropriated for a third person's benefit, and the agent thereupon promises the principal so to appropriate it, the third person may maintain an action against the agent, without any previous communication with him. (*b*) It has also been held that where money was remitted to an agent to be paid by him to a third person, the agent was answerable to such person, in an action for money had and

(*a*) Trustees of Howard College *v.* Pace, 15 Georgia, 486. See also Ephraims *v.* Murdock, 7 Blackf. 10.

(*b*) By Shaw, C. J., 2 Met. 402. Weston *v.* Barker, 12 Johns. 276, Spencer, J., dissenting. Ellwood *v.* Monk, 5 Wend. 235. Delaware and Hudson Canal Co. *v.* Westchester County Bank, 4 Denio, 97. Lawrence *v.* Fox, 20 N. Y. Rep. 268. Fleming *v.* Alter, 7 Serg. & R. 295. Keller *v.* Rhoads, 39 Penn. State Rep. 513. Draughan *v.* Bunting, 9 Ired. 10. Brown *v.* O'Brien, 1 Richardson, 268. Bohanan *v.* Pope, 42 Maine, 93. Felch *v.* Taylor, 13 Pick. 136. Carnegie *v.* Morrison, 2 Met. 381. Arnold *v.* Lyman, 17 Mass. 400. In this last case, H. transferred choses in action and goods to L. who, in consideration thereof promised to pay a debt of a specified amount due from H. to A., and A. maintained an action against L. on this promise. But where property was assigned, and the assignees promised, in consideration

received, though he had never consented so to pay it. (*a*) And it seems that by the old law of England, a person receiving property from A., to be applied to the use of B., was answerable to an action by B., without any promise to him. (*b*)

The fluctuation of decisions in England, on this subject of a consideration arising from third persons, has been the cause of opposite decisions in this country. In some of the state courts, the cases of Bourne *v.* Mason and Crow *v.* Rogers (cited *ante*, 205) have been supposed to furnish the authoritative rule, and have been followed. (*c*) Other courts seem to have supposed that those cases were overruled, or at least that they did not furnish the true rule of law; but that such rule was to be found in Com. Dig. Action upon the Case upon Assumpsit, E. a. in Vin. Ab. Action of Assumpsit, Z., and in the opinions expressed by Lord Holt, 1 Ld. Raym. 368, 369, by Lord Mansfield, 1 Doug. 146 and Cowp. 443, and by Buller, J., 1 Bos. & Pul. 101, note. These and similar authorities, said Shaw, C. J., 2 Met. 405, no doubt had their influence in settling the law in Massachusetts, before the period (1804) at which the state reports commence. The first decision on this subject, in Massachusetts, is Felton *v.* Dickinson, 10 Mass. 287, where a son maintained an action on a promise, made for his benefit, to his father. Then followed several actions, (which are cited *ante*, 209, note *b*,) that were maintained on the ground that the defendants had received money, goods or choses in action, to be applied to the use of the plaintiffs. The last case was Brewer *v.* Dyer, 7 Cush. 337, where A., a lessee by indenture, without assigning the lease, put B. into possession of the demised premises, on

thereof, to pay all the debts of a certain corporation, and there was no specification of its creditors, nor of the amount of their dues, it was held that no such creditor could maintain an action against the assignees. Dow *v.* Clark, 7 Gray, 198. And see Fairlie *v.* Denton, 8 Barn. & Cres. 395 and 2 Man. & Ryl. 353.

(*a*) Hall *v.* Marston, 17 Mass. 575. But see 15 N. Hamp. 135, 136.

(*b*) Disborn *v.* Denaby, 1 D'Anv. Ab. 64. Starkey *v.* Mill, Style, 296.

(*c*) Blymire *v.* Boistle, 6 Watts, 182. Morrison *v.* Beckey, ib. 349. Owings Ex'rs *v.* Owings, 1 Har. & Gill, 484. Ross *v.* Milne, 12 Leigh, 204. Butterfield *v.* Hartshorn, 7 N. Hamp. 345. Warren *v.* Batchelder, 15 ib. 129.

being promised by him that he would pay the rent to the lessor; and the lessor maintained an action against B. on this promise. The court have since declined to extend this doctrine to any new case, and have decided that on a promise, made to the seller by the buyer of an equity of redemption, to secure and cancel the mortgage, with the note for which it was given, no action lies by the mortgagee. (*a*)

Where it is held that he for whose benefit a promise is made to another may maintain an action thereon, it is also held that he to whom the promise is made may maintain an action. Either of them, say the books, may bring the action. (*b*) It was said in Hardr. 321, that where a promise is made to a father for the benefit of his son, the declaration must be upon a promise made to the father, though the son bring the action. But it is not perceived how a party can recover in assumpsit unless he alleges a promise to himself. And Eyre, C. J., 1 Bos. & Pul. 102, said that "in the case of a promise to A. for the benefit of B., and an action brought by B., the promise must be laid as being made to B., and the promise actually made to A. may be given in evidence to support the declaration." But see 17 Verm. 250.

Consideration which a party cannot perform.

To support a contract, the consideration thereof must be such, when the contract is made, as the party can physically and legally perform. (*c*) "Every person," said Lord Kenyon, 3 T. R. 22, "who, in consideration of some advantage, either to himself or another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact but in law."

(*a*) Mellen *v.* Whipple, 1 Gray, 317. See also Millard *v.* Baldwin, 3 Gray, 484. Field *v.* Crawford, 6 Gray, 117.

(*b*) Hardr. 321. Aleyn, 1. Hammond on Parties, 9. 2 Greenl. Ev. § 109. 7 Cush. 340, 341. 42 Maine, 93.

(*c*) See Grotius, Book II. c. xi, § 8. Puffendorf, Book III. c. vii, §§ 1, 3–10. Rutherforth, Book I. c. xii, § 7. 1 Powell on Con. 160 *& seq.* 178, 179. 3 Chit. on Law of Com. & Manuf. 100. Chit. on Con. (10th Amer. ed.) 54–56.

Few cases are to be found, in which a promise has been held void on the mere ground that the consideration was not in the promisor's power legally to perform. In Harvy *v.* Gibbons, 2 Lev. 161, where the defendant promised to repair the plaintiff's barge, in consideration that the plaintiff would discharge him of £20, due from him to a third person, judgment for the plaintiff was reversed, because he could not discharge a debt to another. And in Nerot *v.* Wallace, 3 T. R. 17, where the friend of a bankrupt promised to pay his assignees all such sums as the bankrupt had received on a certain partnership account and had not accounted for, in consideration of the partners' engagement to forbear and desist from taking an examination, before the commissioners, concerning such sums, and that the commissioners also would forbear and desist from such examination, judgment for the assignees was reversed on the ground, in part, that they could not prevent the commissioners from proceeding in the examination. (*a*)

When a party promises that a third person shall do an act, the promise will be on a valid consideration, if the thing to be done by such person be not physically impossible, or beyond his legal ability. The law intends that it is in the promisor's power to cause the third person to do the act stipulated for; or that, when he made the promise, he intelligently assumed the risk of being unable to effect the object, and of being answerable in damages for its failure. (*b*) The case of Harvy *v.* Gibbons, *supra*, would probably have been decided for the plaintiff, if the promise had been that the third person should discharge him from the £20 debt. And in other cases where the promise is to do a thing possible in itself, though it is beyond the power of the promisor to perform it, he will be held liable to an action for damages sustained by his non-performance; his

(*a*) The principal ground of this decision was, that the agreement was unlawful. See Haslam *v.* Sherwood, 4 Moore & Scott, 434 and 10 Bing. 540. Macgregor *v.* Official Manager of Dover & Deal Railway, &c. 18 Ad. & El. N. S. 618.

(*b*) Doughty *v.* Neal, 1 Saund. 216 and note. Hesketh *v.* Gray, Sayer, 185. Mounsey *v.* Drake, 10 Johns. 29.

performance not being excused by any contingency, though not foreseen by him and not within his control. In such a case it is held to be his own fault that he did not expressly provide against contingencies. A leading case on this point is Paradine *v.* Jane, Aleyn, 26, where a lessee, who had covenanted to pay rent, was held liable to pay it, though he had been expelled from the demised premises by Prince Rupert and his soldiers, who were the king's enemies. The same was held in Pollard *v.* Schaaffer, 1 Dallas, 210. Yet it was further held in that case, that the lessee was not bound, by his covenant to keep and deliver up the premises in good repair, to repair waste committed thereon by the British army that took possession of the premises and occupied them. But this decision has been questioned. See 5 Barb. 671. When the premises are destroyed by accidental fire, or by lightning or tempest, or by falling from weakness and decay, the lessee must pay rent (*a*) and must repair, (*b*) if he has so engaged without an express provision exonerating him. 2 Platt on Leases, 120, 186. It is now a common learning, that when a person makes an absolute and unqualified contract to do some particular act, the impossibility of performance occasioned by inevitable accident, or some unforeseen occurrence, will not release him. As if a ship-owner engages to procure and ship a cargo of guano, corn, or dye-wood, at a specified port, the fact that no such article can be procured there, or that its exportation has there been prohibited, or that the loading of it is prevented by an embargo, or by pestilence, furnishes no

(*a*) Belfour *v.* Weston, 1 T. R. 310. Fowler *v.* Bott, 6 Mass. 63. Bigelow *v.* Collamore, 5 Cush. 226. Hallett *v.* Wylie, 3 Johns. 44. Allen *v.* Culver, 3 Denio, 294. Davis's Adm'r *v.* Smith, 15 Missouri, 467. Beach *v.* Farish, 4 Cal. 339. Peterson *v.* Edmonson, 5 Harrington, 378. Linn *v.* Ross, 10 Ohio, 412. Redding *v.* Hall, 1 Bibb, 536. Wagner *v.* White, 4 Har. & Johns. 564. Peck *v.* Ledwidge, 25 Illinois, 112. Niedelet *v.* Wales, 16 Missouri, 214. Proctor *v.* Keith, 12 B. Monroe, 252.

(*b*) Bullock *v.* Dommitt, 6 T. R. 650. Brecknock Co. *v.* Pritchard, ib. 750. Phillips *v.* Stevens, 16 Mass. 238. Leavitt *v.* Fletcher, 10 Allen, 119. Green *v.* Eales, 2 Ad. & El. N. S. 225 and 1 Gale & Dav. 468. Dermott *v.* Jones, 2 Wallace (U. S.) 7, 8. School District *v.* Dauchy, 25 Conn. 530. School Trustees of Trenton *v.* Bennett, 3 Dutcher, 513.

answer to an action for breach of the engagement. (*a*) And when a lessee covenants to repair, except in case of casualties by fire, &c., yet if he covenants to pay rent and does not except casualties, he will be held to pay rent, although the demised premises are destroyed by fire or tempest. (*b*) There is, however, an established difference between a duty created by law and a duty created by contract. When the law creates a duty and the party is disabled to perform it, without any default in him, and he has no remedy over, the law will excuse him. (*c*) So the non-performance of a contract, it is said, will always be excused, when it is occasioned by act of law or by an act done by public authority. (*d*)

As to contracts to do what it is physically impossible to do, the law is stated thus: "If the thing to be done is notoriously physically impossible, and was known to be so by both parties, at the time of the making of the contract, the contract is void." (*e*) The books generally mention a promise to go from London to Rome in three hours, as a promise that would be void, because impossible to be performed. But a distinction is not to be overlooked: "If the condition of a bond be impossible at the time of the making thereof, the bond is single, for it is the same as if there were no condition at all; and a feoffment, on condition that the feoffee go to Rome in a day, is absolute, for the condition is

(*a*) Sjoerds *v.* Luscombe, 16 East, 201. Barker *v.* Hodgson, 3 M. & S. 267. Blight *v.* Page, 3 Bos. & Pul. 295 note. Marquis of Bute *v.* Thompson, 13 Mees. & Welsb. 493, 494. Hills *v.* Sughrue, 15 ib. 253. Kirk *v.* Gibbs, 1 Hurlst. & Norm. 810. Hadley *v.* Clarke, 8 T. R. 259. Atkinson *v.* Ritchie, 10 East, 530. Gilpins *v.* Consequa, Peters, C. C. 85 and 3 Wash. C. C. 184. Harmony *v.* Bingham, 2 Kernan, 99. Stone *v.* Dennis, 3 Porter, 231. Combs *v.* Fisher, 3 Bibb, 51. Clancy *v.* Overman, 1 Dev. & Bat. 402. Baylies *v.* Fettyplace, 7 Mass. 325. But see 3 Best & Smith, 826.

(*b*) 3 Kent Com. (11th ed.) 600 *& seq.* Monk *v.* Cooper, 2 Strange, 763 and 2 Ld. Raym. 1477. Belfour *v.* Weston, 1 T. R. 310. Brown *v.* Quilter, Amb. 619. Hare *v.* Graves, 3 Anstr. 687. Kramer *v.* Cook, 7 Gray, 553.

(*c*) 2 Saund. 421 a, note. Story on Bailm. § 31. Chit. on Con. (10th Amer. ed.) 804, 805. 15 Missouri, 469. 19 Pick. 276. 1 Dallas, 211. 1 Dev. & Bat. 405.

(*d*) Chit. on Con. *supra.*

(*e*) Addison on Con. (5th ed.) 1037. 1 Powell on Con. 161.

repugnant to the feoffment. But if an estate be to arise, or a duty to commence, on a precedent condition that is impossible, they can never have effect." Bac. Ab. Conditions, M. N. And see 1 Powell on Con. 266. Com. Dig. Condition, D. 1. 1 Stephen's Com. (5th ed.) 308, 309. 2 ib. 107, 108. Broom's Maxims, 216–228.

There are anomalous cases of unconscionable bargains, in which promisors have been excused from performance according to the terms of the bargains, and in which the promisee recovered only what was fairly due to him.

James *v.* Morgan, 1 Lev. 111, was "assumpsit to pay for a horse a barleycorn a nail, doubling it every nail; and avers that there were thirty-two nails in the shoes of the horse, which, being doubled every nail, came to five hundred quarters of barley. The cause being tried before Hyde, J., he directed the jury to give the value of the horse in damages, being £8, which they did; and judgment was given for the plaintiff." And Lee, C. J., in 1 Wils. 295, approved this decision. A similar decision was made in Cutler *v.* How, 8 Mass. 257, and in Baxter *v.* Wales, 12 Mass. 365, where the jury were instructed that they might consider the contract unconscionable and might assess, as damages, such sum as would relieve the defendant from what was oppressive in the contract. Such cases are at variance with the rule that a party must recover according to his contract, if he sue upon it, or not recover at all. When an express contract is void, and it is not equitable that the defendant should retain property without paying for it, the usual course is to disregard that contract and sue upon an implied one.

In Thornborow *v.* Whitacre, 2 Ld. Raym. 1164 and 6 Mod. 305, the defendant, in consideration of half a crown, promised to pay two grains of rye on Monday the 29th of March, four grains the next Monday, doubling every Monday for a year. A declaration on this promise was demurred to, on the ground that performance was impossible, "as all the rye in the world was not so much." But "the counsel for the defendant perceiving the opinion of the court

to be against his client, offered the plaintiff his half crown and his cost, which was accepted of, and so no judgment was given in the case."

Consideration void in part.

When one of two considerations is void merely for insufficiency, and not for illegality, the other will support the contract. As a promise in consideration of an assignment of title to dower, and of forbearing to sue an attachment out of chancery upon a decree. For though a title to dower cannot be assigned, yet the forbearance will support the contract. (*a*) So of other like cases. (*b*)

But if one of two considerations of an *entire* contract be illegal, either by the common law or by statute, the whole contract is void; (*c*) as if part of the consideration of a bill of exchange or promissory note be spirituous liquor sold contrary to law, though the other be lawful. (*d*)

It was formerly supposed that if any part of a contract was void by statute, and especially by the statute of frauds, the whole was void. But it is now settled, that if any part of an agreement is valid it will avail *pro tanto*, though another part of it may be prohibited by statute, provided the sound part can be separated from the unsound, and be enforced without injustice to the promisor; as will be seen *post.* 248 *&c. seq.*

Unlawful Consideration.

According to Mr. Chitty, whose description of a simple contract has been repeatedly cited, the consideration must be

(*a*) Coulston *v.* Carr, Cro. Eliz. 847. Com. Dig. Action upon the case upon Assumpsit, B. 13.

(*b*) Pikard *v.* Cottels, Yelv. 56. Crisp *v.* Gamel, Cro. Jac. 128. King *v.* Sears, 2 Crompt. Mees. & Rosc. 48 and 5 Tyrwh. 587. Chit. on Con. (10th Amer. ed.) 56. Wesleyan Seminary *v.* Fisher, 4 Mich. 526.

(*c*) Featherston *v.* Hutchinson, Cro. Eliz. 199 and 3 Leon. 208. Morris *v.* Chapman, T. Jon. 24. Wait *v.* Jones, 1 Scott, 735, 736 and 1 Bing. N. R. 664. Filson's Trustees *v.* Himes, 5 Barr, 452. Collins *v.* Merrell, 2 Met. (Ky.) 163. Crawford *v.* Morrell, 8 Johns. 253. 37 Alab. 46.

(*d*) Scott *v.* Gilmore, 3 Taunt. 226. Gaitskill *v.* Greathead, 1 Dowl. & Ryl. 359. Deering *v.* Chapman, 22 Maine, 488. Yundt *v.* Roberts, 5 Serg. & R. 139. Carlton *v.* Bailey, 7 Foster, 230. Perkins *v.* Cummings, 2 Gray, 258.

sufficient and legal, and the agreement must be "to perform some legal act, or omit to do anything, the performance whereof is not enjoined by law;" that is, the consideration must be lawful, and the thing to be done or omitted must also be lawful, or the agreement is void. It is not only useless but difficult to illustrate these two points separately, by examples. To every agreement there are in fact two considerations. This is manifest in the cases of mutual promises executory, as in the case, for example, of Gibbons *v.* Prewd, Hardr. 102. The plaintiff promised to convey to the defendant all his interest in the estate of a person deceased, before a certain day, and the defendant promised to pay the plaintiff £25 before the same day. The consideration of the plaintiff's promise was the promise of the defendant, and *vice versa.* Had the promise of either been to do an unlawful act, the *contract*, that is, the promise of each, would have been void. The same is equally true, though perhaps less obviously so, of all other agreements, whether executory, or executed on one side only, or executed on both sides. Thus, where an officer, in consideration of a promise of indemnity, suffers a prisoner in execution to escape, the consideration is executed on his part, and executory on the part of the promisor. Here there is not only the promise of indemnity, as the consideration for the officer's act, but there is the officer's act, either done or agreed to be done, as the consideration for the promise of indemnity. And so of all other contracts; as might be shown by a glance at the pleadings of both parties, if both should sue. Either party to a contract may sue the other for a breach of it; and, in all cases, it is necessary to set forth, in the declaration, the consideration of the contract, as well as the terms of it. When, for example, an action is brought on a contract for A.'s doing one thing in consideration of B.'s doing another thing, if A. sues, he states, in his declaration, the thing to be done by himself, as the consideration of the promise made to him by B. If B. sues, he states the thing to be done by himself as the consideration of A.'s promise to him.

A consideration on one side may be lawful, and unlawful

on the other; that is, a promise to do a lawful act may be made on an unlawful consideration; or a promise to do an unlawful act may be made on a lawful consideration: As if A. promise to reap B.'s field, in consideration that B. will beat C., or cause him to be beaten, or if B. promise to beat C., in consideration that A. will reap B.'s field. In such case, as one or the other party may happen to sue, the consideration, or the promise, will be illegal. So both considerations, or the consideration on both sides, may be unlawful. As if A. promise to beat C., in consideration that B. will not give evidence against him, if called as a witness. These contracts are equally void, and none of them can be enforced. (*a*)

Contracts are said to be illegal, either because the consideration of a promise is illegal, or because the promise is illegal. The distinction is without a difference. At least there is no difference, in effect, between the two. Wherever the illegality lies, the contract cannot be supported in a court of law. And it will be found, it is believed, that the phrase "void for illegal consideration" is usually adopted only in those cases where the party, from whom an illegal consideration moved, sues for the breach of a *promise* which is not in itself illegal: As if an officer sues on a promise of indemnity, in itself an unexceptionable promise, the consideration of which was his permitting an escape, an unlawful act. If the other party sue the officer for not permitting the prisoner to go at large, according to agreement, the language would be that the *contract* was illegal; for the consideration of the contract on the part of the party suing, and from whom it moved, was not illegal.

This difference of language, that is, sometimes saying the promise is void for illegal consideration, and sometimes that the contract is void because it is illegal, tends to confuse, and may leave the impression that the party to a contract, who stipulates for nothing unlawful on his part, may enforce his claim against the other party, though the other party, on whom the illegality rests, cannot enforce the contract against *him*. The law is not so. The whole contract

(*a*) See 1 Powell on Con. 176.

is void (to speak with technical precision) whenever the consideration on either side is unlawful; that is, whether that which is the ground of the promise on one part, or the thing which is promised to be done on the other part, is unlawful, all is void, and neither party can derive any assistance from a court of law or of equity to carry it into effect.

Failure of Consideration.

When the consideration of a contract fails, that is, when what was supposed to be a consideration is none, the contract may be avoided. If money has been paid, it may be recovered back, where the consideration fails; or if a note, &c., has been made, failure of consideration is a sufficient defence to a suit brought to enforce payment or performance.

When real estate is conveyed by deed, with warranty, and notes are given for the price, the decisions in this country generally are, that a partial failure of title to the estate is not a full defence to actions on the notes, unless the grantor was guilty of fraud. (*a*) In some cases the grantee, when sued for the price, has been allowed to show partial failure in reduction of damages. (*b*)

The decisions are not uniform on the question whether total failure of title is a defence to an action for the price. In New Hampshire, Massachusetts, Connecticut, Illinois, and New York, such failure is a defence. (*c*) *Contra*, in Maine;

(*a*) Greenleaf *v.* Cook, 2 Wheat. 13. Lloyd *v.* Jewell, 1 Greenl. 352. Howard *v.* Witham, 2 ib. 390. Brown *v.* Reves, 19 Martin, 235. Long *v.* Allen, 2 Florida, 403. Hay *v.* Taliaferro, 8 Smedes & Marsh. 727. Van Lew *v.* Parr, 2 Richardson Eq. 321. Wilson *v.* Jordan, 3 Stew. & Port. 92. White *v.* Beard, 5 Porter, 94. Lattin *v.* Vail, 17 Wend. 188. Tallmadge *v.* Wallis, 25 Wend. 107 and cases there discussed. Smith *v.* Sinclair, 15 Mass. 171. Wentworth *v.* Goodwin, 21 Maine, 150. Barkhamsted *v.* Case, 5 Conn. 528.

(*b*) See 11 Conn. 438. Hart *v.* Ex'rs of Porter, 5 Serg. & R. 203, 206. Van Epps *v.* Harrison, 5 Hill, 63.

(*c*) Tillotson *v.* Grapes, 4 N. Hamp. 448. Rice *v.* Goddard, 14 Pick. 293. Trask *v.* Vinson, 20 ib. 110. Cook *v.* Mix, 11 Conn. 432. Tyler *v.* Young, 2 Scammon, 447. Davis *v.* McVickers, 11 Illinois, 327. Frisbee *v.* Hoffnagle, 11 Johns. 50. This last case has been said to be overruled; but according to Chancellor Walworth in 25 Wend. 116 and Chief Justice Nelson in Tibbets *v.* Ayer, Hill & Denio, 179, the only objection to that case is, not to the princi-

the covenants in a deed being there held to be a sufficient consideration for a note. (*a*)

To avoid circuity of action, courts have of late permitted partial failure of consideration to be a defence *pro tanto* in suits on contracts respecting personal property, work and labor, &c. As in the case of a contract to build a house in a particular manner, and at a specified price, if the work is inferior to that which was agreed on, the defendant may show this fact and reduce the plaintiff's compensation to the actual benefit received by the defendant. *Ante*, 7.

By the common law, neither the want nor the failure of consideration is any defence to an action on a bond, or other sealed instrument, except a bond in partial restraint of trade. By local usage, however, in some of the States of the Union, and by virtue of statutes in other States, as seen *ante*, 161, 162, such defence is allowed. (*b*)

ple of the decision, which is held to be sound, but to the application of that principle to facts which did not show a total failure. In Hill & Denio, *supra*, where the maker of a note given as part consideration for a conveyance of land, with full covenants, had been evicted from the whole of the conveyed premises, it was decided that the note was not recoverable.

(*a*) Jenness *v.* Parker, 24 Maine, 289, and extrajudicial opinions expressed in Lloyd *v.* Jewell and other cases cited *supra*.

(*b*) It has heretofore been mentioned, that a court of chancery will not enforce the execution of a sealed contract, if it be purely voluntary. And in the case of Wright *v.* Moore, Tothill, 27, "a voluntary bond of £1000, entered into for no consideration, was cancelled in the presence of the judges."

CHAPTER IV.

OF UNLAWFUL CONTRACTS.

Every contract to do an act which the law forbids, or to omit an act which the law enjoins, is void. No contract can be enforced, nor damages recovered for the breach of any contract, which contravenes the principles of the common law, the provisions of a statute, or the general policy of the law. No form of words, however artfully devised, can prevent an investigation of the real object of a contract, if that object be illegal. Nor is there any substantial difference, on this point, between simple contracts, and contracts by specialty. Illegality vitiates contracts of every description.

A distinction was formerly taken between *malum in se* and *malum prohibitum;* and some contracts, which violated merely statutory provisions or general policy, were subjected to less rigid rules, than contracts which violated natural justice or furthered palpable iniquity. This distinction is no longer recognized. Every act is now regarded as unlawful, which the law forbids to be done; and every contract is declared void, which contravenes any legal principle or enactment. (*a*)

Unlawful contracts are usually divided into divers species; such as immoral, fraudulent, contrary to the principles of the common law, contrary to the policy of the law, contrary to the provisions of a statute, &c. But it seems unnecessary to make more than two distinctive species, namely, contracts which violate the common law, and contracts which violate a statute.

(*a*) 2 Bos. & Pul. 374. 3 B. & Ald. 183. 7 Greenl. 462. 3 Cush. 450.

I. CONTRACTS WHICH CONTRAVENE THE PRINCIPLES OF THE COMMON LAW.

These might be subdivided almost indefinitely; for the rules of the common law are almost indefinitely numerous. Convenience requires some classification; but not one that is very minute.

Contracts void for immorality.

All contracts which have for their object any thing forbidden by the immutable laws of God are void by the rules of the common law, which adopts and lends its sanctions to those paramount laws; such as a contract to commit murder, larceny, perjury, &c., or to pay money, or do any other act, in consideration of the commission of either of those or of any similar offences. (*a*) So of all contracts that have for their object any thing *contra bonos mores*. (*b*) Thus, an agreement in consideration of future illicit cohabitation is void. (*c*) But a sealed contract made in consideration of past seduction and cohabitation, or past cohabitation without seduction, is not unlawful, but will be enforced. The law, in such case, regards the contract as obligatory in honor and conscience; as intended for the redress of an injury inflicted by the party; as *præmium pudoris vel pudicitiæ*. Such appears to be now the law, though some of the earliest cases do not fully warrant the doctrine. (*d*) But parol promises, on such consideration, stand on different ground. No consideration is necessary to

(*a*) 2 Co. Lit. 206, b. 1 Powell on Con. 165. 2 Pothier on Obligations (Evans ed.) 72. (*b*) Cowp. 39.

(*c*) Walker *v.* Perkins, 3 Bur. 1568 and 1 W. Bl. 517. Franco *v.* Bolton, 3 Ves. 368. Gray *v.* Mathias, 5 Ves. 286. Friend *v.* Harrison, 2 Car. & P. 584.

(*d*) See Whaley *v.* Norton, 1 Vernon, 483. Matthew *v.* Hanbury, 2 ib. 187. Bainham *v.* Manning, ib. 242. Spicer *v.* Hayward, Pre. Ch. 114. Annandale *v.* Harris, 2 P. W. 432. Cray *v.* Rooke, Cas. Temp. Talb. 153. Turner *v.* Vaughan, 2 Wils. 339. Hill *v.* Spencer, Amb. 641. 1 Lomax on Ex'rs, 634–636. Ram on Assets, (Amer. ed.) 186. 1 Story on Eq. § 296. Shaw on Obligations, 64.

support sealed contracts, though an illegal consideration makes them void. But by the law of England all parol (unsealed) promises to make payment for past illicit intercourse, even though the promisor was the seducer, are void for want of a legal consideration. (*a*)

In Wolraven *v.* Jones, 1 Houston, 355, where a woman sued an administrator for wages, alleged to be due to her from the intestate, the jury were instructed, that if the plaintiff did not live with the intestate in the character and capacity of a hired woman or house servant, but as his mistress, the law would not imply a contract nor enforce an express one founded on such a consideration. See also Robbins *v.* Potter, 11 Allen, 588.

A parol promise, however, by the reputed father of a bastard child, to pay the mother an annuity, if she would bring up the child properly, or maintain it and keep the connection secret, is held to be valid, on the ground that the promisor's object was "to preserve the child from want, to relieve himself from being compelled to support it, and to secure to the child the mother's care." (*b*) And in Pennsylvania it has been decided that seduction and begetting a bastard child was a sufficient legal consideration for a parol promise to give the mother a bond for a sum of money; if the promise was not obtained by any oppression or unfairness. (*c*)

In some of the earlier cases, it was suggested that a court of chancery would grant relief to the obligor in a bond given to a common prostitute in consideration of past cohabitation. But it seems that relief will not be given, in such case, unless

(*a*) Matthews's case, 1 Madd. 558. Binnington *v.* Wallis, 4 B. & Ald. 650. Beaumont *v.* Reeve, 8 Ad. & El. N. S. 483. These last two cases have overturned the decision in Gibson *v.* Dickie, 3 M. & S. 463, unless that case can be upheld on a ground not suggested by court or counsel, namely, that a part of the consideration of the defendant's promise to the woman was his retaining of a portion of bank stock and money that he had received of her.

(*b*) Hicks *v.* Gregory, 8 C. B. 378. Jennings *v.* Brown, 9 Mees. & Welsb. 496. Smith *v.* Roche, 6 C. B. N. S. 223.

(*c*) Shenk *v.* Mingle, 13 Serg. & R. 29. And see Maurer *v.* Mitchell, 9 Watts & Serg. 69.

there be fraud. (*a*) In Clarke *v.* Perriam, (*b*) where the plaintiff sought to have a bond enforced as *præmium pudicitiæ*, and she was proved to have been a prostitute before her connection with the obligor, the lord chancellor dismissed the plaintiff's bill. So where fraud is practised on the woman, chancery will grant relief, as in other contracts. Thus where one pretended to convey an estate to a woman, as *præmium pudicitiæ*, when in fact there was no such estate, a conveyance was ordered to be made by the man "out of the best of his estate," equal to what was pretended to be conveyed. (*c*) Lord Hardwicke, in the case of Priest *v.* Parrot (*d*) dismissed a bill for payment of a bond given by a married man to a woman whom he had seduced, she knowing him to be married, and having caused a separation between him and his wife. (*e*)

In Lady Cox's case, (*f*) Sir J. Jekyll, Master of the Rolls, decided that a bond given to a second wife, who lived with the obligor, after she knew he had a former wife alive, should be postponed to all simple contract debts of the obligor, who died without property sufficient to pay all his debts. But if she had left the obligor, on discovering that there was a lawful wife alive, and had thereupon taken a bond, it would have "been a just bond, and for a meritorious consideration." (*g*)

A contract for the occupation of lodgings, with knowledge that they are to be used for the purpose of prostitution, is void. (*h*) So of a contract for board and lodging, if, in addition to the pay therefor, a portion of the profits of prostitution is to be received by the landlord. (*i*) So of a contract for clothes to be paid for from the profits of prostitution (*j*) But board and clothing furnished to a prostitute, though with knowledge that she is such, is a good consideration for a promise,

(*a*) See 2 Vernon, 242, 5 Ves. 286 and Amb. 641. Newland on Con. 483 *& seq.* (*b*) 2 Atk. 333.
(*c*) Cary *v.* Stafford, Amb. 520. (*d*) 2 Ves. Sen. 160.
(*e*) See the vice-chancellor's remarks, in Matthews's case, 1 Madd. 558.
(*f*) 3 P. W. 339. (*g*) See Ex parte Cottrell, Cowp. 742.
(*h*) 1 Esp. R. 13. Ry. & Mood. 251.
(*i*) 1 Selw. N. P. (1st ed.) 60 (7th Amer. ed.) 66. Chit. on Con. (10th Amer. ed.) 735. (*j*) 1 Campb. 348.

express or implied, unless they are furnished for the purpose of enabling her to pursue a course of prostitution. (*a*)

A contract for the sale of prints of an obscene and immoral nature is void. (*b*) And a printer cannot recover pay for printing a work of a grossly immoral nature. (*c*)

Though, by the common law, wagers on indifferent subjects are legal, yet if they are *contra bonos mores*, and lead to indecent examinations and disclosures, they are void for illegality; as a wager upon the sex of a third person; or a wager that an unmarried woman will be delivered of a child before a certain day. (*d*)

Contracts to do or omit, or in consideration of doing or omitting acts, the doing or omitting of which is punishable by criminal process.

Several of the cases under the preceding head fall also within this principle. Thus, letting a house to a woman of ill fame for the purpose of aiding her in her vicious course of life, is an indictable offence. (*e*) So is the publishing of an obscene print or book. (*f*) But all immoral acts, which, if the consideration of a contract, would avoid it, are not indictable. All acts, however, which are indictable, or otherwise punishable criminally, will render a contract void, if they form any part of the consideration. Thus, Lord Ellenborough held that it would be a good defence to an action for not supplying manuscript to complete a work according to agreement, that the matter of the intended publication was of an unlawful and indictable nature. (*g*) So a bond, note, or other promise, given in consideration of stifling or compounding a prosecution for treason, felony, or a *public* misdemeanor, is void; (*h*) or

(*a*) 1 Bos. & Pul. 340. 1 Campb. 348. 2 Car. & P. 347.
(*b*) 4 Esp. R. 97. (*c*) 2 Car. & P. 198.
(*d*) Cowp. 729, 735, 736. 4 Campb. 152.
(*e*) 3 Pick. 26.
(*f*) 17 Mass. 337. 2 Stra. 788. 1 Russ. on Crimes (7th Amer. ed.) 233.
(*g*) Gale *v.* Leckie, 2 Stark. R. 98.
(*h*) 2 Wils. 343. 5 East, 294. 1 Campb. 45, 55. 16 Mass. 91. 9 Verm.

in consideration of concealing treason or felony, which is a punishable misprision ; (*a*) or of compounding informations on penal statutes, in criminal cases. (*b*)

In England, where the party injured has much more control, than in this country, of a prosecution for misdemeanors that chiefly affect an individual, the defendant, *after conviction*, is permitted " to speak to the prosecutor," before sentence is pronounced ; and if the prosecutor declares himself satisfied, a light punishment is inflicted. In such cases, an agreement to make amends to the party injured, to pay his expenses, &c., is lawful, though the intention and end of the agreement are to mitigate the prisoner's punishment. (*c*) And the costs of an indictment for an assault, &c., of which a prisoner has been convicted, where judgment has been respited, is a lawful subject of submission to arbitration, and an award thereon is binding upon the parties, that is, the prosecutor and the defendant. (*d*) But a criminal prosecution is not a lawful subject of reference. (*e*)

A note given to procure a discharge from arrest on an attachment out of chancery, and in satisfaction of a balance of money in the prisoner's hands, for non-payment of which the attachment is sued, is valid ; the process, though criminal in form, being really civil for all purposes for which it is sued out by the party, and therefore subject to his control. (*f*) So of notes given to an officer, who has a warrant of distress, or a capias, against a defendant convicted of a breach of the excise laws, for the purpose of saving his property from sale, or

23. 3 Car. Law Repos. 415. 1 Bay, 249. 1 Bailey, 588. 2 Southard, 470. 5 N. Hamp. 553. 4 Ohio, 400.

(*a*) 4 Bl. Com. 120, 121. 1 Chit. Crim. Law, 3, 4.

(*b*) 4 Bl. Com. 136.

(*c*) 4 Bl. Com. 364. 1 Russ. on Crimes, (7th Amer. ed.) 131. Beeley *v.* Wingfield, 11 East, 46.

(*d*) Baker *v.* Townsend, 7 Taunt. 422, and 1 Moore, 120. See also The King *v.* Dunne, 2 M. & S. 201. As to a prosecutor's rights and liabilities, in England, see 1 Chit. Crim. Law, 3–10.

(*e*) Watson *v.* McCullum, 8 T. R. 520. Kyd on Awards (1st Amer. ed.) 63, 69.

(*f*) Brett *v.* Close, 16 East, 293.

his body from imprisonment. (*a*) But if an officer take a note, or other promise, of a prisoner sentenced to confinement as *a punishment*, in consideration of his being at large, and as a security for his return into custody, it is void; the indulgence being a breach of duty, for which the officer is indictable. *A fortiori* of an agreement to pay an officer, or other person, for an entire escape, either from a mere arrest, or from confinement in prison. (*b*)

There are two cases, in which it was held that an agreement in consideration of compounding a misdemeanor, which principally affects an individual (as fraud, &c.,) is lawful, and may be enforced by action. (*c*) The authorities, that have been cited, seem to settle this point the other way. In Fallowes *v.* Taylor, 7 T. R. 475, a bond was held to be valid, though the consideration on which it was given was, in part at least, an agreement by the obligee not to prefer bills of indictment (which were prepared) against the obligor for levying nuisances in a navigable river. The condition of the bond was that the obligor should remove the nuisances by a certain day, and should at no time erect them again. The recital prefixed to the condition, stated that the obligee had been directed by the quarter sessions to prosecute those who had levied the nuisances, that he had prepared indictments, and that the defendant had applied to him not to prefer them, on condition that he would remove the nuisances and give the bond. The defendant pleaded the general issue, and also performance of the condition; and the issue, joined on the last plea, was found for the plaintiff. A motion was made in arrest of judgment, on the ground that the contract, disclosed in the condition of the bond, was illegal. But the motion was overruled, and the plaintiff had judgment. (*d*) It did not

(*a*) Pilkington *v.* Green, 2 Bos. & Pul. 151. Sugars *v.* Brinkworth, 4 Campb. 46.

(*b*) 2 Hawk. c. 19, §§ 17 *& seq.* 4 Bl. Com. 130. Churchill *v.* Perkins, 5 Mass. 541.

(*c*) Johnson *v.* Ogilby, 3 P. W. 279. Drage *v.* Ibberson, 2 Esp. R. 643. See Chief Justice Tindal's remarks on these cases, in 9 Ad. & El. N. S. 393, 394.

(*d*) But see, as to this decision, 9 Ad. & El. N. S. *supra.*

appear, *on the face of the record*, that the bond was unlawful. Lord Kenyon said, "If there were any thing illegal in the consideration, the defendant should have pleaded it." It is necessary to plead the illegality of a bond; (*a*) but if it might be given in evidence, the defendant, in this case, gave no such evidence, and the verdict virtually negatived the illegality.

By the revised statutes of New York, misdemeanors, except in certain cases, may be compromised, either before or after an indictment. But an assault and battery cannot be compromised after conviction. (*b*)

All contracts to indemnify persons and save them harmless, for doing indictable acts, are void for illegality; as indemnities to printers for publishing libels; or to any person for committing an assault, &c., upon another.

Contracts for the maintenance of suits are void; maintenance being an indictable offence. So of contracts involving champerty, embracery, and the buying of pretended titles. (*c*) The sale of lands out of the vendor's possession, and held adversely at the time, is not a valid consideration for a promise. (*d*) And no action can be sustained by a purchaser against the seller of a pretended title, on account of the seller's subsequent fraudulent connivance with the tenant to defeat the purchaser's title. (*e*)

Dissuading or endeavoring to dissuade a witness from giving evidence against a person indicted, is an indictable offence, and, of course, any promise, made to a witness, in consideration of his not giving evidence, is void. (*f*) Extortion is indictable, and any obligation taken by an officer for the

(*a*) Harmer *v.* Rowe, 6 M. & S. 146.

(*b*) People *v.* Bishop, 5 Wend. 111. See also the Rev. Sts. of Massachusetts, c. 135, §§ 25, 26, and the Gen. Sts. c. 170, § 33. Price *v.* Summers, 2 Southard, 578.

(*c*) 4 Bl. Com. 134, *& seq.* Moore, 751. Dyer, 355, b. Carter, 229. 1 Pick. 415. 5 Pick. 348.

(*d*) 2 Johns. Cas. 58, 423. 2 Caines, 147. The law as to maintenance and champerty is not now in force in New York, except as contained in the statutes of the State. 4 Kernan, 289.

(*e*) Swett *v.* Poor, 11 Mass. 549.

(*f*) Mason *v.* Watkins, 2 Vont. 109. Badger *v.* Williams, 1 Chip. 137

payment of what is not due to him, or for more than is legally due, is void. (*a*)

Contracts contrary to sound policy.

The case of Norman *v.* Cole (*b*) is sometimes cited as having decided that a contract to pay for services in attempting to obtain the pardon of a convict is unlawful and void. But the ground of that decision seems to have been, that means, which Lord Kenyon deemed unwarrantable, were to be used to procure a pardon; namely, that money was to be given to M., a person of good connections, and having access to persons of influence, for using his interest, by representing, in favorable terms, the case and character of a convict, who was under sentence of death. If any thing more was decided, the case is in conflict with the early case of Lampleigh *v.* Braithwait, (*c*) upon the authority of which the court of New Hampshire held that an agreement to use legitimate means to procure the pardon of a convict is neither immoral nor against public policy. (*d*) And so hold the court of Georgia. (*e*)

In Addison on Con. (2d Amer. ed.) 96, (5th ed.) 892, Norman *v.* Cole is cited as deciding that an agreement is void, as against public policy, if made "to pay money in consideration that a party will use his private interest and influence with the crown to obtain the pardon of a criminal." And in Hatzfield *v.* Gulden, 7 Watts, 152, it was decided that an engagement to procure signatures to a petition for the pardon of a convict sentenced to punishment was unlawful and could not be enforced by action. See also Wildey *v.* Collier, 7 Maryl. 273, 281. McGill's Adm'r *v.* Burnett, 7 J. J. Marsh.

(*a*) 1 Russ. on Crimes, (7th Amer. ed.) 142. Commonwealth *v.* Cony, 2 Mass. 524. Commonwealth *v.* Bagley, 7 Pick. 279.

(*b*) 3 Esp. R. 253. See Wilkinson *v.* Kitchin, 1 Ld. Raym. 89.

(*c*) Hob. 105, Moore, 866 and 1 Brownl. 7.

(*d*) Chadwick *v.* Knox, 11 Foster, 226, 236.

(*e*) Formby *v.* Pryor, 15 Georgia, 258. In Shaw on Obligations, 64, note (1) the case of Stewart *v.* Earl of Galloway is cited, in which it was held that, by the law of Scotland, a bond granted as a premium to solicit pardon, being *turpis causa*, would not support an action.

640. Wood *v.* McCann, 6 Dana, 368, and remarks of Grier, J. 16 Howard, 334.

All contracts to procure or to endeavor to procure an act of a legislature, by any sinister means, or by any personal influence on individual members, are immoral, unlawful, and inconsistent with sound policy. But a contract to act openly as attorney for a petitioner, in preparing documents and addressing a committee of a legislature, is lawful. (*a*)

An agreement by a petitioner to the House of Commons, against the return of a member thereof, on the ground of bribery, not to proceed with the petition, in consideration of a sum of money, was held to be void for illegality. (*b*) And securities, given in consideration of withdrawing opposition to a bill pending in parliament, were held to be illegal and void, on the ground of public policy. (*c*)

Marriage brocage contracts, that is, agreements to pay third persons for procuring a marriage, by means of their exertions and influence with one of the parties to the match, are void. (*d*) So of contracts in restraint of marriage. Thus,

(*a*) Marshall *v.* Baltimore & Ohio Railroad Co. 16 Howard, 314. Bryan *v.* Reynolds, 5 Wis. 200. Harris *v.* Roof, 10 Barb. 489. Rose *v.* Truax, 21 ib. 361. Wood *v.* McCann, 6 Dana, 366. Clippinger *v.* Hepbaugh, 5 Watts & Serg. 315. Frost *v.* Inhabitants of Belmont, 6 Allen, 152. Sedgwick *v.* Stanton, 4 Kernan, 289. And see Fuller *v.* Dame, 18 Pick. 472. Pingry *v.* Washburn, 1 Aik. 264. An agreement to use one's influence in favor of a candidate for office is illegal. Nichols *v.* Mudgett, 32 Verm. 546. See also Meacham *v.* Dow, 32 Verm. 721. 2 Kent Com. (11th ed.) 609, 610 and notes.

(*b*) Coppock *v.* Bower, 4 Mees. & Welsb. 361 and 1 Horn & Hurlst. 340. Lord Abinger said the petition was "a proceeding instituted not for the benefit of individuals, but of the public; and the only interest in it, which the law recognizes, is that of the public. I agree that if the person who prefers that petition finds in the progress of the inquiry, that he has no chance of success, he is at liberty to abandon it at any time. But I do not agree that he may take money for so doing, as a means and with the effect of depriving the public of the benefit which would result from the investigation. It seems to me to be as unlawful so to do, as it would be to take money to stop a prosecution for a crime."

(*c*) Vauxhall Bridge Co. *v.* Earl Spencer, 2 Madd. 356.

(*d*) Hall *v.* Potter, Show. P. C. 76 and 3 Lev. 411. Reeve Dom. Rel. 419.

an agreement between a man and a woman that he would pay her £1000, if he married any other person except herself, was held to be void; the agreement not being to marry her, and she not agreeing to marry him; so that he was restrained from marrying at all, if she should refuse to marry him. (*a*) The decisions on this subject rest on the ground, that though the law does not oblige any one to marry, yet that marriage is a moral and political duty, and that an agreement "to omit moral duties, which, for the exercise of our virtues, are left to our own free choice," is not the proper subject matter of an action. "Whatsoever a man may lawfully forbear, that he may oblige himself against; except when a third person is wronged, or the public is prejudiced by it." (*b*) A bond from a widow not to marry again was decreed to be delivered up, although there was a counter-bond to pay a sum of money if she did not. (*c*) A wager between two persons, that one of them will not marry within six years, is void, unless it be shown that such temporary restraint is proper and prudent in the particular case. (*d*)

Conditions, which restrain marriage generally, are void, if annexed to devises or legacies. But a condition which restrains marriage as to time, &c., or which requires consent of parents, trustees, &c., is good. Such conditions are regarded as allowable regulations, not prohibitions, of marriage, and as proper exertions of the liberty of disposing of property according to the owner's pleasure; which liberty is as much favored by the law, as the liberty of marriage. In both cases such restrictions only are permitted, as are deemed to be of public utility.

But devises and legacies on condition that the devisee or legatee does not marry, or on condition of their being enjoyed so long only as the devisee or legatee remains single, are treated as unconditional devises and bequests. The condition is only *in terrorem*, and is inoperative. The party does not

(*a*) Low *v.* Peers, Wilmot, 364 and 4 Bur. 2225. See also Cock *v.* Richards, 10 Ves. 429. Sterling *v.* Sinnickson, 2 Southard, 756.

(*b*) Wilmot, 377. (*c*) Baker *v.* White, 2 Vernon, 215.

(*d*) Hartley *v.* Rice, 10 East, 22.

forfeit the bequest by marrying, unless it be limited over by the testator. (*a*) This distinction, however, does not hold in cases of a condition precedent; as a legacy to be paid to A., on condition of his marrying B., or marrying C., with the consent of the executor, or other person named. (*b*)

In favor of free and unconstrained marriages, very strict rules are applied to the limitation of legacies, and very liberal rules to the construction of consent to marriages by guardians, trustees, &c. (*c*)

The rule of the civil law is, *matrimonium debet esse liberum;* and all conditions, whether precedent or subsequent, annexed to gifts, bequests, &c., are void, if their tendency or design be to restrain the liberty of marriage. (*d*)

Contracts in general restraint of trade are against sound policy.

The distinction is well established between agreements that are intended for a general restraint of trade, and those which stipulate only for a particular restraint. All agreements not to exercise a particular trade or profession at any place are void, whether the agreement be by parol or by specialty. And it is immaterial whether it be the trade or pursuit which the party usually follows, or any trade or pursuit, that he engages not to pursue. It is also immaterial whether the agreement is for the life of the party, or for a fixed and definite time. All such agreements are void, although made upon a valuable consideration; and they are denominated agreements for a general, or total, restraint of trade. But agreements not to exercise a trade in a particular place, or to trade with particular persons, are denominated agreements for a particular, or partial, restraint of trade. And such agreements are valid, if made on a reasonable consideration, but invalid, if made

(*a*) 1 Roper on Legacies, c. xiii. Keily *v.* Monck, 3 Ridgeway P. C. 205. Parsons *v.* Winslow, 6 Mass. 169.

(*b*) Harvy *v.* Aston, Comyns's Rep. 726 and Willes, 83. Long *v.* Dennis, 4 Bur. 2052.

(*c*) See Willes, 99, note (*a*.)

(*d*) See Comyns's Rep. 734–738. 2 White & Tudor's Lead. Cas. in Eq. (3d Amer. ed.) 390 *& seq.*

without such consideration, though they may be by bond or other specialty. It is generally said that an agreement of this kind is the only exception to the rule that a contract under seal imports a consideration which a party is not permitted to deny. It might, perhaps, be as properly said, that this is the only case in which a contract by specialty is unlawful and void merely because it is without actual consideration.

In this class of cases, it is held that a consideration must appear on the face of the agreement, and that a declaration on a bond that sets forth no consideration is bad on demurrer. (*a*) But if a declaration avers that the defendant, for the considerations mentioned in a certain deed, covenanted not to exercise a trade within certain limits, without stating what those considerations were, and the defendant neither craves oyer of the deed, nor demurs to the declaration, the court will presume that the deed disclosed a sufficient legal consideration. (*b*)

Courts do not inquire whether the consideration of such a contract is equal in value to the restraint agreed upon. "It is enough," said Tindal, C. J. "that there actually is *a* consideration for the bargain, and that such consideration is a legal consideration, and of some value." (*c*) In Bragg *v.* Tanner, (*d*) the sum of ten shillings was held to be a legal consideration for an agreement not to keep a draper's shop in Newgate Market. And one dollar was held to be a legal consideration for a covenant not to run a stage-coach between Providence and Boston, in opposition to the plaintiff. (*e*) But courts will inquire and decide whether the actual consideration

(*a*) Hutton *v.* Parker, 7 Dowl. P. C. 739. And see Mallan *v.* May, 11 Mees. & Welsb. 665, and the ancient decisions there cited by Baron Parke. 1 P. W. 182. 3 Y. & Jerv. 330. 2 Ohio State R. 519.

(*b*) Homer *v.* Ashford, 11 Moore, 91 and 3 Bing. 322.

(*c*) Sainter *v.* Ferguson, 7 C. B. 727, 728, 730. Hitchcock *v.* Coker, 2 Har. & Woll. 464, 6 Ad. & El. 438, 457 and 1 Nev. & P. 796. In this last case, the judgment of the King's Bench was reversed, and it was decided that an agreement was not unreasonable nor oppressive, by reason of its not being limited to the life of the promisee nor to the time during which he should carry on business.

(*d*) Cited by Montague, C. J., in Cro. Jac. 597.

(*e*) Pierce *v.* Fuller, 8 Mass. 223. And see Hearn *v.* Griffin, 2 Chit. R. 407.

is legally such as will sustain the agreement. Whether an agreement of this kind is reasonable and valid is to be decided, as said by Tindal, C. J., 7 Bing. 743, "by considering whether the contract is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable."

And a bond given by a dentist, that he would not practise within the distance of one hundred miles from the city of York, where the obligee resided, in consideration of receiving instructions, and a salary determinable at three months' notice, was held to be unreasonable and void. (*a*) And an agreement not to carry on the business of manufacturing and selling shoe-cutters "within the Commonwealth of Massachusetts" was decided to be void. (*b*) As to the limits within which a party may reasonably restrain himself from exercising his business, see 11 Ohio State R. 357, 3 Beavan, 383 and the cases collected and discussed in Tallis *v.* Tallis, 1 El. & Bl. 391.

Where the stipulations in a contract of this kind are divisible, and a part imposes reasonable and part unreasonable restraints, effect will be given to the former, and not to the latter. (*c*)

(*a*) Horner *v.* Graves, 5 Moore & Payne, 768 and 7 Bing. 735. This case, says Lord Denman, in Archer *v.* Marsh, 6 Ad. & El. 967, 968, 2 Nev. & P. 568 and Willm. Woll. & Dav. 644, "appears to be overruled by the late decision in error," reversing the judgment of the King's Bench in Hitchcock *v.* Coker. See Young *v.* Timmins, 1 Tyrwh. 226 and 1 Crompt. & J. 331. Mallan *v.* May, 11 Mees. & Welsb. 653. The first of these cases was distinguished from that of Bunn *v.* Guy, 4 East, 190, where an attorney's agreement not to practise "within London and one hundred and fifty miles from thence" was held valid. Tindal, C. J., said that an attorney's business, which may be carried on by correspondence and agents, required a limit of much larger range than the business of a dentist, which requires his personal presence and that of his patients together at the same place.

(*b*) Taylor *v.* Blanchard, 13 Allen, . See Ward *v.* Byrne, 5 Mees. & Welsb. 548.

(*c*) Chesman *v.* Nainby, 2 Strange, 739 and 2 Ld. Raym. 1456. Mallan

In Alger *v.* Thacher, 19 Pick. 51, a bond in which the obligor engaged not, "*at any time*" thereafter, to carry on or use the art or occupation of an iron founder or the business of founding or casting iron, was held to be void, as it purported to exclude the obligor, everywhere, and *at all times*, from a participation in the trade or business referred to. In Wallis *v.* Day, Murph. & Hurlst. 22 and 2 Mees. & Welsb. 273, a covenant to serve the obligees during the covenantor's life as an assistant in the trade of a carrier, and not otherwise to exercise that trade, was held not to be void, inasmuch as he was not absolutely restrained from carrying on the trade, but only from carrying it on any other way than as an assistant of the obligees. Lord Abinger said that there was no authority that made illegal the contract to serve for life. "Suppose," said he, "a man engaged in trade is desirous, when old age approaches, of selling the good will of his business, why may he not bind himself to enter into the service of another, and to trade no more on his own account. So long as he is able, he is bound to render his services; and it cannot be said to be a contract in absolute restraint of trade, when he contracts to serve another, for his life, in the same trade." And he cited Wickens *v.* Evans, 3 Y. & Jerv. 318.

The leading case, on this subject of restraint of trade, is Mitchel *v.* Reynolds, 1 P. W. 181, which was several times argued, and in which Chief Justice Parker, of the King's Bench, elaborately discussed the doctrine and the prior decisions, and "delivered the resolution of the court" in an opinion that has ever since been regarded as a guiding authority, as well in this country as in England. (*a*) In that case, it was

v. May, 11 Mees. & Welsb. 653. Lange *v.* Werk, 2 Ohio State R. 519. Alcock *v.* Giberton, 5 Duer, 76. Beard *v.* Dennis, 6 Ind. 200.

(*a*) The following are American cases, the particulars of which are not hereafter stated, but which conform, in principle, to Mitchel *v.* Reynolds, and to other English cases. Pike *v.* Thomas, 4 Bibb, 486. Kellogg *v.* Larkin, 3 Chand. (Wis.) 133. Nobles *v.* Bates, 7 Cowen, 307. Chappel *v.* Brockway, 21 Wend. 157. Van Marter *v.* Babcock, 23 Barb. 633. Bowser *v.* Bliss, 7 Blackf. 344. Gilman *v.* Dwight, 13 Gray, 356. Palmer *v.* Stebbins, 3 Pick. 148. Stearns *v.* Barrett, 1 ib. 443. Pierce *v.* Woodward, 6 ib. 206.

decided that an assignment of a lease of a messuage and bakehouse for the term of five years, was a legal consideration for a bond, by the assignee, engaging not to exercise his trade of a baker within the parish where the bakehouse was situate, during the said term.

This case was followed by Chesman *v.* Nainby, 2 Strange, 739 and 2 Ld. Raym. 1456, where a shopkeeper took a servant upon wages, in the business of a linen draper, which the servant was expected to learn and "become a perfect and knowing person in the said trade and mystery." He gave to the draper a bond of £100, not to set up or exercise said trade within half a mile of the draper's house. This contract was held to be valid; as it appeared that it was a part of the draper's inducement to take the servant into his employ, and that £100 was the sum which the draper might reasonably expect to receive from an apprentice to the trade. So of a bond, on similar consideration, wherein the obligor engaged not to exercise his trade within the city and liberties of Westminster. (*a*) So of a bond, not to practice as surgeon, &c., on the obligor's own account, for fourteen years, in consideration that the obligee had taken him as an assistant in the business of surgeon, &c., "for so long a time as it should please the obligee." The being admitted as an assistant of an established practitioner, with a view to the credit to be derived from that situation, was deemed a reasonable consideration for the bond. (*b*) So also of a sealed contract, on a proper consideration, not to carry on the business of a rope-maker during life, except on government contracts, and for such of the party's friends, as the obligee should refuse to supply on credit. (*c*) An agreement on a legal consideration, not to be interested, directly or indirectly, in any voyage to the northwest coast of America, or in any traffic with the natives of that coast, for seven years, is valid; and it is a breach of such agreement

(*a*) Clerke *v.* Comer, Cunningham's Rep. 51, 7 Mod. 230 and Rep. Temp. Hardw. 53.

(*b*) Davis *v.* Mason, 5 T. R. 118, and see Hayward *v.* Young, 2 Chit. R. 407.

(*c*) Gale *v.* Reed, 8 East, 80.

to own and fit out a vessel for such voyage, though the party divest himself of all interest in the vessel and cargo before the departure of the vessel on her voyage. (*a*) A covenant not to carry on nor assist in carrying on the sale of certain described goods, on certain premises, or within two miles thereof, was held to be broken by the covenantor's supplying such goods, from a place beyond the prescribed limit, to persons residing within that limit, at their solicitation. (*b*) A bond not to engage in the business of iron casting within certain limits, is broken by the obligor's becoming a stockholder in a corporation carrying on that business within those limits, or by being employed by such corporation in carrying on their business. (*c*)

Monopolies are odious and generally contrary to the common law. They are said to be contrary to Magna Charta. A grant, however, of the sole use of a newly invented art is held to be good, being indulged for the encouragement of ingenuity. By the English statute of James I., and by the patent laws of the United States, such grants are limited to a few years. Agreements, therefore, concerning the disposition and use of patented machines, &c., though in restraint of trade, are not for that reason void. And a bond or other specialty, by which a patentee should engage not to use his machine could not be avoided for want of consideration. Indeed a transfer of his right, *per se* renders him legally liable to damages, if he afterwards uses the invention. That he may make such transfer, without consideration, if he please to give away his right, would not seem to admit of doubt. Secrets of art, not patented, are not within the scope of the law against restraint of trade. Thus, it has been decided that a trader may sell a secret in his trade, and restrain himself, personally, from the use of it. (*d*)

(*a*) Perkins *v.* Lyman, 9 Mass. 522.

(*b*) Brampton *v.* Beddoes, 13 C. B. N. S. 538. See also Turner *v.* Evans, 2 El. & Bl. 512. Düffy *v.* Shockey, 11 Ind. 70.

(*c*) Whitney *v.* Slayton, 40 Maine, 224. And see 51 ib. 146.

(*d*) Bryson *v.* Whitehead, 1 Sim. & Stu. 74. Vickery *v.* Welch, 19 Pick. 523. See also Jones *v.* Lees, 1 Hurlst. & Norm. 189.

A *post obiit* contract, that is, an agreement, on the receipt of money, to pay a larger sum than is received by the promisor, and the legal rate of interest, on the death of a person on whom the promisor has some expectation, if the promisor be then alive, is void, if advantage be taken of his necessity to induce him to make such agreement, and he will be relieved in chancery; but it is valid, if made on terms in which the stipulated payment is not more than a just indemnity for the hazard. And there are data on which it can be ascertained whether this kind of contract is reasonable or unreasonable; for the lives of the promisor and of the person on whose death payment is to be made, are subject to valuation on principles and calculations established in all life-insurance offices. (*a*) In Boynton *v.* Hubbard (*b*) a covenant made by an heir to convey, on the death of his ancestor, if he should survive him, a certain undivided part of what should come to him by descent, was held to be void at law as well as in equity, being a fraud on the ancestor and productive of public mischief. Though this was not strictly a *post obiit* contract, yet it was held to fall under the principle of the cases, which are usually litigated in chancery, of heirs dealing with their expectancies. Parsons, C. J., said, "in unconscionable *post obiit* contracts, courts of law may, when they appear, in a suit commenced on them, to have been against conscience, give relief by directing a recovery of so much money only as shall be equal to the principal received and the interest." See 1 Atk. 347.

All wagers are void that are contrary to public policy. As on the question of war or peace; on the event of an election; (*c*) on the life of a foreign potentate whose country is

(*a*) See Gowland *v.* DeFaria, 17 Ves. 20, and remarks on that case in 7 Clark & Fin. 458, by Lord Cottenham. Newland on Con. c. xxix. Reeve Dom. Rel. 419. 2 Powell on Con. 187 *& seq.* Earl of Chesterfield *v.* Jansen, 1 Wils. 286. Baugh *v.* Price, ib. 320. 1 Story on Eq. §§ 342 *& seq.* 8 Pick. 480. 3 Met. 121.

(*b*) 7 Mass. 112.

(*c*) 3 Stark. Ev. (4th Amer. ed.) 1656. Rust *v.* Gott, 9 Cowen, 169. Yates *v.* Foot, 12 Johns. 1. Stoddard *v.* Martin, 1 R. I. 1. Ball *v.* Gilbert, 12 Met. 397. McKee *v.* Manice, 11 Cush. 357. McAllister *v.*

at war with that of either of the parties to the wager; (*a*) or on the amount of any branch of revenue. (*b*)

By the common law of England, wagers respecting indifferent matters were lawful; but the common law on this subject has not been adopted in New Hampshire; Perkins *v.* Eaton, 3 N. Hamp. 155; and has never been supposed to be in force in Massachusetts. See 12 Met. 399. By an act of parliament, (8 & 9 Vict. c. 109, § 18,) all contracts or agreements, by way of gaming or wagering are now made void. See Addison on Con. (5th ed.) 901. Also 2 Smith Lead. Cas. (6th Amer. ed.) 340, "as to what cases amount to wagers within the meaning of this act."

In Texas and California all wagers are recoverable except such as are prohibited by statute, or are against public policy, or tend to affect the interest, character, or feelings of third parties. A wager on a horse-race is recoverable in those States. (*c*) And the courts in New Jersey, Delaware, and Illinois hold that wagers on indifferent questions are not prohibited in those States. (*d*)

It is against the policy of the law to allow seamen to recover on a promise of increased wages for extra work done during the voyage for which they shipped, (*e*) or a witness to recover on a promise of being paid more than the legal fee

Hoffman, 16 Serg. & R. 147. Allen *v.* Hearn, 1 T. R. 56. Porter *v.* Sawyer, 1 Harrington, 517. Wheeler *v.* Spencer, 15 Conn. 28. Wroth *v.* Johns, 4 Har. & McHen. 284. Murdock *v.* Kilbourn, 6 Wis. 468. It is held in Illinois that a wager there on the result of a Presidential election in another State is not unlawful. Smith *v.* Smith, 21 Illinois, 244.

(*a*) Gilbert *v.* Sykes, 16 East, 150.

(*b*) Atherfold *v.* Beard, 2 T. R. 610. Shirley *v.* Sankey, 2 Bos. & Pul. 130.

(*c*) Johnson *v.* Fall, 6 Cal. 359. Kirkland *v.* Randon, 8 Texas, 10. Bass *v.* Peevey, 22 ib. 295.

(*d*) 4 Zab. 576. 5 Harrington, 347. 3 Scammon, 529.

(*e*) Stilk *v.* Meyrick, 6 Esp. R. 129 and 2 Campb. 317. Harris *v.* Watson, Peake's Cas. 72. Harris *v.* Carter, 3 El. & Bl. 559. Bartlett *v.* Wyman, 14 Johns. 260. White *v.* Wilson, 2 Bos. & Pul. 116. Frazer *v.* Hatton, 2 C. B. N. S. 512.

for his attendance a court. (*a*) And see *post.* 244 as to promises to pay officers more than their established fees, &c.

Trading with subjects of an enemy's country, without the license of the constituted authorities.

"The law," says Chancellor Kent, 16 Johns. 483, "puts the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special permission of the government." Hence, a policy of insurance on enemy's property is void. (*b*) So of bills of exchange, promissory notes, and other contracts. (*c*)

In Antoine *v.* Morshead, (*d*) it was held that an alien enemy, a Frenchman, to whom a bill of exchange was indorsed, drawn by one English prisoner in France, in favor of another, on a house in England that accepted it, might maintain an action upon it, on the return of peace, against the acceptors. Chambre, J., said this was not a contract between an English subject and an alien enemy. And Kent, Ch. (16 Johns. Rep. 471) says the case had nothing to do with voluntary intercourse in the way of mercantile negotiation and trade.

Where an American vessel, pretending to be a neutral, went into Bermudas, and in the character of a neutral obtained credit for repairs, during war, it was held that the owners of the vessel were answerable, on the restoration of peace, to the British merchants who assisted them to repair; on the ground that the plaintiffs were ignorant of the national character of the vessel, and dealt upon the faith that they were trading with a neutral. (*e*) A license from a British admiral, to protect a ship from capture on a particular voyage, during war between this country and Great Britain, was held not to be a lawful consideration for a promissory note given to the

(*a*) Willis *v.* Peckham, 1 Brod. & Bing. 515 and 4 Moore, 300. See Sweany *v.* Hunter, 1 Murph. 181.

(*b*) See the cases on this point, 1 Phillips on Insurance, (3d ed.) §§ 147 *& seq.*

(*c*) 7 Taunt. 449, and cases in a note to the American edition.

(*d*) 6 Taunt. 237.

(*e*) Musson *v.* Fales, 16 Mass. 332.

seller by the buyer of the license (*a*) A copartnership between subjects of different governments is dissolved, or suspended, by a war between the countries of which the copartners are subjects. (*b*) A license from the government legalizes the contracts of its subjects with foreign enemies, so far as to enable them to enforce such contracts in the courts of the licensing governments, and to protect the party from prize law. (*c*)

Ransom bills, &c., form an exception to the general law on this subject, as stated *ante*, 95.

Contracts to obstruct the course of justice, the execution of legal process, or to indemnify officers against nonfeasance, misfeasance, or malfeasance, in their official business.

Contracts to do acts of this kind, which are punishable as crimes, have already been mentioned.

Nonfeasance is the omission of an act which the party ought to do. Misfeasance is the improper performance of an act which may lawfully be done. Malfeasance is the doing of an an act which ought not to be done at all. (*d*)

A promise by a friend of a bankrupt to pay such sums as the bankrupt is charged with having received and not accounted for, if the assignees and commissioners will forbear to examine him respecting those sums, is void for illegality. (*e*) So of a promise to pay money in consideration that the promisee will not oppose the promisor's discharge under an insolvent law. (*f*) And of a promise by a third person to pay part of an insolvent's debt, in order to obtain his creditor's signature to the insolvent's petition. (*g*) And of a promise by a turnpike corporation that certain persons shall be exempted from paying toll at its gates, if they will withdraw their

(*a*) Patton *v.* Nicholson, 3 Wheat. 204. A different decision will be found in 13 Mass. 26.

(*b*) Seaman *v.* Waddington, 16 Johns. 510.

(*c*) See Mr. Wheaton's note to Patton *v.* Nicholson, 3 Wheat. 207.

(*d*) 2 Instructor Clericalis, 107. 1 Chit. Pl. (6th Amer. ed.) 151.

(*e*) Nerot *v.* Wallace, 3 T. R. 17. Kaye *v.* Bolton, 6 ib. 134.

(*f*) Tuxbury *v.* Miller, 19 Johns. 311. Waite *v.* Harper, 2 Johns. 386. Bruce *v.* Lee, 4 Johns. 410. Goodwin *v.* Blake, 3 Monroe, 106.

(*g*) Yeomans *v.* Chatterton, 9 Johns. 295. *Post*. 271.

opposition to a legislative act respecting the alteration of the road. (*a*) And of a promise by an officer, who had seized goods on an *elegit*, that if the creditor would take out a new *elegit* and deliver it to him, he would procure the goods to be found by an inquisition, and would deliver them to such person as the creditor should appoint; for he was bound to return an indifferent jury. (*b*) So of an agreement with an officer to permit a prisoner to escape. (*c*) So of an agreement to indemnify an officer, if he will permit an escape. (*d*) And of an agreement to deliver an execution debtor to an officer at a future day, in consideration of his forbearing to arrest the debtor when in his presence and power; (*e*) or to surrender a prisoner on mesne process, or pay the debt and cost, in consideration of his being permitted to go at large until the return day of the writ. (*f*) Otherwise, if the undertaking be to the plaintiff in the suit. (*g*) If the undertaking be to the officer, he must pursue the statute of 23 Hen. VI. and take a bail bond in his own name. (*h*) In Benskin *v.* French, (*i*) a promise to a bailiff to deliver to him, the next morning, a prisoner whom he had arrested, in consideration of his being permitted to remain in the promisor's house during the night, was held to be valid; the court not inferring from the statement that there was an escape, as the officer also might have remained in the house. Whether any judgment was rendered in this case is made a question in T. Jon. 139; and in 1 T. R. 422, Buller, J., says the case is to be upheld on the ground that the promise was "made on the plaintiff's part," that is,

(*a*) Pingry *v.* Washburn, 1 Aik. 264.

(*b*) Morris *v.* Chapman, 1 Freeman, 32, Carter, 223 and T. Jon. 24.

(*c*) Featherston *v.* Hutchinson, Cro. Eliz. 199 and 3 Leon. 108. Blithman *v.* Martin, 2 Bulst. 213 and Godb. 250.

(*d*) Plowd. 60. Hetley, 175. Yelv. 197. 7 Johns. 159. 7 Greenl. 113. 2 Chip. 11.

(*e*) Denny *v.* Lincoln, 5 Mass. 385. Fanshor *v.* Stout, 1 Southard, 319.

(*f*) Rogers *v.* Reeves, 1 T. R. 418.

(*g*) Milward *v.* Clerk, Cro. Eliz. 190. Leech *v.* Davys, Aleyn, 58. Hill *v.* Carter, 2 Mod. 304.

(*h*) Fuller *v.* Prest, 7 T. R. 110.

(*i*) 1 Sid. 132, 1 Keb. 483 and 1 Lev. 98.

made to the bailiff in behalf of the plaintiff, and thus ranging with the cases before cited from Cro. Eliz., Aleyn, and 2 Mod. From the report of this case by Levinz, it seems that the action was brought by the original plaintiff, declaring on a promise to the bailiff *ex parte quærentis*. And so the matter is stated in T. Jon. 139.

By the statute of 23 Hen. VI. c. 9, officers are prohibited to take any obligation of a prisoner who is entitled to be bailed, except to themselves, and in the name of their office; and all other obligations taken upon the enlargement of prisoners, or by color of office, are declared to be void. In most particulars, this statute is merely in affirmance of the common law, and is in force as the common law of many States in the Union. All bonds, and other engagements, taken for ease and favor, in contravention of the spirit of this statute, are void. (*a*) This statute mentions only "sheriffs, under-sheriffs, and other officers and ministers." It has been held that the sergeant at arms of the house of commons is not an officer, within the statute, and yet that a bond given to him by a prisoner ordered into his custody by the house, conditioned to appear, &c., is void by the common law, being for ease and favor. (*b*) So of a bond, taken by the marshal of the king's bench, who is not named in the statute; (*c*) and so, it would seem of a bond given to the sergeant at arms of the marches of Wales. (*d*)

The statute mentions obligations only; yet all parol undertakings are equally within its purview and spirit. (*e*) In all cases of bonds and other engagements taken of prisoners by officers, the material question is whether they were given for

(*a*) See Bac. Ab. Sheriff, O. Law of Arrests, 104, 105. Dole *v.* Bull, 2 Johns. Cas. 239. Richmond *v.* Roberts, 7 Johns. 319. Strong *v.* Tompkins, 8 Johns. 98.

(*b*) Norfolk's case, Hardr. 464.

(*c*) Bracebridge *v.* Vaughan, Cro. Eliz. 66.

(*d*) Johns *v.* Stratford, Cro. Car. 309.

(*e*) Beawfage's case, 10 Co. 101. Sedgworth *v.* Spicer, 4 East, 568. Fuller *v.* Prest, 7 T. R. 110. Strong *v.* Tompkins, 8 Johns. 98.

ease and favor. (*a*) Obligations for ease and favor are those only which are given to purchase an indulgence not authorized by law. Hence bonds for the debtor's liberties, under statutes which authorize the taking of bonds of that kind in a specified form, are not void, though they are not strictly according to such form. (*b*) All contracts and engagements between officers and defendants are watched with a jealous eye by courts, in order to prevent oppression under the semblance of indulgence and humanity. (*c*)

Since the statute of 23 Hen. VI. (if not before) all promises to officers, to induce them to accept bail, are void; for it is their duty to accept sufficient bail when offered; and a contract to accept insufficient bail is void, as it is a contract to violate their duty. (*d*) Wherever it is the duty of a person in a public trust to do an act, and he exacts a promise from him for whose benefit it is to be done, to compensate him for the service, the consideration is unlawful and the promise void.(*e*) *A fortiori* is a promise void, when made for the payment of more than the sum provided by law for the performance of any official duty. (*f*) Demanding and receiving more than legal fees is an indictable offence; may be punished by fine; subjects the offender to a *qui tam* action for a penalty; and is a good cause of action for reclaiming the excess in assumpsit for money had and received. (*g*)

Though an agreement to indemnify an officer for doing an unlawful act is void, yet a bond to save an officer harmless

(*a*) See Lenthall *v.* Cooke, 1 Saund. 161, and notes to that case. Also 1 Vent. 237. 2 Salk. 438. Oke's case, 1 Freeman, 375.

(*b*) Baker *v.* Haley, 5 Greenl. 240. Burroughs *v.* Lowder, 8 Mass. 373.

(*c*) See Reed *v.* Pruyn, 7 Johns. 430. Sherman *v.* Boyce, 15 Johns. 443. Sugars *v.* Brinkworth, 4 Campb. 47.

(*d*) Stotesbury *v.* Smith, 2 Bur. 924. Highmore on Bail, 28.

(*e*) Bridge *v.* Cage, Cro. Jac. 103. Callagan *v.* Hallett, 1 Caines, 104. Hatch *v.* Mann, 15 Wend. 50. Smith *v.* Whildin, 10 Barr, 39. Stotesbury *v.* Smith, 2 Bur. 926 and 1 W. Bl. 204.

(*f*) Batho *v.* Salter, Latch, 54 and W. Jon. 65. Woodgate *v.* Knatchbull, 2 T. R. 148. Lane *v.* Sewall, 1 Chit. R. 175. Dew *v.* Parsons, ib. 295 and 2 B. & Ald. 562. Rea *v.* Smith, 2 Handy, 193. Pool *v.* City of Boston, 5 Cush. 219.

(*g*) 1 Hawk. c. 27. Jons *v.* Perchard, 2 Esp. R. 507.

for an unlawful act already done is valid. (*a*) The consideration is not illegal, and the seal imports a sufficient consideration, or supersedes the necessity of any.

When goods are seized by an officer on execution, a contract to pay the debt, in consideration of his releasing them, is not unlawful. This is entirely different from a promise in consideration of suffering a prisoner to go at large. (*b*) And it is the constant practice in Maine, New Hampshire, and Massachusetts, where attachments are made on mesne process, for the officer to deliver the property attached to a third person, taking his promise to return it, or to pay the judgment which the plaintiff may recover, or an agreed sum, if he fail to return it. This has never been deemed illegal, and such promises have often been enforced by action. (*c*)

A bond, taken by a sheriff from his deputy and sureties, engaging to indemnify the sheriff against all misconduct of the deputy for which the sheriff is responsible, is not illegal; as its object is not to induce illegal acts; (*d*) nor is a promise of indemnity to a sheriff against the misconduct of a bailiff appointed at the promisor's suggestion or request. In such cases, the act of the bailiff is regarded as the act of the party soliciting his appointment; that is, the plaintiff in the original writ; and the court will not allow the sheriff to be troubled by him in consequence of any negligence or misbehavior of the bailiff. (*e*)

In all cases of promises to indemnify against unlawful acts, this distinction holds, namely, if the act, directed or agreed to be done, is known, at the time, to be a trespass and unlawful, the promise of indemnity is unlawful and void; otherwise, it is a good and valid promise.

This class of cases has already been fully considered. *Ante*,

(*a*) Hackett *v.* Tilly, Holt, 201, 11 Mod. 93 and 2 Ld. Raym. 1207. Fox *v.* Tilly, 6 Mod. 225. Given *v.* Driggs, 1 Caines, 450, 460. Hall *v.* Huntoon, 17 Verm. 244.

(*b*) Love's case, 1 Salk. 28.

(*c*) 14 Mass. 195. 16 ib. 8, 453, 464. 3 Greenl. 357. 7 N. Hamp. 594.

(*d*) Norton *v.* Simmes, Hob. 12. Bac. Ab. Sheriff, H. 2. 11 Mod. 93, 94.

(*e*) Dabridgecourt *v.* Smallbrooke, Owen, 97 and Cro. Eliz. 178. De-Moranda *v.* Dunkin, 4 T. R. 119.

11–13. Ignorance of the moral quality of actions, or of the law relating to offences, will not excuse a breach of law, nor render legal an engagement to save an offender harmless, in consideration of his committing a punishable offence. (*a*) Therefore A.'s license to B. to beat him is void, though it is tantamount to a promise not to seek redress for the injury; for the beating is a breach of the peace, and indictable. (*b*)

All contracts, the object of which is to induce an omission of duty, are unlawful and void, no less than those which are made for the purpose of encouraging the commission of unlawful acts. (*c*)

II. CONTRACTS WHICH VIOLATE THE PROVISIONS OF A STATUTE.

Before stating the principles which govern the main subject of this division, it may be well to state the doctrine respecting contracts void in part only, and the alleged difference, as to this matter, between contracts which violate statutes, and those which violate the common law.

It has heretofore been mentioned that if one of two considerations of a promise be void merely, the other will support

(*a*) See 1 Comyn on Con. 1st ed. 31. 1 Powell on Con. 166. Allen *v.* Rescous, 2 Lev. 174.

(*b*) Matthew *v.* Ollerton, Bul. N. P. 16, and Comb. 218. Stout *v.* Wren, 1 Hawks, 420. Logan *v.* Austin, 1 Stew. 476. *Quære*, whether an action would lie for a blow received in those exercises that prepare for the defence of the country, or in mere athletic exercises, where the *necessary* consequences of the exercise are not detrimental to the party? See Keilw. 136, a. 3 Inst. 56. 1 Mod. 136. 2 Bishop on Crim. Law, § 592.

In the Mirror, c. I., sect. 13, is this passage: "Of misadventures in turnaments in courts and lists, king Henry the 2 ordained, that because at such duells happen many mischances; that each of them take an oath that he beareth no deadly hatred against the other, but onely that he endeavoureth with him in love to try his strength in those common places of lists and duells, that he might the better know how to defend himselfe against his enemies; and therefore such mischances are not supposed felony, nor the coroners have not to doe with such mischances which happen in such common meetings where there is no intent to commit any felony." See 1 Hale P. C. 472, 474. Foster's Crown Law, 259, 260.

(*c*) Goodale *v.* Holridge, 2 Johns. 193. Norton *v.* Syms, Moore, 856. Greenwood *v.* Colcock, 2 Bay, 67. Hodsdon *v.* Wilkins, 7 Greenl. 113.

the promise; but that if one of two considerations be unlawful, the promise is void. When, however, the illegality of a contract is in the act to be done, and not in the consideration, the law is different. If, for a legal consideration, a party undertakes to do two or more acts, and part of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Wherever the unlawful part of a contract can be separated from the rest, it will be rejected, and the remainder established. This cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful; because the whole consideration is the basis of the whole promise. The parts are inseparable. Otherwise, there would be two or more contracts, instead of one. But where, for one or more lawful considerations, a promise is made to perform a legal act and also an act illegal, there is no difficulty in sustaining and enforcing the promise *pro tanto;* for so far the contract has all the properties which the law requires. It is "an agreement, upon sufficient consideration, to do a legal act." The illegal act which is also agreed to be done, may be rejected without interference with the other. Therefore, says Hutton, J., (*a*) "at the common law, when a good thing and a void thing are put together in one self-same grant, the same law shall make such a construction, that the grant shall be good for that which is good, and void for that which is void." By "void," in this passage, is meant void for illegality, as the context shows, and as it has been received and understood. (*b*) So if any part of the condition of a bond be against law, it is void for that part, and good for the rest; or if a bond be given for the performance of covenants contained in a separate instrument, some of which are lawful and others unlawful. (*c*) So of parol contracts.

But it was asserted, until it became a maxim, that if any part of an agreement be contrary to a statute, the whole is

(*a*) Bishop of Chester *v.* Freeland, Ley, 79.

(*b*) See 8 East, 236. 1 Johns. 362.

(*c*) Chamberlain *v.* Goldsmith, 2 Brownl. 282. Norton *v.* Syms, Moore, 856.

void. (*a*) This distinction seems to stand on no sound principle; and, upon examination, will not be found, as a general rule, to be supported by authority.

The first case on the point is believed to be Lee & wife *v.* Coleshill, (*b*) under the statute of 5 Edw. VI. prohibiting the sale of offices, &c. By the third section of that statute, "all *such* bargains, sales, promises, bonds, agreements, covenants and assurances," are declared to be void. (*c*) According to the report in Croke, Coleshill, a custom-house officer, made one Smith his deputy, and covenanted (*inter alia*) to surrender his old patent of office and procure a new one to Smith and himself, before a certain day; and that if Smith died before him, he would pay to Smith's executors £300; and gave Smith a bond to perform these covenants. Upon a suit on this bond, by the executors of Smith, it was held that the whole was void, though some of the covenants might be lawful; "otherwise," said the counsel, "all the meaning of the statute should be defrauded by putting in a lawful covenant within the indenture." Yet the counsel further said, "for the good covenants, peradventure an action of covenant would lie, if they be not performed;" that is, an action on the covenants, but not on the bond given to secure performance of them. The case is reported somewhat differently in 2 Anderson, 65, by the name of Smyth *v.* Colshill, but the same ground of decision is taken.

Afterwards, the distinction, on this point, between the common law and a statute, was asserted, *arguendo*, in many cases, as a general principle. (*d*) Twisden, J., and Chief Justice Wilmot are reported to have ascribed to Lord Hobart the *dictum*, often repeated in the books, that "a statute is like a tyrant; where he comes, he makes all void. But the common law is like a nursing father; it makes only void that part where the

(*a*) 1 Saund. 66, note. 1 Powell on Con. 199.

(*b*) Cro. Eliz. 529.

(*c*) See Bac. Ab. Offices, &c. B.

(*d*) See Pearson *v.* Humes, Carter, 230. Mosdel *v.* Middleton, 1 Vent 237. 11 Mod. 94, by Powell, J. 2 Wils. 351, by Wilmot, C. J. 3 Taunt. 244, by Lawrence J.

fault is, and preserves the rest." The cases in which this distinction is laid down as a general principle, were mostly on bonds taken by officers, contrary to the statute of 23 Hen. VI.; and it was *this* statute (*the* statute, not *a* statute) which Lord Hobart compared to a tyrant. "I have heard Lord Hobart say," says Twisden, J., "that because *the* statute would make sure work, and not leave it to exposition what bonds should be taken, therefore it was added that bonds taken in any other form should be void; for said he, *the* statute is like a tyrant," &c. (*a*) That statute prescribed the form of the obligation which an officer should take from a person arrested, and expressly made "any obligation, in other form, void." Hence it is said, (*b*) "if a sheriff will take a bond for a point against *that* law, and also for a due debt, the whole bond is void; for the letter of *the* statute is *so;* for a statute is a strict law; but the common law doth divide according to common reason, and having made that void which is against law, lets the rest stand." (*c*)

To the case of Norton *v.* Simmes (*d*) may be traced most of the *dicta* in the books, on the point now in question. In the three reports of that case, a principle is advanced, general in its terms; but it is in reference to the statute of Hen. VI.; and the point was not adjudged. The suit, in that case was on a bond for the performance of several covenants, some of which were void by the common law; and the plaintiff had judgment for damages sustained by the non-performance of the valid covenants.

The compiler of Bacon's Abridgment (Sheriff, H. 2.) seems to have understood the distinction as existing only under the statute of Henry VI. and other statutes (if any) in which a specific form of obligation is prescribed, and all other forms forbidden; and Lawrence, J., in 8 East, 236, 237, expressly asserts the same; which renders it remarkable that he should afterwards, in 3 Taunt. 244, have advanced the doctrine as a general one.

(*a*) 1 Mod. 35. (*b*) Hob. 14.
(*c*) See Shep. Touch. 374. Plowd. 68.
(*d*) Hob. 12, 1 Brownl. 63 and Moore, 856.

If then any part of a contract is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute; provided the statute does not expressly, or by necessary implication, render the whole void; and provided also, that the sound part can be separated from the unsound. As to the possibility of such separation, however, there is no difference between contracts against the common law, and against a statute. Such is the true principle, and such, it will be found, are the modern decisions.

Thus, if in a deed a rector or vicar grants a rent-charge out of his benefice, contrary to the statute of 13 Eliz. c. 20, and also covenants personally to pay the rent-charge, he is liable on his covenants, though the grant is void for illegality. (*a*) So a bill of sale of a ship, by way of mortgage, though void as such, for want of a recital of the certificate of registry required by statute of 26 Geo. III., may be good as a covenant to repay the money borrowed; such covenant being contained in the same instrument. (*b*) So if there be in a deed one limitation to a charitable use, and therefore void by statute of 9 Geo. II., yet other limitations in the same deed, which are not within the statute, are not therefore void. (*c*) The case of Greenwood *v.* Bishop of London (*d*) is a strong authority to the same point. A conveyance of an advowson, including the next presentation, was made for an entire sum, and was supported for the advowson only; the conveyance of the next presentation being void for simony, which is a statute offence. There are also several perfectly analogous cases on the property tax act of 46 Geo. III. (*e*)

It appears, from these cases, that when the invalid part of an agreement can be separated from the valid, the latter shall stand, although the former be declared void by statute. And

(*a*) Mouys *v.* Leake, 8 T. R. 411.

(*b*) Kerrison *v.* Cole, 8 East, 231.

(*c*) Doe *v.* Pitcher, 6 Taunt. 369.

(*d*) 5 Taunt. 727. See also Newman *v.* Newman, 4 M. & S. 66.

(*e*) Wigg *v.* Shuttleworth, 13 East, 87. Gaskell *v.* King, 11 East, 165. Howe *v.* Synge, 15 East, 440. Tinkler *v.* Prentice, 4 Taunt. 549. Fuller *v.* Abbott, ib. 105. Readshaw *v.* Balders, ib. 57.

it may be inferred that a case like that of Lee & wife *v.* Coleshill, (*a*) would now be differently decided, unless (according to what would seem to be the better opinion) the lawful covenant, in that case, should be deemed dependent on that which was unlawful, and so the void part inseparable from the sound. (*b*)

In Crosley *v.* Arkwright and Denn *v.* Dolman, (*c*) under the annuity act of 17 Geo. III., it was held that the want of a memorial of an annuity deed, registered according to the directions of the statute, avoided the whole deed, though there were parts of it not connected with the annuity. The court held themselves bound by the words of the statute, which declares annuity deeds, of which a memorial is not registered, "void to all intents and purposes whatsoever." These decisions were questioned by Mr. Evans, in his Notes to the Annuity Act, and by Mr. Ellis in his treatise on the Law of Debtor and Creditor, p. 377, *note* (o). By the subsequent decisions in analogous cases (already cited) the part of the deed which related to the annuity would alone seem to be within the operation of the statute. "The judges," says Chief Justice Wilmot, "*formerly* thought an act of parliament might be eluded, if they did not make the whole void, if part was void." (*d*)

It is often laid down in the books, that if any part of an agreement is void by *the statute of frauds*, &c., the whole is void. An examination of the cases, however, will show that this is too broadly asserted, and that the true doctrine does not rest upon any distinction between agreements void in part by statute, and void in part by the common law. The principle of the decisions under the statute of frauds, &c., is the same as in the other cases already mentioned, and is this; to wit, if the part of the agreement, which is void by the statute, is so involved with the rest of the agreement (which,

(*a*) Cro. Eliz. 529. 2 And. 55.

(*b*) See Ley, 79. Hob. 14 a, *note* (2) by Judge Williams. Bac. Ab. Offices, &c., F.

(*c*) 2 T. R. 603. 5 ib. 641.

(*d*) 2 Wils. 351.

if standing alone would be valid,) as not to admit of separation, the whole is void; otherwise not.

The first case on this point is Lord Lexington *v.* Clarke & wife, (*a*) where a woman, after her husband's death, in consideration of being permitted to occupy premises which were leased to her husband, promised orally to pay the rent which had accrued during his life, as well as the rent which should subsequently accrue during her occupation. The court held this to be an entire agreement; and the promise, as to one part, being void by the statute of frauds, &c., it could not stand good for the other part. In Cooke *v.* Tombs, (*b*) the same rule was applied to an unwritten agreement for the sale of real and personal property; to wit, houses, docks, and timber for ship-building. On the authority of this last case, Chief Baron Macdonald shortly after ruled the point in the same way, at nisi prius. (*c*) Three years afterwards, the court of King's Bench decided the point in the same way, in Chater *v.* Beckett. (*d*) Lord Kenyon said, "The promise was void in part by the statute, and *the agreement being entire*, the plaintiff cannot separate it, and recover on one part of the agreement, the other being void." Grose, J., said, "It was one indivisible contract, and the plaintiff cannot recover on any part." The same was also held in Thomas *v.* Williams, 10 Barn. & Cres. 664 and 5 Man. & Ryl. 625. But in Wood *v.* Benson, 2 Crompt. & J. 94 and 2 Tyrwh. 93, Lord Lyndhurst said "the case of Thomas *v.* Williams may, as appears to me, be supported. Part of the contract, in that case, was void by the statute of frauds. The declaration stated the entire contract, including that part of it which was void, and therefore the contract, as stated in the declaration, was not proved. The same observation applies to Lexington *v.* Clarke and

(*a*) 2 Vent. 223.

(*b*) 2 Anstr. 420. According to subsequent decisions, the agreement concerning the personal property was void also, under the statute. But as it was not so regarded by the court, the case supports the decision in Lexington *v.* Clarke. See Roberts on St. of Frauds, 111, *note* (53).

(*c*) Lea *v.* Barber, 2 Anstr. 425, *note*.

(*d*) 7 T. R. 201.

Chater *v.* Beckett; and I have no disposition to complain of those decisions; because, in none of those cases does there appear to have been any count upon which the plaintiff could recover." Baron Bayley said, "It by no means follows that because you cannot sustain a contract in the whole, you cannot sustain it in part, provided your declaration be so framed as to meet the proof of that part of the contract which is good." In that case, as there was a general indebitatus count for goods sold and delivered, the plaintiffs recovered for that part of them, the sale of which was not within the statute of frauds, though the sale of another part was within that statute. And such is now the prevailing law. (*a*)

The cases of Vaughan *v.* Hancock, 3 C. B. 766, Crawford *v.* Morrell, 8 Johns. 253, and Noyes's Ex'x *v.* Humphreys, 11 Grattan, 636, may be sustained on the ground that the declaration stated an entire contract only.

The established doctrine is believed now to be, that an agreement, which is in part within the statute of frauds, is valid as to such part as is not within the statute, provided always that the valid part can be separated from the invalid, and can be separately enforced without injustice to the promisor. Otherwise, if injustice would be done, by allowing part only to be recoverable. Thus, where a party in Boston orally contracted for goods in Philadelphia beyond the value allowed by the statute of frauds to be thus contracted for, and also contracted to pay for the transportation thereof to Boston, which contract was not within the statute, it was held that an action could not be supported for the recovery of the transportation. Irvine *v.* Stone, 6 Cush. 508. So in Lea *v.* Barber, 2 Anstr. 425 note, the defendant made an oral agreement to take an assignment of leasehold premises, to wit, a brick-ground, and to buy the brick, consisting chiefly of half-made bricks, at a valuation to be made by third persons; it was held that though the contract for the bricks was not within the statute,

(*a*) Mayfield *v.* Wadsley, 3 Barn. & Cres. 361 and 5 Dowl. & Ryl. 224. Ex parte Littlejohn, 3 Mont. Deac. & De Gex, 182. Irvine *v.* Stone, 6 Cush. 508. Rand *v.* Mather, 11 Cush. 1, overruling Loomis *v.* Newhall, 15 Pick. 159. Browne on St. of Frauds, c. ix.

yet the defendant could not be called on to pay for half-made bricks without the brick-ground. And see also Mechilen *v.* Wallace, 7 Ad. & El. 49. Cooke *v.* Tombs, 2 Anstr. 420. Hodgson *v.* Johnson, El. Bl. & El. 685. In such cases the parts of the contracts are held not to be severable.

The general doctrine, as to agreements that contravene legislative enactments, is, shortly, as follows:

Whenever the consideration of an agreement, or the act undertaken to be done, is in violation of a statute, the agreement is void, and no action can be maintained, by either party, for the breach of it.

It was held, in the time of Elizabeth, that when a statute merely inflicted a penalty for doing an act, or for making a contract of a specified kind, without prohibiting the act or contract, the payment of the penalty was the only legal consequence of a violation of the statute; that the contract was valid and might be enforced. Thus, under the statute of 27 Hen. VI., which imposed a penalty for selling property at a fair on Sunday, it was held that the contract of sale was not void, though the seller was liable to punishment. (*a*) And in Gremare *v.* Valon, (*b*) Lord Ellenborough ruled that an unlicensed surgeon might recover pay for surgical services, though the statute of 3 Hen. VIII. enacts that no person shall practise as a surgeon, without being licensed, under a penalty. In Bartlett *v.* Vinor, (*c*) Lord Holt denied this doctrine, and said that "a penalty implies a prohibition, though there are no prohibitory words in the statute." And in Drury *v.* Defontaine, (*d*) Mansfield, C. J., declared that the law is changed since the decision in Comyns *v.* Boyer, and "if any act is forbidden under a penalty, a contract to do it is now held void. That case is not now law."

(*a*) Comyns *v.* Boyer, Cro. Eliz. 485.

(*b*) 2 Campb. 144. This was carried to the court in bank, but turned there upon a point of evidence.

(*c*) Carth. 252 and Skinner, 322.

(*d*) 1 Taunt. 136. See also De Begnis *v.* Armistead, 10 Bing. 110 and 3 Moore & Scott, 516.

Accordingly it has been decided, under the statute of 39 Geo. III. (which directs that printers shall affix their names to any book which they print, and that if they omit so to do they shall forfeit £20 for each copy,) that a printer, who omits to affix his name to a book, cannot recover for labor and materials used in printing it. Bayley, J., said it made no difference whether the thing was prohibited or enjoined absolutely, or only under a penalty. (*a*) The same principle was recognized by Lord Eldon, in Dyster's case. (*b*) So in Nichols *v.* Ruggles, (*c*) it was decided that a contract to reprint any literary work, in violation of a copyright secured to a third person, is void; and that a printer who executes such a contract, knowing the rights of such third person, cannot recover pay for his labor. Yet the act of congress on the subject merely inflicts a penalty on the offender, and contains no prohibitory clause. So of the sale of lands in Pennsylvania, under the Connecticut title. (*d*) By the statute of 22 Car. II. it is enacted that if any person shall sell any sort of grain, usually sold by bushel, by any other bushel or measure than that which is agreeable to the standard marked in the exchequer, he shall forfeit 40*s*. Under this statute, a contract for the sale of corn by the hobbett, which is not a part of the standard measure, was held to be void; and the court refused to sustain an action against the purchaser, on his refusal to perform his contract. (*e*)

By the English statute of 29 Car. II. c. 7, "no tradesman, artificer, workman or laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary calling upon the Lord's day, or any part thereof, works of necessity and charity only excepted," under a penalty.

The decisions on this statute and the *dicta* of judges are not perfectly consistent. The principle seems to be this; to

(*a*) Bensley *v.* Bignold, 5 B. & Ald. 335.

(*b*) 1 Rose, 349.

(*c*) 3 Day, 145.

(*d*) Mitchell *v.* Smith, 4 Yeates, 84. 4 Dall. 269. 1 Binn. 110.

(*e*) Tyson *v.* Thomas, McClel. & Y. 119. See 4 C. B. 376, and also Forster *v.* Taylor, 5 B. & Ad. 887. Little *v.* Poole, 9 Barn. & Cres. 192.

wit, if any person makes a contract, which is within his ordinary calling, on the Lord's day, he cannot enforce that contract; and that "worldly labor" is not confined to one's ordinary calling, but applies to any business he may carry on. (*a*) But where one purchases an article on that day, and retains it, and afterwards promises to pay for it, he is liable to an action for the price; but not on the original contract. (*b*)

In Pennsylvania, a note given on the Lord's day is held to be void. (*c*) In Connecticut, a plea to an action on a promissory note, that it was executed and delivered on the Lord's day, was held to be a good bar. (*d*) By the Massachusetts statutes, the doing of "any manner of labor, business or work, except only works of necessity or charity, or any travelling, except from necessity or charity," are expressly forbidden under a penalty. Formerly it was provided that the Lord's day should be "understood to include the time between the midnight preceding and the sunsetting of the said day." Rev. Sts. *c.* 50, § 4. But now it "shall be the time from midnight to midnight." Gen. Sts. *c.* 84, § 12. Under the former law, it was necessary that it should appear or be proved, in order to avoid a contract, &c., that it was made within the prescribed hours, or was not from necessity nor charity. Geer *v.* Putnam, 10 Mass. 312. Clap *v.* Smith, 16 Pick. 247. And see also 10 Met. 364. 12 ib. 26. 13 ib. 287. This is no longer necessary in that State. And it is now there held, that if a party offers in evidence his day-book in an action for goods sold by him, and the charge is dated on a Sunday, he cannot recover, unless he shows, (as he may be allowed to do,) that the sale there charged was not in fact made on that day. Bustin *v.* Rogers, 11 Cush. 346. That a note bears date on Sunday, is not cause for arresting judgment on a verdict found for the holder. Hill *v.* Dunham, 7 Gray, 543.

(*a*) Fennell *v.* Ridler, 5 Barn. & Cres. 406 and 8 Dowl. & Ry. 204. Smith *v.* Sparrow, 4 Bing. 84. See 4 Best & Smith, 927.

(*b*) Williams *v.* Paul, 6 Bing. 653. See 5 Mees. & Welsb. 702. 1 Horn & Hurlst. 12.

(*c*) Kepner *v.* Keefer, 6 Watts, 231. See also 2 Miles, 402.

(*d*) Wight *v.* Geer, 1 Root, 474.

An action cannot be maintained for a deceit practised in the exchange of horses or for breach of warranty on the sale of a horse, nor for pay for a horse sold on Sunday. Robeson *v.* French, 12 Met. 24. Hulet *v.* Stratton, 5 Cush. 539. Ladd *v.* Rogers, 11 Allen, 209. Lyon *v.* Strong, 6 Verm. 219. But see 7 Jones (N. C.) 356.

In Gregg *v.* Wyman (*a*) it was decided that he who knowingly let a horse on Sunday, to be driven to a specified place, but not for any necessary or charitable purpose, could not maintain an action against the hirer for killing the horse by immoderate driving beyond the place specified. See also, to the same effect, Way *v.* Foster, 1 Allen, 408, though Mr. Justice Chapman there said that Gregg *v.* Wyman "carried the doctrine to its extreme limit," and had been denied, and the contrary decided by the court of New Hampshire, in Woodman *v.* Hubbard. (*b*) See also 23 Howard, 209, 218.

A person travelling on Sunday, unnecessarily and not from charity, cannot maintain an action against a town for an injury then sustained by him from its defective highway. (*c*) But in Maine, where Sunday included only the time from midnight to sunsetting, it was held to be no defence to an action against a town for damage to a horse by a defect in its highway, after sunset of that day, that the plaintiff let the horse on that day, and that, at the time of the injury, the horse was used under that letting. (*d*)

An action on a bond executed on Sunday, neither from necessity nor charity, cannot be maintained. (*e*)

The execution of a will on Sunday is not "labor, business, or work" prohibited by statute. (*f*) And if a letter is written and delivered on Sunday, requesting and promising to pay for a certain service, and there is no proof of an agreement, made on that day, to perform the service, the party who received

(*a*) 4 Cush. 322. See 11 Conn. 455.
(*b*) 5 Foster, 67. And see 39 Maine, 199.
(*c*) Bosworth *v.* Swansey, 10 Met. 363. Jones *v.* Andover, 10 Allen, 18.
(*d*) Bryant *v.* Biddeford, 39 Maine, 193.
(*e*) Pattee *v.* Greely, 13 Met. 284.
(*f*) Bennett *v.* Brooks, 9 Allen, 118. See 7 R. I. 22.

the letter may maintain an action upon the promise therein contained, if he afterwards perform the service on a week day. (*a*)

In 13 Met. 287, Chief Justice Shaw, in a note, referred to several cases in other States, in which it had been decided that no action would lie on a contract made on Sunday, not from necessity or charity; namely, 18 Alab. 390, 19 ib. 566. 2 Doug. (Mich.) 73. 7 Blackf. 479. 13 Shepley, (26 Maine,) 464. And here may be added 14 N. Hamp. 133, 19 ib. 233. 25 Ind. 503. 18 Verm. 379. 14 B. Monroe, 419. 22 Penn. State Rep. 109. 24 N. Y. Rep. 353. 12 Mich. 378.

In 30 Missouri, 387, a note, given on Sunday for an antecedent debt, was held to be valid. A debt is discharged by payment thereof made on Sunday, and retained by the creditor, 7 Gray, 164. A note actually made on Sunday, but dated on Monday, for the purpose of giving it credit, is valid in the hands of an indorsee, without notice. (*b*) So of a note dated and made on Sunday, in the hands of a *bonâ fide* holder who did not take notice of the date. (*c*)

In good sense, there can be no difference between an express prohibition of an act by statute (whether under a penalty or not) and the infliction of a penalty for the doing of the same act, without an express prohibition. In many statutes, there are both a prohibition and a penalty; in others, a penalty without a prohibition, or a prohibition without a penalty. And it may be now considered as settled by authority, as well as required by policy and legal conformity, that all contracts which contravene the provisions of a statute, however that statute may express the will of the legislature, are void for illegality.

It is not easy to reconcile the case of Johnson *v.* Hudson (*d*) with this doctrine and with the other modern cases, unless it be upon a ground incidentally mentioned by the reporter. The plaintiff, in that case, had, without being licensed, sold a quantity of tobacco, which was part of a larger quantity

(*a*) Tuckerman *v.* Hinkley, 9 Allen, 452. And see 15 N. Hamp. 577.
(*b*) Vinton *v.* Peck, 14 Mich. 287.
(*c*) 42 N. Hamp. 369.
(*d*) 11 East, 180.

consigned to him *to be disposed of.* The statute of 29 Geo. III. enacts that every person, who shall deal in tobacco, shall, before he shall deal therein, take out a license, under a penalty of £50. In a suit against the purchaser, for the price of the tobacco, a defence was interposed that the plaintiff could not legally sell it. The plaintiff obtained a verdict before Lord Ellenborough, and a rule was reluctantly granted to show cause why the verdict should not be set aside; the court saying there was no clause in the statute making the sale illegal, and that it was, at most, a breach of a regulation protected by a specific penalty. "They also doubted whether the plaintiff could be said to be a dealer in tobacco, within the meaning of the act." The rule was finally discharged. And on the ground that the plaintiff was not a dealer, within the act, the case does not conflict with the other adjudications. (*a*)

Where a statute expressly prohibits an act, the decisions are uniform, that a contract, founded on a violation of the enactment cannot be enforced. Thus, as the statute of 10 Geo. II. c. 28, prohibits theatrical entertainments, unless they are licensed by the king or lord chancellor, it was decided that no action lay for a breach of an agreement to dance at Haymarket Theatre; there having been no license granted for that theatre. (*b*) So where a bank made a loan of bills of foreign banks, contrary to a statute prohibiting such loan, and took a note payable in the same, the promisor was held not to be liable on his note. (*c*) So of a note given for shingles not of the dimensions, nor surveyed, as required by a statute which forbade the sale. (*d*) So of a note given as a premium on a policy of insurance of a ship to a port interdicted by an act of congress. (*e*)

(*a*) See 5 B. & Ad. 899. 14 Mees. & Welsb. 463. In Lloyd & Welsb. 96, note, and 11 Cush. 323, it is denied that the case of Johnson *v.* Hudson is law.

(*b*) Gallini *v.* Laborie, 5 T. R. 242. See 7 Gray, 162.

(*c*) Springfield Bank *v.* Merrick, 14 Mass. 322.

(*d*) Wheeler *v.* Russell, 17 Mass. 258. Law *v.* Hodson, 2 Campb. 147 and 11 East, 300. Little *v.* Poole, 9 Barn. & Cres. 192.

(*e*) Russell *v.* DeGrand, 15 Mass. 35. See also 1 Bos. & Pul. 272. 6 T. R. 723. 4 M. & S. 346. 1 Comyn on Con. (1st ed.) 39–46.

Most of the cases on this subject are collected, and ably canvassed by the counsel who argued the case of Wheeler *v.* Russel. (*a*)

It makes no difference whether the contract be oral, written, or sealed. If the consideration, or the act to be done, be illegal, the contract is void, whatever form it may have assumed. As "courts will not lend their aid to enforce a contract entered into with a view of carrying into effect anything which is prohibited by law," they will not allow a party, who sells goods, knowing that the buyer is to use them in contravention of a statute, to recover the price. Thus where an Englishman in Guernsey sold goods, and assisted in packing them in a particular manner for the purpose of their being smuggled into England, it was held that the seller could not recover pay for them. (*b*) And the same doctrine was applied, where the seller was a foreigner, who sued on a bill of exchange given for goods which he had assisted in smuggling into England. He could not resort to the laws of England which he had assisted to evade. (*c*) Where an English merchant chartered a vessel of a merchant in New York, while the non-intercourse laws of the United States were in force, for the purpose of conveying a cargo from New York to Fayal, to be transported thence to England, it was held, that he could not maintain an action in this country for the hire of the vessel. (*d*)

But where the contract and delivery of goods were complete abroad, and the vendor, a foreigner, did no act to assist the smuggling of them, he was held entitled to recover pay for them in England, though he knew that they were to be smuggled. (*e*) This case can be reconciled with the subsequent decisions only on the ground that a foreigner is not bound to *guard* the revenue laws of England, though he cannot actively assist in violating them. See Story on Conflict of Laws, §§ 251, 257. See also *post.* 269, 270.

(*a*) 17 Mass. 258.
(*b*) Biggs *v.* Lawrence, 3 T. R. 454.
(*c*) Clugas *v.* Penaluna, 4 T. R. 466. Waymell *v.* Reed, 5 T. R. 599.
(*d*) Graves *v.* Delaplaine, 14 Johns. 146.
(*e*) Holman *v.* Johnson, Cowp. 341.

Though Mansfield, C. J., in Hodgson *v.* Temple (*a*) said, "the merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor, &c.; he should share in the illegal transaction;" yet that point was not necessarily involved in the decision; and in Lightfoot *v.* Tenant, (*b*) it was decided that a person selling goods in order that they might be exported to a place where by statute they could not be exported legally, could not recover, even on a bond given for the price of them. So of drugs sold and delivered to a brewer, the vendor knowing that they were to be used in a brewery, contrary to the statute of 42 Geo. III., though it did not appear that they were so used. (*c*) So of money lent for the purpose of settling losses on illegal stock-jobbing transactions, and thus applied by the borrower. (*d*) "If it be unlawful," says Abbott, C. J., "for one man to pay, how can it be lawful for another to furnish him with the means of payment?" So of money lent to ransom a ship, contrary to the statute of 45 Geo. III. (*e*) In Ex parte Bulmer, (*f*) Lord Erskine held that if the money be not applied to the illegal purpose, the lender may maintain an action on the loan, and he decreed accordingly. But the court of king's bench decided differently in Ex parte Bell, (*g*) and the remarks of Eyre, C. J., in 1 Bos. & Pul. 556, and of Lord Ellenborough, in Langton *v.* Hughes, (*h*) show that Lord Erskine's doctrine is not recognized as the law of England.

The principle of the decisions last cited is not peculiar to contracts prohibited by statutes, although those decisions were made in cases which turned on statutory prohibitions. (*i*)

(*a*) 1 Marsh. 5 and 5 Taunt. 181. But see Lloyd & Welsb. 97 and 11 Cush. 323, *contra*.

(*b*) 1 Bos. & Pul. 551.

(*c*) Langton *v.* Hughes, 1 M. & S. 593. See also 6 Ohio, 442.

(*d*) Cannan *v.* Bryce, 3 B. & Ald. 179.

(*e*) Webb *v.* Brooke, 3 Taunt. 6.

(*f*) 13 Ves. 313.

(*g*) 1 M. & S. 751.

(*h*) 1 M. & S. 596, 597.

(*i*) See 1 Bos. & Pul. 456. 3 Taunt. 12.

There remains only one more topic in the doctrine of unlawful contracts, now to be mentioned; namely, how far the foregoing principles affect subsequent or collateral contracts, the direct and immediate consideration of which is not illegal. This is a subject somewhat intricate, and the adjudications on it are not easily reducible to any clear elementary proposition. The later cases are manifestly more strict than the earlier ones, as it cannot have failed to be seen, is likewise true of the decisions on the whole doctrine of unlawful agreements.

It may be taken, however, as established doctrine, that if a promise is entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by that act, though the promisee knew, and even though he were the contriver and conductor, of such act. As if a smuggler sell goods to one who knows they were smuggled, but who had no agency in running them, he may recover pay for the goods. (*a*) So, where Armstrong, during the war of 1812, imported goods on his own account from the enemy's country, under the false pretext of a capture *jure belli*, and goods were sent by the same ship to Toler, and on a seizure of the goods, Toler, at Armstrong's request, became surety for the payment of the duties, &c., on Armstrong's goods, and also became responsible for the expenses of defending a prosecution for the illegal importation of the goods, and was compelled to pay them; it was held that Toler might maintain an action on Armstrong's promise to refund the money. (*b*) Marshall, C. J., said: " The contract made with the government for the payment of duties is a substantive independent contract, entirely distinct from the unlawful importation; the consideration is not affected with the vice of the importation. If the amount of duties be paid by A. for B., it is the payment of a debt from B. to the government. The criminal importation constitutes no part of this consideration." It was further held,

(*a*) 11 Wheat. 271, 276.

(*b*) 11 Wheat. 258. See the case on the seizure of the goods, 1 Wheat. 408. 2 Wheat. 278.

however, that if Toler had been concerned in the scheme of importing the goods, or had any interest in the goods of Armstrong, or if they had been consigned to him, with his privity, that he might protect them for Armstrong, no action could have been supported.

In Tenant *v.* Elliott, (*a*) and in Farmer *v.* Russell, (*b*) it was held that where on an illegal contract between two persons, one of them pays money to a third person for the other, the other may recover the money from such third person. The court said that the demand arose simply from the placing of the money in the defendant's hands to be delivered to the plaintiff, and not from the original unlawful contract. Eyre, C. J., admitted that if it were possible to mix the original transaction with the contract on which the action was brought, the plaintiff could not recover.

Several cases on this point have arisen upon the statute of 7 Geo. II. c. 8, "to prevent the infamous practice of stockjobbing." The fifth section of that statute enacts, "that no money or other consideration shall be voluntarily given, paid, had or received, for the compounding, satisfying or making up any difference for not transferring any public stock, or for not performing any contract or agreement stipulated to be performed; and all and every person, who shall voluntarily compound, make up, pay, satisfy, take or receive such difference money, &c., shall forfeit the sum of one hundred pounds." The first case, which arose on a collateral contract connected with the transactions prohibited by this statute, is Faikney *v.* Reynous. (*c*) Faikney and Richardson were jointly concerned in stockjobbing transactions, and Faikney voluntarily paid £3000 to divers persons for compounding differences for not delivering stock. Richardson and Reynous gave a bond to Faikney to reimburse him a moiety of the sum thus paid by him; and in a suit on this bond, the court held the defendants liable, on the ground that the bond was not given for payment

(*a*) 1 Bos. & Pul. 3
(*b*) 1 Bos. & Pul. 296, Rooke, J., dissenting.
(*c*) 4 Bur. 2069.

of the composition money, but for reimbursing the plaintiff a debt of honor paid on Richardson's account. The next case is Petrie *v.* Hannay, (*a*) in which an action was sustained on a bill of exchange accepted for reimbursement of a moiety of a sum paid to a broker with the privity and consent of the defendant; the broker having been employed by the plaintiff and defendant to pay differences in a stockjobbing transaction in which they were jointly concerned. Lord Kenyon dissented; but the other judges felt bound by the decision in Faikney *v.* Reynous. In both these cases, the court proceeded (partly at least) on the distinction between contracts for the doing of things *mala in se*, and things merely prohibited by law. This distinction, it has been seen, is now exploded; though Lord Erskine recognized it in Ex parte Bulmer, heretofore cited. In Petrie *v.* Hannay, a distinction was also taken between an express request to advance money in payment of an illegal demand, and an implied contract; and the same distinction was suggested by Heath, J., in 2 H. Bl. 382, and by Mansfield, C. J., in 4 Taunt. 167. But Lord Eldon denied that any such distinction existed. (*b*)

The real ground of the decisions in Faikney *v.* Reynous, and Petrie *v.* Hannay, was, that the plaintiffs' rights of action were taken by the court to be founded altogether on the contract of loan, &c., between them and the defendants, and derived no aid from the illegal transactions in which the parties had been previously engaged, and were not affected by them. In Booth *v.* Hodgson, (*c*) Ashhurst, J., said the ground of decision in Faikney *v.* Reynous was that the defendant had voluntarily given another security; "but it does not follow that the plaintiff could have recovered on the original contract for money paid to the use of the defendant." The same remark is applicable to Petrie *v.* Hannay, where a bill of exchange had been accepted by the defendant. But can this be a valid ground of claim, in any case of this sort? Would it not bind a defendant, in all cases, to pay an unlawful demand, if he should make an express promise to pay, and thus legalize all contracts, however vicious?

(*a*) 3 T. R. 418. (*b*) 2 Bos. & Pul. 373. (*c*) 6 T. R. 410.

The cases of Faikney *v.* Reynous and Petrie *v.* Hannay were never favorably received; have often been questioned by the highest authority; and may now be considered as wholly overturned. In Mitchell *v.* Cockburne, (*a*) Eyre, C. J., said the latter of these cases was decided on the authority of the former, "but perhaps it would have been better if it had been decided otherwise; for when the principle of a case is doubtful, I think it better to overrule it at once, than build upon it at all." In Booth *v.* Hodgson, (*b*) Lord Kenyon, who dissented from the other judges in Petrie *v.* Hannay, said he wished to avoid making any other observation on those two cases, than that they were distinguishable from the case then before him. In Aubert *v.* Maze, (*c*) Lord Eldon said: "It seems to me that if the principle of those cases is to be supported, the act of parliament will be of very little use." Heath and Chambre, Js., also questioned the correctness of those decisions. In Ex parte Daniels, (*d*) Lord Eldon again expressed his dissent to those cases. Lord Loughborough also, in Ex parte Mather, (*e*) said he could not accede to them. And Lord Manners, in Ottley *v.* Brown, (*f*) entirely disregarded them. Lord Erskine, however, in Ex parte Bulmer (*g*) recognized the doctrine of those cases; but the decision made by him, in that case, has not been followed, but overruled, as before mentioned. There are, doubtless, expressions in the opinion given by Marshall, C. J., in Armstrong *v.* Toler, (*h*) from which it may be inferred that he considered the cases of Faikney, &c., as sound law.

The direct decisions of the courts in England, in addition to the foregoing dissenting *dicta*, leave those two first decisions on the stockjobbing law without foundation for their support.

In Steers *v.* Lashley, (*i*) five years after Petrie *v.* Hannay

(*a*) 2 H. Bl. 379. See also 10 Bing. 110.
(*b*) 6 T. R. 409.
(*c*) 2 Bos. & Pul. 373.
(*d*) 14 Ves. 192.
(*e*) 3 Ves. 373.
(*f*) 1 Ball & Beatty, 366, 367.
(*g*) 13 Ves. 313.
(*h*) 11 Wheat. 258.
(*i*) 6 T. R. 61.

was decided, it was held that a bill of exchange accepted for the amount of money paid by a broker for the acceptor, for differences in stockjobbing transactions, could not be recovered, because the bill was "given for the very differences." Lord Kenyon said: "If the plaintiff had lent this money to pay the differences, and had afterwards received the bill for that sum, then according to the principle established in Petrie *v.* Hannay, he might have recovered." (*a*) "With great submission to Lord Kenyon," says Lord Erskine, (*b*) (who was counsel in Steers *v.* Lashley,) that case is the same with Faikney *v.* Reynous and Petrie *v.* Hannay. And in Cannan *v.* Bryce, (*c*) it was expressly held that money lent to settle losses on illegal stockjobbing transactions could not be recovered. Ten days after the decision of Steers *v.* Lashley, the court of common pleas decided that where one of two partners in copartnership for insuring ships, &c., contrary to the statute of 6 Geo. I. c. 18, had paid the whole loss, he could not recover of his copartner a moiety of the money so paid. (*d*) So in Booth *v.* Hodgson, (*e*) where three partners were concerned in illegal insurances, in the name of one of them, it was held that the ostensible partner could not recover from a broker premiums, received by him for the firm, on such insurances.

In Brown *v.* Turner (*f*) the case of Steers *v.* Lashley was confirmed, in a case precisely like it in principle, though a question was made as to its correctness, as well as respecting its application to stockjobbing in the stock called *omnium*. In Aubert *v.* Maze, (*g*) the case of Mitchell *v.* Cockburne was revised and confirmed; and an award of an arbitrator was set aside because he had awarded a sum due from one partner to another for money paid on account of losses incurred in illegal insurances. In Branton *v.* Taddy (*h*) it was decided that

(*a*) Sir James Mansfield, C. J., also intimated a distinction between money borrowed to pay an illegal demand, and money advanced to effectuate an illegal transaction. 3 Taunt. 13.

(*b*) 13 Ves. 313.
(*c*) 3 B. & Ald. 179.
(*d*) Mitchell *v.* Cockburne, 2 H. Bl. 379.
(*e*) 6 T. R. 405.
(*f*) 7 T. R. 630.
(*g*) 2 Bos. & Pul. 371.
(*h*) 1 Taunt. 6.

one of two partners in illegal underwriting could not recover premiums from the assured, though the plaintiff underwrote in his own name only, and the agreement between him and his partner was secret, and unknown to the assured when the policies were made. In Webb *v.* Brooke (*a*) it was held that money could not be recovered, which was lent to one prisoner of war by another, for the purpose of obtaining a ransom of the defendant's vessel, contrary to statute; though a bill of exchange had been given for the money, payable to the plaintiff's order. In Clayton *v.* Dilly (*b*) it was decided that the plaintiff could not recover money paid on the loss of an illegal wager made by the defendant's authority. In Simpson *v.* Bloss, (*c*) where the defendant had assumed a part of a bet made and won by the plaintiff, in an unlawful wager, and the plaintiff advanced to the defendant his share of the winning, in expectation that the loser would pay the plaintiff, but the loser died insolvent, not having paid; it was held that the plaintiff could not recover back the money so advanced. Though the demand was collateral to the illegal transaction, Gibbs, C. J., said that as the plaintiff could not establish his case without the aid of the unlawful wager, he could not maintain his action. It was further decided in Ex parte Bell, (*d*) that money advanced by one partner to the others, for the purpose of paying losses incurred, or to be incurred, in illegal insurances by the firm, could not be recovered back, though it did not appear that the money had been thus applied. And finally it was determined, in Cannan *v.* Bryce, (*e*) that money lent by one who was not a party to the transaction, but for the purpose of enabling the borrower to pay a loss incurred in illegal stockjobbing, could not be recovered. In nearly all these cases, Faikney *v.* Reynous and Petrie *v.* Hannay were relied upon by counsel. Various distinctions between those cases and the cases under consideration were suggested by the judges, at different times, but their authority was not wholly denied, except in one or two instances. Since

(*a*) 3 Taunt. 6.
(*b*) 4 Taunt. 165.
(*c*) 2 Marsh. 542 and 7 Taunt. 246.
(*d*) 1 M. & S. 751.
(*e*) 3 B. & Ald. 179.

the decision in Cannan *v.* Bryce, it is not easy to see any ground left on which those cases can stand. (*a*)

The foregoing principle is not applicable to a case where a debtor conveys his property for the purpose of defrauding his creditors. As between grantor and grantee, in such case, the transaction is valid. No one but a creditor of the grantor can take advantage of the fraud. Therefore, if the grantee have money in his hands, the proceeds of the property so conveyed, which he has promised to pay to the grantor's children, according to the original agreement between him and the grantor, those children may recover the money; and the grantee cannot defend against them on the ground that the original transaction was fraudulent. (*b*)

An assignment of a negotiable instrument founded in illegality generally obliges the promisor to pay the assignee, if the assignment be taken without notice. The exceptions to this rule arise from the provisions of statutes: As in the case of usurious notes, and bills of exchange, in England, previously to the passing of the statute of 58 Geo. III. c. 93, which changed the law, in such cases; or notes given for money won by gaming or lent for gaming. (*c*) But if the assignee take the assignment with notice of the original vice, he cannot recover of the original promisor.

If a contract that is assigned be not negotiable, the original promisor may defend against the assignee, though he had no notice, in the same manner as against the original promisee. (*d*)

Under the statute of 9 Anne, c. 14, "to restrain gaming," money lent for the purpose of gaming may be recovered by the lender, in assumpsit on the loan. The statute renders void

(*a*) Before Cannan *v.* Bryce was decided, Mr. Paley, in his Treatise on Agency, 104, note, spoke of those cases as overturned. See Gross *v.* La Page, Holt N. P. 105, and the reporter's note to that case. 2 Evans's Pothier, (1st Amer. ed.) 1–16. Staples *v.* Gould, 5 Sandf. 411.

(*b*) Fairbanks *v.* Blackington, 9 Pick. 93.

(*c*) See Kyd on Bills, (3d ed.) 280–283. 4 Mass. 371, 372. 13 Mass. 515. Ord on Usury, 109.

(*d*) Fales *v.* Mayberry, 2 Gallis. 560.

all notes, bills, bonds, mortgages, or other securities for money won by gaming, or for reimbursing or repaying money knowingly lent for gaming or betting; but does not render contracts void. (*a*) Fair gaming is not prohibited by the common law, and by that law assumpsit lies for money won. (*b*) In Massachusetts, all gaming is unlawful, and he who lends money for the purpose of enabling another to engage in gaming, cannot recover it of the borrower. (*c*)

See Brooks *v.* Martin, 2 Wallace, 70, (cited *ante*, 116, 117,) where Miller, J., at page 81, referred to several cases in 17 Howard, 237, 238, in which a difference between enforcing illegal contracts, and asserting a title to money which has arisen from them, was distinctly taken. And he said the court were satisfied that the doctrine of those cases is sound.

The case of Holman *v.* Johnson was cited, *ante*, 260, to the position that a foreigner selling and delivering goods, in his own country, to a British subject, may recover pay for them in a British court, though he knew at the time of sale and delivery, that the buyer intended to smuggle them into England; but that he cannot recover, if he be a party to the smuggling by some act. And in Pellecat *v.* Angell, 2 Crompt. Mees. & Rosc. 311, Lord Abinger said there was nothing illegal in merely knowing that the goods one sells are to be disposed of in contravention of the fiscal laws of another country. "The distinction is," said he, "where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise; then he must take the consequences of his own act." See Addison on Con. (2d Amer. ed.) 110. See also Cullen *v.* Philp, in Shaw on Obligations, 84, note (4),

(*a*) Barjeau *v.* Walmsley, 2 Strange, 1249. Robinson *v.* Bland, 2 Bur. 1077. Wettenhall *v.* Wood, 1 Esp. R. 18.

(*b*) Bac. Ab. Gaming, A.

(*c*) White *v.* Buss, 3 Cush. 449. And so is the law of England, when money is lent for the purpose of such gaming as is there unlawful. 3 Mees. & Welsb. 434 and 1 Horn & Hurlst. 146.

where it is said that the law is so, whether the seller abroad is a foreigner or a native of Great Britain.

These cases seem to establish a distinction between contracts that affect merely the revenue laws, and cases in which other laws are violated by contracts. (*a*) And since the decisions in Lightfoot *v.* Tenant and Langton *v.* Hughes, already cited, revenue cases must be deemed exceptions to the rule that is applied to other cases. Yet the New York courts have established it as law in that State, (Kreiss *v.* Seligman, 8 Barb. 439, and Tracy *v.* Talmage, 4 Kernan, 162,) that knowledge by a seller that the buyer intends to make an unlawful use of the property is not a defence to an action for the price. (*b*) Hence, as the validity of a contract is to be determined by the law of the place where it is made, (6 Mass. 377) it was decided, in Dater *v.* Earl (*c*) that the seller of spirituous liquors in New York, by one who knew that the buyer intended to sell them in violation of law, but did not participate in that intent, might maintain an action in Massachusetts, and recover pay therefor. But in Webster *v.* Munger, (*d*) it was held that a sale of such liquors in another State, which sale was there lawful, if made by a citizen of Massachusetts, who knew, or had reasonable cause to believe, that the purchaser intended to sell them in Massachusetts against law, and "with a view to such result," could not there support an action for the price.

In M'Intyre *v.* Parks, 3 Met. 207, an action was maintained against a citizen of Massachusetts by a citizen of New York for the price of lottery tickets, though the plaintiff knew that the defendant bought them for the purpose of selling them in his own State against law; the sale being lawful in New York. This case was not satisfactory to the profession, and though it may not be sustainable on the ground upon which it was placed, namely, the decision in Holman *v.* Johnson, yet it would seem that it may now rest on the same ground that upholds the case of Dater *v.* Earl, *supra*.

(*a*) See 2 Parsons on Notes and Bills, 319–321.
(*b*) And so it is held in Maryland. 10 Gill & Johns. 11.
(*c*) 3 Gray, 482. (*d*) 8 Gray, 584.

Contracts in fraud of bankrupt and insolvent acts.

The intent of such acts (statutes) is, that all the property of a bankrupt or insolvent shall be equally distributed among his creditors, and, that being done, that he should have a discharge. 1 H. Bl. 657. Hence any agreement for securing to one creditor more than the others are to receive, or to pay money to a creditor to induce him to sign the debtor's certificate, or to induce him to withdraw his opposition to a certificate, is fraudulent and void. (*a*) And the same doctrine is applied to composition deeds and to voluntary assignments for the benefit of creditors. Arnold, 181. 3 Anstr. 910. 4 East, 372. 4 Bing. 224. 3 Allen, 443. 9 Ind. 430. 8 Met. 227. 6 M. & S. 160. 15 Pick. 49.

(*a*) Holland *v.* Palmer, 1 Bos. & Pul. 95. Sumner *v.* Brady, 1 H. Bl. 647. Robson *v.* Calze, 1 Doug. 228. Coates *v.* Blush, 1 Cush. 564. 1 Cooke on Bankr. Laws, (8th ed.) 470 *& seq.* Esp. on Law of Bankrupts, 316. Mallalieu *v.* Hodgson, 16 Ad. & El. N. S. 689. Wiggin *v.* Bush, 12 Johns. 306. 1 Story on Eq. §§ 378, 379. Ingraham on Insolvency, 104. Cases cited *ante*, 241, notes (*f*) and (*g*).

CHAPTER V.

CONSTRUCTION OF CONTRACTS.

As agreements derive their force from the mutual assent of the parties to certain terms, it follows that the operation and extent of every agreement are to be ascertained from the intention of the parties. This intention is to be collected from the expressions used by the contracting parties.

Fonblanque defines interpretation, or construction, to be the collection of the meaning of the contract from the most probable signs. Powell says construction is the drawing of an inference, by the aid of reason, as to the intent of a contract, from given circumstances, upon principles deduced from men's general motives, conduct, and actions. (*a*)

The necessity of rules of construction arises from the imperfection of language and from the imperfect use of it in those instances in which language wholly unequivocal and explicit might be selected. "If," says Vattel, "the ideas of men were always distinct and perfectly determined; if, in order to make them known, they had only proper terms, and none but such expressions as were clear, precise, and susceptible of only one sense, there would never be any difficulty in discovering their meaning in the words by which they would express it. Nothing more would be necessary than to understand the language." Even in this state of things, however, it is obvious

(*a*) Vattel's chapter on the interpretation of treaties contains an exposition, most of which is applicable to contracts between individuals, and deserves attentive perusal. Sheppard's Touchstone, ch. v., on the exposition of deeds, and the twelve rules for the interpretation of agreements, which are laid down by Pothier, in his treaties on the Law of Obligations, should be studied. See also Rutherforth, book ii. ch. 7.

to those who have experience in the affairs of life, that rules of construction would be necessary. In contracts where more than one definite object is stipulated for, (at least wherever a *general* object is intended to be secured by a stipulation concerning *a variety of particulars*,) it is hardly possible to foresee every case that will arise even under the course of events that is anticipated. Much less can the state of affairs be foreseen which new conjunctures and unexpected events will certainly produce. Yet it would be injurious to both parties, if the exact literal stipulations of a complicated contract were to be performed, and nothing more; and therefore it is necessary to resort to construction, that is, to inductions drawn from the general views of the parties (as expressed in their contract) with reference to the existing circumstances; in other words, to collect, from the object, drift, and spirit of their agreement, what their leading and paramount intentions were, and to carry those intentions into effect.

Thus it often happens that a contract evinces a general and also a particular intent. The particular intent, perhaps, cannot be carried into effect at all; or if it should be, it would wholly, or in a great measure, defeat the general intent. In such cases, though there is no doubt of the parties' views, as expressed in their contract, courts will so construe their words as to give effect to their general intent. This is not only reasonable in itself, but is also manifestly conformable to the design of the parties, as displayed by the general spirit of their agreement. (*a*)

The rules of construction are, in general, the same in law and in equity; (*b*) in simple contracts, and contracts by specialty. (*c*) But courts of equity have greater powers than courts of law, to modify contracts according to subsequent exigencies. It sometimes happens that courts of law cannot afford an ample, or even any, remedy on a contract, on account of the necessary construction which they give it. But

(*a*) See 3 Bur. 1634. 2 T. R. 254. 1 Doug. 277.
(*b*) 2 Bur. 1108. 3 Bl. Com. 431.
(*c*) 13 East, 74, by Lord Ellenborough.

a court of chancery will enforce it *cy pres :* that is, as nearly in conformity to the terms of it, as is practicable; *ut res magis valeat quam pereat.* This is done at the instance of the promisee, when he prefers a partial execution of what he supposed to be his rights, to a total failure of his claim.

Language, however, is of itself imperfect and equivocal; and the manner in which it is used often increases the difficulty of acquiring clear and definite notions of the speaker's or writer's meaning. Mr. Locke's third book of his Essay concerning the Human Understanding is as useful to members of the legal profession, as to any other class of scholars; and his ninth, tenth, and eleventh chapters on the imperfection and abuse of words, and the remedies of those imperfections and abuses, are very pertinent to the subject of contracts and the interpretation of them.

The imperfection and abuse of language render it important that certain fixed canons of interpretation should be adopted, in order to give a uniform effect to the stipulations of contracting parties, who resort to judicial tribunals for the enforcement of rights and redress of wrongs arising from contracts and the breach of them. If rules of interpretation would be necessary, even were language clear and unequivocal, and the ideas of the parties precise and determinate, such rules become indispensable, when language itself is defective, and by an abuse and ignorance of it, men involve their agreements in what Mr. Roberts terms "amphibology of diction, and delitescence of meaning."

Only a general statement of some of the most prominent rules of construction will be here made, and a few practical illustrations of those rules be added.

The first principle of construction, and that upon which rest all the rules, which will be hereafter mentioned, is this, namely, that the apparent intent of the parties shall be regarded, so far as the rules of law will permit. *Verba intentioni, non e contra, debent inservire.* The purpose of construction is to *find* the meaning of the parties; not to *impose* it. (*a*)

(*a*) Plowd. 160. Shep. Touch. 86. 1 Doug. 277. 7 T. R. 678. 14 Wis. 105. See Fulbecks Direction, *c*, iv. viii.

1. As a general rule, *the terms of a contract are to be understood in their ordinary and popular sense, rather than in their strict grammatical or etymological meaning.* (*a*)

But it is as true in law, as in other subjects, that usage is to govern in the application of language. *Consuetudo, cum omnium domina rerum, tum maxime verborum est.* Hence, there is an exception to the rule just mentioned, in those cases in which words have acquired, by usage, a peculiar sense different from the ordinary and popular one. And it is, in such cases, immaterial whether the sense, acquired by usage, be the strict grammatical or etymological one, or one which departs from all philological as well as popular and ordinary meaning, and is wholly anomalous.

Buller, J., says a policy of assurance has at all times been considered, in courts of law, as an absurd and incoherent instrument; but it is founded on usage, and must be governed and construed by usage. (*b*) In the same case, Lord Kenyon said: "I remember it was said, many years ago, that if Lombard Street had not given a construction to policies of insurance, a declaration on a policy would have been bad on general demurrer; but the *uniform practice* of merchants and underwriters had rendered them intelligible." (*c*)

Where, in any case, language has acquired a peculiar meaning with reference to the subject matter of a contract, that meaning shall prevail in that particular case. (*d*) Hence, mercantile contracts are construed according to the sense attached by mercantile usage to the terms employed by the parties. And so of other contracts, not strictly mercantile, if there be a usage which the parties must be supposed to have had in view, when their contracts were made. But this construction cannot be allowed to prevail, unless the terms of the contract are general, or doubtful, on the face of them. If the terms employed are inconsistent with the construction which usage,

(*a*) Plowd. 169. 4 East, 135. 3 Dallas, 240. 3 Missouri, (1st ed.) 447. See 4 Ind. 417, 521. 9 ib. 135. 10 ib. 321, 327.

(*b*) Brough *v.* Whitmore, 4 T. R. 210.

(*c*) See also 2 Bos. & Pul. 167, 168. 10 Allen, 313.

(*d*) Bridge *v.* Wain, 1 Stark. R. 504. Scott *v.* Bourdillion, 2 New Rep. 213.

&c., would give them, they must have the meaning which the parties obviously intended. (*a*) A commercial usage will be considered as established, when it has existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made with reference to it. No specific time can be prescribed. (*b*)

So the ordinary and popular sense of terms may be controlled by local usage and understanding, and by the law of the place where the contract is made, or with reference to that law. Ashhurst, J., says: "It may be necessary to put a different construction on leases made in populous cities from that on those made in the country." (*c*) A "pack of wool," in Yorkshire and in Wiltshire may perhaps differ in weight; and the words would be construed to mean the one weight or the other, according to the place where a contract is made. (*d*) So of "cotton in bales;" in some places, compressed bales are meant by these words; in other places, bags merely. (*e*) So if one sell tods, pounds, bushels, yards, ells, or perches, of any thing, they will be accounted, measured, and reckoned according to local custom. (*f*) But if a particular measure is established by law, with a prohibition against using any other, that measure will be understood, notwithstanding any local usage to the contrary. (*g*)

The usages of banks, where parties to notes and bills are accustomed to transact business, are recognized by courts as

(*a*) 2 Stark. Ev. (4th Amer. ed.) 453 *& seq.* 3 ib. 1036. Dickinson *v.* Lilwall, 4 Campb. 279. Gibbon *v.* Young, 8 Taunt. 254. Lewis *v.* Thatcher, 15 Mass. 433. Webb *v.* Plummer, 2 B. & Ald. 746. See 8 Met. 576. 12 Cush. 429.

(*b*) Noble *v.* Kennoway, 2 Doug. 513. Barber *v.* Brace, 3 Conn. 9. Smith *v.* Wright, 1 Caines, 43. Rapp *v.* Palmer, 3 Watts, 178. Collings *v.* Hope, 3 Wash. C. C. 150. Davis *v.* New Brig, Gilpin, 486. Trott *v.* Wood, 1 Gallis. 443. See 1 Oldright (Nov. Scotia) 259, 10 Allen, 305.

(*c*) 2 T. R. 760. See also 1 Doug. 207. 6 Greenl. 225. 21 Pick. 372.

(*d*) 1 Evans's Pothier (1st Amer. ed.) 50, note (*b*). Shep. Epit. 172.

(*e*) Taylor *v.* Briggs, 2 Car. & P. 525.

(*f*) 1 Powell on Con. 376. See also Hewet *v.* Painter, 1 Bulst. 174.

(*g*) Master, &c., of St. Cross *v.* Lord Howard de Walden, 6 T. R. 338. Hockin *v.* Cooke, 4 T. R. 314. See also 3 T. R. 271. 4 ib. 750.

evidence of the assent of such parties to those usages, and therefore as giving a construction to their contracts different from the ordinary meaning of the terms employed, or implied by law, in cases where no such usages prevail. But a knowledge, express or implied, of the usage, must be brought home to the party who is to be affected by it. (*a*)

If words have a known legal meaning, usage cannot control that meaning. To give effect to a usage, in such case, it must be specially included or referred to in the contract, or the words must be explained in the contract itself, so as to conform to the usage. (*b*) This rule, however, does not, it seems, always hold in parol contracts. (*c*)

Technical words in a deed are to be construed according to their legal meaning. (*d*)

2. *Construction is to be what the common lawyers term favorable;* that is, if the terms of an agreement are susceptible of two senses, they are to be understood so as to have an actual and legal operation.

If, therefore, the ordinary and grammatical sense of words used in a contract render it ineffective or frivolous, they are to be construed according to their less obvious and more remote meaning: *Verba aliquid operari debent, et cum effectu sunt accipienda; debent intelligi ut aliquid operentur.* Thus, "to," "from," and "until," if used in their strict and most proper sense, are exclusive of the subject to which they refer. But if this sense would render an agreement nugatory, they shall be construed to include the subject. (*e*) The same construction is to be adopted in order to prevent contradiction

(*a*) See Jones *v.* Fales, 4 Mass. 245. Lincoln, &c., Bank *v.* Page, 9 Mass. 155. Whitwell *v.* Johnson, 17 Mass. 449. City Bank *v.* Cutter, 3 Pick. 414. Renner *v.* Bank of Columbia, 9 Wheat. 581. Mills *v.* Bank of U. States, 11 ib. 431. Bank of Washington *v.* Triplett, 1 Peters, 25. Brent's Ex'rs *v.* Bank of Metropolis, ib. 89. Warren Bank *v.* Parker, 8 Gray, 221.

(*b*) Doe *v.* Lea, 11 East, 312. 2 Stark. Ev. (4th Amer. ed.) 455. 3 ib. 1038. Sleght *v.* Rhinelander, 1 Johns. 192.

(*c*) Doe *v.* Benson, 4 B. & Ald. 588. Den *v.* Hopkinson, 3 Dowl. & Ryl. 507. Furley *v.* Wood, 1 Esp. R. 199. (*d*) 4 Watts, 89.

(*e*) See 3 Leon. 211. 5 East, 254–260. 1 Doug. 382. 1 Bur. 285. Cowp. 714. 1 T. R. 490.

and absurdity; (*a*) also to save a contract from being void for illegality; the law making no presumption against the validity of an agreement. "Whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." (*b*)

This rule of favorable construction must, however, bend to the intention of the parties; the purpose of it being, like that of all other rules of construction, to give effect to such intention. If therefore the parties obviously meant to make a frivolous, absurd, or unlawful agreement, they must abide by the legal consequences.

3. *The subject matter of an agreement is to be considered in construing the terms of it, which are to be understood in the sense most agreeable to the nature of the agreement: Verba generalia restringantur ad habilitatem rei, vel aptitudinem personæ.* (*c*)

Thus, a stipulation in a policy of insurance, that a ship shall "sail or depart with convoy," is held to mean "convoy for the voyage." The subject matter of such agreement is a voyage, and merely departing with convoy, and then proceeding alone, would be no protection to the ship on the voyage. (*d*) And the captain must take sailing orders, or directions as to keeping with the convoy, obeying signals, &c. Otherwise the security intended by convoy would not be procured. (*e*) So a license to load a cargo in an enemy's country, and import it into Great Britain, authorizes a purchase of the cargo. (*f*) In Pen *v.* Glover, (*g*) there was a condition in a lease, that the lessee should not molest, vex, or put out any

(*a*) Carter, 108, 109. 1 Freem. 247. T. Ray. 68. 1 Sid. 105. Finch's Law, 52. Fonbl. Book I. c. 6, § 18. Willes, 332.

(*b*) Co. Lit. 42.

(*c*) 1 Powell on Con. 377. 1 T. R. 703. 2 Cush. 283. 3 Allen, 349.

(*d*) Jefferyes *v.* Legendra, 1 Show. 321. Lilly *v.* Ewer, 1 Doug. 72.

(*e*) Webb *v.* Thomson, 1 Bos. & Pul. 5. Anderson *v.* Pitcher, 2 ib. 164. See 8 Met. 96. 46 N. Hamp. 255.

(*f*) Fenton *v.* Pearson, 15 East, 419.

(*g*) Moore, 402 and Cro. Eliz. 421.

copyholder, paying his duties and services, under the penalty of forfeiture. The lessee entered into a cowhouse and beat a copyholder. A forfeiture was claimed under the word "molest." But it was held, that the molestation must be such as should be an expulsion, or molestation concerning the copyhold tenement; that a tort to the person of a copyholder was not intended.

A grant of common out of *all* one's manor authorizes the grantee to depasture his cattle only in commonable places, and not in the grantor's garden. So a grant of *all* trees growing on a farm does not extend to fruit trees, if there be any other trees on the farm. (*a*) A general covenant for quiet enjoyment of land extends only to evictions and disturbances by title. But a covenant to indemnify against a particular person, by name, extends to entries and disturbances of that person by tort as well as by right. (*b*) So if the condition of a bond be that the obligor shall not hurt or molest the obligee "on any account," it shall be construed to be a wrongful molestatation, and not to hinder the obligor from pursuing the obligee for crimes committed by him, or for any other just cause. (*c*)

Under this third rule of interpretation may also be given the following cases, where general words are restrained by the subject matter of the contract.

The use and object of a sweeping clause are, generally, to guard against any accidental omission; but it is meant to refer to estates or things of the same nature and description with those that have been before mentioned. (*d*) A release of all demands, when a particular demand is acknowledged to have been received, is confined to the demand specified. (*e*) In 2 Rol. Ab. 409, it is said, "If a man should receive £10, and give a receipt for it, and doth thereby acquit and release the

(*a*) 1 Powell on Con. 377. Shep. Touch. 86, 87.

(*b*) Dalison, 58, pl. 8. 110, pl. 2. Chanudflower *v.* Prestley, Yelv. 30. Greenby *v.* Wilcocks, 2 Johns. 1.

(*c*) Dobson *v.* Crew, Cro. Eliz. 705.

(*d*) By Ld. Mansfield, Cowp. 12.

(*e*) 1 Powell on Con. 391 *&* *seq.* 1 Domat, (2d ed.) 38, § 21.

person of all actions, debts, duties, and demands, nothing is released but the £10; because the last words must be limited by those foregoing." Lord Holt is reported (*a*) to have denied this case in Rolle; but Lord Ellenborough (*b*) said, he was sorry to find that it had been denied to be law, because it seemed to him to be as sound a case as could be stated. And it is now, doubtless, the settled law of England and of this country. (*c*)

But if the general words of release stand alone, without any recital, or reference to the subject matter on which it is to operate, the rule does not apply. In such case, the release is taken most strongly against the releasor. (*d*) Extrinsic evidence cannot be admitted to explain the releasor's intentions, and to what demand the release is to be applied; (*e*) otherwise, of a receipt. (*f*)

Where the condition of a bond is larger than the recital, the recital shall restrain it; on the principle that the condition is be confined to the subject matter. The recital shows what the subject matter is. "The condition cannot be taken at large, but must be tied up to the particular matters of the recital." (*g*) Thus, where the condition of a bond recited that the obligee had made the obligor bailiff of the hundred of Brixto, and the engagement was that the obligor should make true return of all warrants directed to him; on a suit upon this bond, alleging that the obligee made a warrant to the obligor to execute a certain process, and that he had not returned it, it was held, on demurrer, that no cause of action was shown; because the generality of the condition must be

(*a*) 1 Show. 155. (*b*) 4 M. & S. 427.

(*c*) Bac. Ab. Release, K. Cole *v.* Knight, 3 Mod. 277. Abree's case, Hetley, 15. Payler *v.* Homersham, 4 M. & S. 423. Lampon *v.* Corke, 5 B. & Ald. 606. Lyman *v.* Clarke, 9 Mass. 235. Munro *v.* Alaire, 2 Caines, 329. Bac. Ab. Release, I.

(*d*) Thorpe *v.* Thorpe, 1 Ld. Raym. 235. Bac. Ab. Release, K.

(*e*) Butcher *v.* Butcher, 1 New Rep. 113. Pierson *v.* Hooker, 3 Johns. 68.

(*f*) 3 Stark. Ev. (4th Amer. ed.) 1044, 1272. 8 Johns. 389. 9 Johns. 310. 1 Johns. Cas. 145. 11 Mass. 32. 4 Greenl. 427.

(*g*) By Eyre, J. Gilb. Cas. 240.

restrained by the recital, and the defendant was liable only for not returning warrants to be executed within the hundred of Brixto: *Non constat*, on these pleadings, that such was the warrant which the defendant, as was alleged, had not returned. (*a*) After verdict, however, judgment would not be arrested for such cause. It would be intended that the warrant was directed to the defendant as bailiff of the hundred for which he was appointed. (*b*) In Pearsall *v.* Summersett, (*c*) the condition of the bond recited that the plaintiff had accepted, indorsed, &c., divers bills of exchange for the accommodation of W., several of which were outstanding, and in order to indemnify the plaintiff, in respect thereof, from all losses, charges, &c., the defendant stipulated to pay all that the plaintiff had advanced, or thereafter should advance, on account of W. It was held, that the condition should be confined to payments in respect to bills accepted before the date of the bond.

In a suit on a bond reciting that J. had been appointed deputy postmaster for the term of six months, and with a condition that during all the time he should continue in that office, he would faithfully perform the duties, &c., it was held, that the surety of J. was not liable for his default after six months had elapsed. (*d*) So where the condition of a bond is for the good conduct of a person in an office which is annual, &c., though the condition purport to be commensurate with his continuance in office, and he be reëlected or reappointed, yet the obligor is liable only during the continuance of the office under the first election or appointment; (*e*) otherwise, if the office is not by law an annual one, though

(*a*) Stoughton *v.* Day, Style, 18 and Aleyn, 10.

(*b*) Weston *v.* Mason, 3 Bur. 1727. (*c*) 4 Taunt. 593.

(*d*) Arlington *v.* Merricke, 2 Saund. 414, and note (5).

(*e*) Liverpool Water Works *v.* Atkinson, 6 East, 507. St. Saviour's *v.* Bostock, 2 New Rep. 175. Hassell *v.* Long, 2 M. & S. 363. Bigelow *v.* Bridge, 8 Mass. 275. U. States *v.* Kirkpatrick, 9 Wheat. 720. Commonwealth *v.* Fairfax, 4 Hen. & Munf. 208. Commonwealth *v.* Baynton, 4 Dallas, 282. S. Carolina Society *v.* Johnson, 1 McCord, 41. S. Carolina Ins. Co. *v.* Smith, 2 Hill, (S. C.) 589. Chelmsford Co. *v.* Demarest, 7 Gray, 1. And see Middlesex Manuf. Co. *v.* Lawrence, 1 Allen, 339.

the officer may be annually elected or appointed. (*a*) Where a bond was given for the fidelity of an accountant in a bank, and that he should continue in the service of the bank for two years, the bond was held to secure the bank while the accountant was in their service; the mention of two years only preventing his sooner leaving the service. (*b*)

So if there is a change of parties, the obligor and his sureties are not held on the contract. As where a bond was given for the fidelity of a clerk of the obligee, and the obligee entered into partnership with a third person, and the clerk was afterwards guilty of misconduct in the partnership business. (*c*) So in case of a material variation in the mode or extent of transacting the business of the obligee. (*d*) So where a bond was given to several persons as governors of a voluntary society, with a condition for the faithful collection and accounting, &c., of H. to the obligors, and their successors, as governors, and the society afterwards was incorporated; a default of H., after the incorporation, was held not to be covered by the bond. (*e*) In Barclay *v.* Lucas, (*f*) on a bond reciting that the obligees "had agreed to take" one Jones into their service, and employ him as a clerk in their shop and counting-house, and that the defendants had agreed to become security for his fidelity, &c., and the condition was that Jones should faithfully account, &c.; it was held that the sureties were liable for the misconduct of Jones, after the obligees had received a new partner into their business. This decision was made on the ground that the intention of the parties was to take and give security *to the house;* and in England the house frequently continues under the original firm, though

(*a*) Curling *v.* Chalklen, 3 M. & S. 502. 1 New Rep. 40, by Mansfield, C. J. Dedham Bank *v.* Chickering, 3 Pick. 335.

(*b*) Worcester Bank *v.* Reed, 9 Mass. 267.

(*c*) Wright *v.* Russell, 3 Wils. 530. And see Barker *v.* Parker, 1 T. R. 287. Strange *v.* Lee, 3 East, 484. Bellairs *v.* Ebsworth, 3 Campb. 53.

(*d*) Bartlett and Bowdage *v.* Attorney General, Parker's Rep. 277, 278. Miller *v.* Stewart, 9 Wheat. 680. Boston Hat Manufactory *v.* Messenger, 2 Pick. 223. See also 4 Pick. 314. Fell on Guaranties, chap. v.

(*e*) Dance *v.* Girdler, 1 New Rep. 34. (*f*) 1 T. R. 291, note.

there is a succession of partners. But this decision has been questioned by counsel and judges, and probably would not now be regarded as authority, except under precisely similar facts. The case of Wright *v.* Russell, (*a*) there doubted, has been repeatedly confirmed. In Metcalf *v.* Bruin, (*b*) where a bond was given to the trustees of a numerous and fluctuating body, called the Globe Insurance Company, to secure the fidelity of a servant of the company "during his continuance in the service of the company," it was held that the actual existing body of persons, carrying on the same business under the same name, were intended by the bond; and that the obligees, who were trustees of the company, were entitled to sue for a breach of the bond by the servant, which happened after a change in some of the members of the company.

But the recital in the condition of a bond does not confine the responsibility of the obligor to the limits of the recital, where the condition itself manifestly is designed to be extended beyond the recital. The rule holds only in case of general terms consistent with the limitation expressed, or to be collected from the scope of the contract. Therefore, where the condition of a bond, in addition to matter mentioned in the recital, contained a stipulation for indemnity against claims arising from acceptances "or any other account thereafter to subsist" between the parties, it was held that a transaction, not specified in the recital, was provided for in the condition. (*c*)

Guaranties, or letters of credit, are construed strictly; the generality of the words being restrained to the particular case in view of the guarantor, in all instances in which such a course is not inconsistent with the terms employed. (*d*) The principle applied to guaranties is the same which is applied to bonds with conditions; and the cases on both species of

(*a*) 3 Wils. 530. (*b*) 12 East, 400.

(*c*) Sansom *v.* Bell, 2 Campb. 39. See Com. Dig. Parols, A. 19. Watson *v.* Boylston, 5 Mass. 411.

(*d*) See Fell on Guaranties, chap. v. Melville *v.* Hayden, 3 B. & Ald. 593. Norton *v.* Eastman, 4 Greenl. 521.

contracts are cited by counsel, and commented on by courts, as mutual authorities.

In Union Bank *v.* Clossey, (*a*) it was held that the condition of a bond that a clerk in a bank should "well and faithfully perform the duties assigned to and trusts reposed in him," applied to his honesty only, and not to his ability; and that for a mere mistake of the clerk, his sureties were not responsible. But in Minor *v.* Mechanics' Bank of Alexandria, (*b*) the supreme court of the United States decided that a condition "well and truly" to execute official bank duties, included not only honesty, but reasonable skill and diligence. The supreme courts of Massachusetts, New Jersey, and Pennsylvania have made like decisions. (*c*) "The operations of a bank require diligence, with fitness and capacity, as well as honesty in its cashier; and the security for the faithful discharge of his duties would be utterly illusory, if we were to narrow down its import to a guaranty against personal fraud only." (*d*)

The contracts of sureties are always strictly construed; and it is not improbable that in some of the cases which have been cited, a more liberal and extended construction might have been given to the stipulations, if the principal only had been concerned. But the same construction is given to a bond with sureties, when the principal is sued alone, as when all are sued, or the sureties only. (*e*)

In Williams *v.* Jones, (*f*) a bond, given by G., a postmaster appointed for three years, was held to be a security for defaults after the three years expired; he continuing in office, without any new appointment or bond. But his successor had been obliged to give bond for the arrears of G., and had taken out a *scire facias* against G., and afterwards an extent; and he was held to be entitled to hold G.'s land against the assignee of G., who took it from G. before the

(*a*) 10 Johns. 271. (*b*) 1 Peters, 48.

(*c*) American Bank *v.* Adams, 12 Pick. 303. State Bank *v.* Chetwood, 3 Halst. 25. Barrington *v.* Bank of Washington, 14 Serg. & R. 405.

(*d*) By Story, J., 1 Peters, 69.

(*e*) 8 Mass. 276. (*f*) Bunb. 275.

expiration of three years; as well for the amount of G.'s default after that time, as for the small sum in which G. was in arrear when the three years expired. If this case be law, it probably stands on the ground of prerogative, by which the crown, and its debtors and assignees, are placed on different grounds from subjects in their contracts with each other. (*a*)

4. *The whole contract is to be regarded in giving it a construction, and one part is to be interpreted by another. Ex antecedentibus et consequentibus fit optima interpretatio. Turpis est pars, quæ cum suo toto non convenit.* (*b*)

Most of the cases, cited under the preceding rule, are perhaps equally included in this.

In the Duke of Northumberland *v.* Errington, (*c*) Buller, J., said, "It is immaterial in what part of a deed any particular covenant is inserted; for in construing it, we must take the whole deed into consideration, in order to discover the meaning of the parties." In that case, it was held that the general words in the beginning of the lessee's covenant, "jointly and severally," &c., extended to all the subsequent covenants, though those words were not repeated in every covenant throughout the deed: Because it would not have answered the lessor's purpose that the lessee should be bound separately in the subsequent covenants. Lord Alvanley says, "However general the words of a covenant may be, if standing alone, yet if from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words. If such an inference does arise from concomitant covenants, they will control the general words of an independent covenant in the same deed." (*d*) A very early case, (*e*)

(*a*) See The King *v.* Smith, Wightwick, 34, that the king takes priority of a purchaser, in case of debts of his officers and receivers. The crown has a lien on the officer's lands, &c., in case of a contract by specialty.

(*b*) Plowd. 161. Winch, 93. 1 Domat, (2d ed.) 37, § 10. Shep. Touch. 87.

(*c*) 5 T. R. 526. See 19 Texas, 1. 32 Miss. 678.

(*d*) 3 Bos. & Pul. 574, 575. See Folsom *v.* McDonough, 6 Cush. 208.

(*e*) Broughton *v.* Conway, Dyer, 240, Moore, 58 and Dalison, 58, pl. 8. See also Dalison, 110, pl. 2.

illustrates Lord Alvanley's statement. A lessor covenanted that he had made no former grant or any thing whereby the grant or assignment might be in any measure impaired, hindered, or frustrated, but that the assignee, by virtue of that grant and assignment, might quietly have, hold, &c., without any impediment or disturbance by him, or by any other person. Dower was assigned to the wife of a former owner of the leased premises, and a suit was brought on a bond given by the lessor to perform the covenants in his assignment; and it was held that the generality of the latter covenant was restrained by the words of the former; that the lessor had covenanted for quiet enjoyment only against other persons having right derived from him.

The leading judgment, on the application of this rule is that given by Lord Eldon, in the case of Browning *v.* Wright. (*a*) Parker, J., (*b*) termed it "a triumph of common sense." Wright bargained, sold, &c., to Browning, his heirs, &c., a parcel of land, and warranted it against himself, and covenanted that notwithstanding any act by him done to the contrary, he was seized lawfully and absolutely in fee simple, *and that* he had a good right, full power, &c., to convey. The breach of covenant, alleged in the declaration, was, that Wright had not good right, full power, &c., to convey to the plaintiff, for that one Child and his wife were lawfully and rightfully seized of said land, and had a lawful and rightful title thereto not derived from the plaintiff (Browning), and that he had been obliged to become tenant to Child and wife; and thus lost his fee simple in the estate conveyed. It was held that the covenant, namely, that Wright had good right, lawful title, &c., was either a part of the preceding special covenant, or, if not, that it was qualified by the other special covenants against the acts of himself and his heirs only. "We do not do justice to the parties," said Buller, J., in that case, "unless we look to the whole deed, and infer from that their real intention. The defendant has expressly told us, in one part of the

(*a*) 2 Bos. & Pul. 13.

(*b*) 8 Mass. 217. See also Stannard *v.* Forbes, 6 Ad. & El. 572 and Willm. Woll. & Dav. 321.

deed, that he means to covenant against his own acts; and are we to say that he has, in the same breath, covenanted against the acts of all the world?" (*a*) On the same principle of construction, it was held, where Lord Rich, on conveying land, covenanted that it was worth £1000 per annum, and so should continue, notwithstanding any act done, or to be done, by him, that the latter words "any act," &c., extended to the time when the covenant was made, as well as to future time. (*b*)

In Jackson *v.* Stevens, (*c*) where the owner of three fourths of a tract of land granted a moiety thereof by metes and bounds, with all the estate, right, title, &c., which he had "in the above described premises," it was held that a moiety only passed by the deed.

In regard to agreements respecting a demise of lands, &c., subsequent words are often held to control prior ones; or rather to show what was intended by prior words. There are several cases, in which the question was raised whether an instrument was intended for a present demise, or a stipulation for a lease in future. (*d*)

5. *Construction is to be such that the whole instrument, or contract, and every part of it, may take effect, if it be possible*

(*a*) See also, on this point, 1 Leigh's Nisi Prius, 613, 614. Foord *v.* Wilson, 8 Taunt. 543 and 2 Moore, 592. Milner *v.* Horton, McClel. 644. Sicklemore *v.* Thistleton, 6 M. & S. 9. Sugden on Vendors, ch. xiii. Gainsford *v.* Griffith, 1 Saund. 58, and notes. Howell *v.* Richards, 11 East, 633. Eastabrook *v.* Smith, 6 Gray, 572. Nind *v.* Marshall, 1 Brod. & Bing. 319. Cole *v.* Hawes, 2 Johns. Cas. 203. Whallon *v.* Kaufman, 19 Johns. 97. Knickerbacker *v.* Killmore, 9 Johns. 106. Barton *v.* Fitzgerald, 15 East, 530. Babcock *v.* Wilson, 17 Maine, 372. Smith *v.* Compton, 3 B. & Ad. 200.

(*b*) Rich *v.* Rich, Cro. Eliz. 43. See also Gervis *v.* Peade, Cro. Eliz. 615. Woodyard *v.* Dannock, ib. 762. But see Crayford *v.* Crayford, Cro. Car. 106. Hughes *v.* Bennet, ib. 495. Harflet *v.* Butcher, Cro. Jac. 644. It may not be easy to reconcile all these cases, with respect to the *application* of the rule of construction above mentioned; but the principle itself is recognized in each one of them, as well as in others cited in Browning *v.* Wright, 2 Bos. & Pul. 13.

(*c*) 16 Johns. 110. Doe *v.* Anderson, 1 Stark. R. 155.

(*d*) See Roe *v.* Ashburner, 5 T. R. 163, and previous decisions there cited. Bac. Ab. Leases, &c. K. 1 Platt on Leases, 579 *&c. seq.* 2 Wend. 433.

consistently with the rules of law and the intention of the parties. (*a*)

The last previous rule is perfectly consistent with this, though it may seem, at the first thought, to contradict it. Under that rule, every part of the agreement does take effect; and the effect intended by the parties. One part is construed, not destroyed nor impaired, by the other. Words, used in an apparently general sense, are held to have been intended in a special or restrained sense, from inspecting the context, and looking to the effect. *Noscitur a sociis.* So that the whole and every part, as the parts are understood upon a view of the whole, have an effectual operation. This fifth is, therefore, an additional, and not a mere modifying rule; as examples will show.

"If I have in D. blackacre, whiteacre, and greenacre, and I grant unto you *all my lands in D.*, that is to say, blackacre and whiteacre, yet greenacre shall pass too." (*b*) A case is mentioned in Savile, 71, where C. C. leased land to J. S. for twenty-one years, and covenanted that the lessee should enjoy the land for the term against "the said B. C." It was held, that the word "said" should be rejected, because B. C. had not before been mentioned; but that the covenant was against the interruption of B. C., if there were any such person. (*c*) So where one Brooks, who owned three parcels of land (each particularly described in the deed of one Wylie conveying them to him) made a deed of conveyance, beginning his description of the land thus: "Three parcels or lots situated in Portland, and bounded as follows, to wit, the first lot beginning," &c., and setting forth the boundaries of that lot, and then closing thus: "Being the same which was conveyed to me by J. Wylie, by deed dated," &c.; all the three parcels were held to have passed by the deed; (*d*) otherwise the words

(*a*) Shep. Touch. 87. 16 Johns. 178. Randel *v.* Chesapeake and Delaware Canal Company, 1 Harrington, 154.

(*b*) By Lord Hobart, Hob. 172.

(*c*) Ought not this to have been regarded as a mere clerical error, a misnaming of the lessor?

(*d*) Child *v.* Ficket, 4 Greenl. 471.

"three parcels" would have had no effect. To restrain the meaning of "three" to the one particularly described, would have been to contradict or destroy the word, and not to expound it. If the deed had professed to convey but one lot, the reference to Wylie's deed might and ought to have been restrained, according to the fourth rule, to the description of the lot professed to be conveyed. Or if no reference had been made to Wylie's deed, the first lot only would have passed, because there would have been no means of ascertaining where or what the other two lots were; and then that part of the deed, which mentioned three lots, would have been void for uncertainty as to all but the one described, according to another rule of construction, which will be mentioned hereafter. So where the owner of a farm, which he held by two deeds, one conveying to him an undivided third part, and the other the residue thereof, made a mortgage of a tract of land described as being the same mentioned in his first deed, to which he referred for a description, and as being his whole farm; it was decided that he had mortgaged his whole farm, and not one third only; that the reference to the first deed was for description of the land, and not for the quantity of estate or interest mortgaged. (*a*)

In Saward *v.* Anstey, (*b*) the defendant covenanted with the plaintiff to pay an annuity on an estate which he had purchased of the plaintiff, and to indemnify him. The annuity was charged on the land only, and not on the occupant, and belonged to the plaintiff's sisters. In a suit on the covenant, for not paying the annuity, the declaration did not aver that the plaintiff had been damnified. It was contended that, taken all together, the covenant was only for indemnity, and that therefore no cause of action was shown. But it was decided otherwise. For if the clause of indemnity were to limit the covenant for payment to cases where the plaintiff was himself damnified, it would wholly destroy its effect. The plaintiff could not be damnified by non-payment of the

(*a*) Willard *v.* Moulton, 4 Greenl. 14. And see Co. Lit. 146 *a*. Jackson *v.* Stevens, 16 Johns. 110.

(*b*) 2 Bing. 519 and 10 Moore, 55.

annuity. The covenant for payment must therefore have been intended for the benefit of others (the plaintiff's sisters) for whom he doubtless meant to provide the personal responsibility of the defendant. The covenant of indemnity to himself was clearly useless. By the construction given to the contracts, in these three instances, every part of them took effect.

The old books say that if there be two clauses or parts of a deed repugnant the one to the other, the first part shall be received, and the latter rejected, unless there be some special reason to the contrary; but that in the case of a will containing two repugnant clauses or parts, the first shall be rejected, and the last received. "The first deed and the last will shall operate," is an ancient maxim. (*a*) In modern times this maxim has very little operation. A "reason to the contrary" is almost always found. The rules of construction now applied, in cases of repugnancy, give effect to the whole and every part of a will, deed or other contract, when that is consistent with the rules of law and the intention of the party. And when this is impossible, the part which is repugnant to the general intention, or to an obvious particular intention, is wholly rejected. Parts, which were once regarded as repugnant, are now deemed consistent.

As to wills. In Owen, 84, Anderson, J., says, conformably to the old notion, "if I devise my land to J. S. and afterwards, by the same will, I devise it to J. D., now J. S. shall have nothing, because it was my last will that J. D. should have it." This, however, is merely ill applied technicality. The whole will, and each part of it, is as much the last will, as the last clause of it. And the whole shall stand, if it be possible consistently with the testator's intentions. Contradiction and repugnancy are not to be presumed, if in any legal way a consistent meaning can be found. In the case supposed by Anderson, J., the devisees would each take a moiety of the land. So where (*b*) legacies are given to

(*a*) Plowd. 541. Co. Lit. 112, b. Shep. Touch. 88.

(*b*) See Wallop *v.* Darby, Yelv. 209. Plowd. 541, *in margine*. Swinb. Part I. § 5. Co. Lit. 112 note 144. 13 Mass. 535. 2 Cush. 114.

several persons, in different clauses of a will, if there is a deficiency of assets, all must abate proportionally, unless the testator uses language which shows a contrary intent; as, if he directs a particular legacy "to be first paid," or unless, from his obligation to provide for a particular legatee, a contrary intent is to be inferred.

As to grants and other contracts. In grants, &c., if words of restriction are added, which are repugnant to the grant, the restrictive words are rejected. As if one grant all his lands, in the whole town of A., namely, in the first parish; all the lands will pass, and the *scilicet* is void. Otherwise, if the grant be of lands in the town of A., namely, in the first parish. (*a*) So if there be a demise of lands and woods, (described,) except the woods, the exception is void. Or a lease for years to O. and his assigns, provided he shall not assign; the proviso is void. But if the *scilicet* or proviso be merely explanatory, and not repugnant to the grant, &c., the latter shall be limited by the explanatory clause. As in a feoffment of two acres, *habendum* the one in fee, and the other in tail, the habendum only explains the manner of taking, but does not restrain the gift. In these last, and similar examples, the substance of the premises is not altered. (*b*)

Whatever is expressly granted, or covenanted, or promised, cannot be restrained or diminished by subsequent provisos, restrictions, &c.; but general or doubtful clauses precedent may be distributed or explained by subsequent words and clauses not repugnant or contradictory to the express grant, covenant, or promise. (*c*) Nor can subsequent words or clauses, repugnant to the express grant, demise, covenant, &c., enlarge such grant, &c. Thus, where in a lease of land for forty years, the lessor covenanted that the lessee and his assigns should enjoy the land for the term of "eighty years aforesaid," it was decided that this covenant for enjoyment

(*a*) Hob. 173.

(*b*) See Hob. 172, 173. Moore, 880. Bac. Ab. Grants, I. 1. Jackson *v.* Ireland, 3 Wend. 99.

(*c*) See Cutler *v.* Tufts, 3 Pick. 272.

did not enlarge the term; and the words "eighty years aforesaid," were rejected as inconsistent with the demise. (*a*) So where a rent of £20 was granted, issuing out of certain lands, *habendum* after the decease of Ann Greaves and Thomas Greaves, or either of them; the first payment to be made at a certain feast day that should first happen after the death of A. or T. Greaves; with a clause that if the rent should be unpaid at any feast day named, the grantee, at any time during the joint lives of said A. and T. Greaves, might distrain, &c., as no rent was granted during the joint lives of these persons, the words "during the joint lives," &c., were rejected as repugnant. (*b*) So where A. acknowledged the receipt of three hogsheads of tobacco in part of his claim on B., "he the said A." to be allowed per cent. the highest six months' credit price, it was held that the words "said A." should be rejected as repugnant to the clear intent of the parties. (*c*) So in all cases, doubtless, of the erroneous substitution of one party for the other, in a written contract, where the error is manifest on inspection of the instrument. This rejection of repugnant matter can, however, be made only in cases where there is a full and intelligible contract left to operate after the repugnant matter

(*a*) Savile, 71, pl. 147. See Weak *v.* Escott, 9 Price, 595.

(*b*) Crowley *v.* Swindles, Vaugh. 173. This case was decided on a demurrer to a cognizance in replevin, in which the grant was pleaded according to its meaning and effect, without mentioning the joint lives, &c. The plaintiff had oyer, and set forth the grant *in hæc verba*, and demurred. The cognizance was held good. The construction would have been the same if the grantee had claimed the rent while A. and T. Greaves were both alive.

(*c*) Ferguson *v.* Harwood, 7 Cranch, 414. This case also was decided on a question of variance; the pleadings alleging the contract as above stated, and the contract itself being different. But Story, J., said that if the contract had been as set forth, the same result must have been produced. The cases of Vernon *v.* Alsop, T. Ray. 68, 1 Lev. 77 and 1 Sid. 105, and Mills *v.* Wright, 1 Freem. 247, come within this rule of construction; where the condition of a bond for payment of money was that the bond should be void if the money was *not* paid. It was wholly repugnant to the bond itself; but by rejection the bond was left in full force, as an entire and perfect contract. See Finch's Law, 52. Stockton *v.* Turner, 7 J. J. Marsh. 192. Gully *v.* Gully, 1 Hawks, 20. 1 Doug. 384, by Buller, J. 2 Atk. 32.

is excluded. Otherwise, the whole contract, or such parts of it as are defective, will be pronounced void for uncertainty.

In those contracts, in which the repugnancy or ambiguity is apparent on the face of the contract itself, if the repugnancy, &c., be such as renders the intention of the parties unintelligible, the contract is null and void. Parol evidence is inadmissible to explain a written instrument which contains a patent ambiguity. If the rules of construction fail to elicit the meaning, the parties are without remedy. But there are ambiguities and repugnancies which are latent; and "a latent ambiguity," says Lord Bacon, "may be holpen by averment." A latent ambiguity is one which arises extrinsically in the application of an instrument of clear intrinsic meaning. As if one promise to pay John Smith a certain sum of money. This is clear on the face of the promise; but there may be many men of that name. This is an extrinsic fact, and parol evidence is admissible to show to which man of this name the promise was made. So if one devise or grant his land in D., the words are unambiguous; but parol evidence may and must be received to show the situation, extent, &c., of the land. "Parcel or not parcel of the thing demised is always matter of evidence." (*a*)

In conveyances of land, it is often necessary to resort to extrinsic evidence of the grantor's intention. The ambiguity often being latent, evidence *dehors* the grant, &c., is allowed to affect its construction. The description of land can be verified or falsified, in part or in whole, by inspecting the land, and by comparing monuments, courses, distances, &c. Therefore, if the description of an estate conveyed be sufficient to ascertain what was intended to pass, though, upon examination, or upon inquiry into extraneous matter of description, the estate will not agree with some of the particulars of the description, yet it should pass by the conveyance, so that the intention may be effected. No peculiar *principle* of construction is adopted in these cases. Nor is this *application* of the

(*a*) See 3 Stark. Ev. (4th Amer. ed.) 1000, 1026. 1 T. R. 704.

common rules of construction peculiar to agreements respecting lands. In all agreements, whatever be the subject of them, when there is a latent ambiguity, the same application of the principle is made.

As conveyances of real estate are as frequent as almost any other species of contract, and are the frequent subject of discussion in the courts, some of the prominent rules and established canons of their construction may properly be mentioned in this connection.

When the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain it, no estate will pass except such as agrees with every particular of the description. As if one grant all his land in his own occupation in the town of D., no land passes, except what is in his own occupation, and is also in that town. Every part of such grant takes effect by this construction. (*a*) But if the description is sufficient to ascertain the estate, although the estate will not agree with all the particulars of the description, yet it will pass. As if one convey his house in D., which formerly belonged to A. B., when it never was A. B.'s, but was C. B.'s, the house in D. shall pass, if the grantor had only one house. The description of the house in D. is sufficient to ascertain the building. The intention of the parties is thus effected, and the rejected part of the deed is that which cannot operate consistently with that intention. If, however, the grantor had two or more houses in D., neither of which ever belonged to A. B., the grant would be inoperative, and void for uncertainty. But if other words of description were added, sufficient to identify the house intended, then it would pass, on the principle before mentioned, though the former owner was misnamed. (*b*) Thus a conveyance "of all that my farm in W., on which I now dwell, containing one hundred acres, with my dwelling house and barn thereon, being lot No. 17, &c., bounded," &c., was held to pass the farm on

(*a*) Plowd. 191.

(*b*) Lambe *v.* Reaston, 5 Taunt. 207. Vose *v.* Handy, 2 Greenl. 322. Roe *v.* Vernon, 5 East, 51. Doe *v.* Greathed, 8 ib. 91. Bac. Ab. Grants, H. 1. Com. Dig. Grant, E. 13. See 9 Allen, 113.

which the grantor dwelt, though it was not lot No. 17, and though the boundaries were mostly misdescribed. (*a*) See Allen *v.* Lyons, 2 Wash. C. C. 475. Winkley *v.* Kaime, 32 N. Hamp. 268. 1 Greenl. Ev. § 301.

Where the boundaries of land described in a deed are fixed and known monuments, although neither courses, distances, nor computed contents agree therewith, the monuments must govern. Courses and distances may be erroneously taken and measured; and computation of contents may be inaccurate. Fixed monuments remain, and there can be no uncertainty about them. If, however, the monuments cannot be ascertained, the length of lines mentioned in the deed must govern. But there may be cases, in which it is more reasonable to suppose that there is a mistake as to the monuments referred to, than in the admeasurement of the distances, when they are found to disagree; and in such cases (which must be few) the admeasurement shall determine the boundaries, rather than the monuments. (*b*)

If a deed of conveyance refer to a monument not in existence at the time, and the parties afterwards erect it, with the intention of conforming to the deed, the monument will govern the extent, though it do not coincide with the line described in the deed. (*c*)

(*a*) Worthington *v.* Hylyer, 4 Mass. 196. Jackson *v.* Loomis, 18 Johns. 81. 19 Johns. 449. In Plowd. 191, will be found the substance of the law as to the construction of grants. See also Massie *v.* Watts, 6 Cranch, 148. Jackson *v.* Wilkinson, 17 Johns. 146, and cases there cited. Jackson *v.* Clark, 7 Johns. 217. The state of titles in Kentucky gave rise to a course of decisions, and to the adoption of rules of construction, which evince great skill and ability in the courts, and which have nearly overcome and reduced to order the confusion formerly so embarrassing to claimants of land in that portion of the country. The most important of these decisions may be found (either made or cited by the supreme court of the United States) in Cranch and Wheaton. But as the doctrines are chiefly of local application, though not contrary to the spirit of the common law rules of construction, it seems hardly advisable to detail them in this place. See 1 Pirtle's Digest, 113–131.

(*b*) See Savile, 114. 2 N. Hamp. 303. 2 Mass. 380. 6 ib. 131. 3 Pick. 401. 5 ib. 135. Cooke, 460. 6 Wheat. 582.

(*c*) Makepeace *v.* Bancroft, 12 Mass. 469. Lerned *v.* Morrill, 2 N. Hamp. 197. Waterman *v.* Johnson, 13 Pick. 267. Kennebec Purchase *v.* Tiffany, 1 Greenl. 219.

Lands, granted as bounded on a river, extend to the thread of the river, *ad filum aquæ*, unless from prior grants on the other side of the river, or from the terms of the grant in question, such construction is negatived. (*a*) And if there be an island in the river, the line will run in the same manner as if there were no island. If, therefore, the island be wholly on one side of the thread of the stream, it will belong to the owner of the bank on that side; if in the middle of the stream, it will belong in severalty, one half to each of the riparian proprietors. So of any other proportions into which the island may be divided by the thread of the river. (*b*) And the law is the same in case of the accession of an island in a stream. It will belong to the owners of the banks, and they will be entitled to hold to the thread of the river and to divide it *pro modo et quantitate agrorum*. (*c*) Islands, however, are the subject of separate grants, and this doctrine of boundaries in grants of land bordering on streams holds only where the islands are not otherwise appropriated.

This construction of boundaries is applied only to land bordering on streams *not navigable*. By the common law, a stream or inlet of the sea, is regarded as navigable only so far as the tide ebbs and flows. Thus far, if it can be used by water-craft to any useful purpose, it is technically navigable. All arms of the sea, coves, creeks and streams, where the tide ebbs and flows, are the property of the sovereign, as far as the ordinary high water mark. But a subject may acquire property therein, by grant, or prescription which supposes a grant. (*d*) See Phear on Rights of Water, 11.

In running the side lines of a proprietor on a stream not navigable, they are to be extended, from their respective

(*a*) Lunt *v.* Holland, 14 Mass. 151. King *v.* King, 7 ib. 496. The King *v.* Wharton, 12 Mod. 510. 3 Kent Com. (11th ed.) 542 *& seq.* 9 Cush. 495.

(*b*) Ingraham *v.* Wilkinson, 4 Pick. 268, and cases there cited.

(*c*) Vinnius, 141, (Amsterdam ed. of 1692.) Heinec. Pand. Pars vi. § 168. Heinec. Inst. Lib. II. tit. 1, § 357. Deerfield *v.* Arms, 17 Pick. 41.

(*d*) Davis, 155–158. 4 Bur. 2162. 2 Doug. 441. 4 T. R. 439. 2 Bos. & Pul. 472. 5 Taunt. 705. 1 Marsh. 313. 1 Pick. 180. 2 Johns. 362. 6 ib. 133. 21 Pick. 344. 34 Miss. 36. 34 N. Hamp. 349.

termini on the shore, at right angles with the course of the stream, unless otherwise established by the terms of his grant. Knight *v.* Wilder, 2 Cush. 199. A grant of land bounded on such stream conveys to the grantee a title to the centre of the stream, though the monuments are described as standing on the bank or margin of the stream, if the boundary afterward mentioned be "thence on the stream." And this is so, as well in acts of a legislature fixing the boundaries of towns, &c., as in grants by individuals. Coovert *v.* O'Conner, 8 Watts, 470. Luce *v.* Carley, 24 Wend. 451. Noble *v.* Cunningham, 1 McMullan Eq. 289. The State *v.* Canterbury, 8 Foster, 195. Inhabitants of Ipswich, Petitioners, 13 Pick. 431. Cold Spring Iron Works *v.* Inhabitants of Tolland, 9 Cush. 492. See Morrison *v.* Langworthy, 4 Greene (Iowa) 177.

A conveyance of land described as running "to the Genesee River, thence along the shore of said river," was held to pass no part of the bed of the river. Child *v.* Starr, 4 Hill, 369.

The *shore*, technically taken, is the space between low water and ordinary high water mark; and the same construction is, of course, given to a grant of land bounded by the shore. (*a*) By the civil law, "*est autem littus maris, quatenus hybernus fluctus maximus excurrit.*" (*b*) By this law, also, the property in streams actually navigable belonged to the sovereign, or public, though the tide did not ebb and flow therein. A conveyance of land bounded on one side "by the sea or beach," includes the land between high and low water mark. Doane *v.* Willcutt, 5 Gray, 328. Jerwood on Rights to Sea Shores, 98.

This last difference in the two legal systems probably may be ascribed to the different size, &c., of the fresh-water rivers on the continent, and on the island of Great Britain. The Code Napoleon adopts the doctrine of the civil law. *Flumina autem* omnia *et portus, publica sunt; ideoque jus piscandi omnibus commune est in portu fluminibusque.* (*c*) Vinnius, in his commentary on this passage (p. 126) restricts the word "flumina"

(*a*) Storer *v.* Freeman, 6 Mass. 435. Blundell *v.* Catterall, 5 B. & Ald. 294, 304.

(*b*) Justinian, Inst. Lib. II. tit. 1, § 3. 5 B. & Ald. 292.

(*c*) Justinian, Inst. Lib. II. tit. 1, § 2.

to such streams as are perennial, and the "jus piscandi" to the subjects of the country "*cujus fines flumen alluit, et quatenus alluit.*"

In Pennsylvania, North Carolina, and South Carolina, the civil law doctrine is adopted in regard to the *actually* navigable fresh-water rivers in those States. (*a*) In Connecticut, New York, Massachusetts, Ohio, and Wisconsin, the doctrine of the common law is adhered to. (*b*) And see 24 Howard 41.

The owner of land adjoining on a stream not technically navigable, has, therefore, by the common law, an exclusive right of fishery *ad filum aquæ*, and may maintain a suit for a violation of this right. (*c*) But the public has an easement or servitude in streams that will bear water-craft to any useful purpose; namely, a free right of passage.

The same law, as to boundaries and right of fishery, doubtless applies to cases of land adjoining small ponds. (*d*) But in Massachusetts, by a colonial ordinance of 1641, "for great ponds lying in common, it shall be free for any man to fish and fowl there, and may pass and repass, on foot, through any man's propriety for that end, so they trespass not upon any man's corn or meadow." It was also provided in the same ordinance, that "every inhabitant, who is an householder, shall have free fishing and fowling in any great ponds, bays, coves, and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the town, or the general court have otherwise appropriated them." To this privilege is however added a proviso, that no town shall appropriate to any particular person any great pond

(*a*) Carson *v.* Blazer, 2 Binn. 475. Shrunk *v.* Schuylkill Navigation Company, 14 Serg. & R. 71. Wilson *v.* Forbes, 2 Dev. 30. Ingram *v.* Threadgill, 3 ib. 59. Cates *v.* Wadlington, 1 M'Cord, 580. Walker *v.* Shepardson, 4 Wis. 486.

(*b*) Adams *v.* Pease, 2 Conn. 481. The People *v.* Platt, 17 Johns. 195. Hooper *v.* Cummings, 20 ib. 90. Freary *v.* Cooke, 14 Mass. 488. Commonwealth *v.* Chapin, 5 Pick. 199. Gavit *v.* Chambers, 3 Ohio, 496.

(*c*) See cases last cited, and Waters *v.* Lilley, 4 Pick. 145.

(*d*) See Lowell *v.* Robinson, 16 Maine, 357. Waterman *v.* Johnson, 13 Pick. 261. Phinney *v.* Watts, 9 Gray, 269. Bradley *v.* Rice, 13 Maine, 201. The State *v.* Gilmanton, 9 N. Hamp. 461.

containing more than ten acres of land, &c. (*a*) This ordinance altered the common law in regard to the right of a several fishery in large ponds, and was designed to preserve to the people at large a favorite privilege and amusement. The effects of the ordinance are clearly perceptible at this day. As to fishing, &c., in tide waters, it seems to have been intended to restrict the right to householders in the town where the waters were. But this part of the ordinance is not at all regarded in practice, and probably was never so applied as to restrain the common law right of every citizen in those waters. Otherwise, it is believed, as to ponds. (*b*) Great ponds, that is, of more than ten acres, have in many instances become private property. But whether the owners can exclude all other persons from fishing therein, is not known to have been decided. See West Roxbury *v.* Stoddard, 7 Allen, 158.

Although the borderers on streams not navigable own to the centre of the water, and have an exclusive right of fishery to that extent, subject only to the easement of passage on the water by the public, yet the legislature of Massachusetts have, from the earliest period, made provision for the passage of fish from the ocean into the ponds and streams above, and have subjected the owners of contiguous land, of mills, &c., to divers onerous duties; such as keeping open fish-gates on their dams, &c. And this legislative power has often been judicially recognized. (*c*) It is a part of the law of that State (probably derived from the ordinance abovementioned,) that towns may appropriate the fishery in tide waters within their limits, if not appropriated by the legislature. (*d*) See 9 Gray, 503–528.

The right in the waters and shores of the sea, and in navigable tide waters in North America originally belonged to the English crown. That right, to a certain extent, passed to the council, established at Plymouth in England, for the

(*a*) Ancient Charters, &c. 148, 149.

(*b*) See Sullivan on Land Titles, 284 *& seq.* 2 Dane Ab. Ch. LXVIII. 10 Cush. 188. 7 Allen, 167.

(*c*) See 9 Pick. 87. Not so in New York. 17 Johns. 195.

(*d*) Coolidge *v.* Williams, 4 Mass. 140.

settlement of New England; and so far as it respects Massachusetts and Maine, the same right was transferred to the company which undertook that settlement; and their transfer was confirmed by the charter of Charles II. In that charter (dated May 1628), "ports, rivers, water, fishing," &c., were fully confirmed unto the company; and upon their establishing a government here, they took the dominion of the territory, and all its franchises and privileges, and parcelled them out in small divisions. Thus the people of the colony, in their political capacity, succeeded to all the territorial right that formerly belonged to the English crown and government. As the king might grant an exclusive right to a subject, in a fishery, or in the soil under navigable waters, so the colony succeeding to his property and power, had the same authority to make like grants to individuals, or to corporate bodies. This power, like all other powers of a kindred nature, vested in the legislature of the colony.

An ordinance of 1647 made a material change in the law on this subject of public property in tide waters. And that change has continued till the present time. For though the colony charter was annulled in 1684, by a decree in chancery, yet a new charter was granted in 1691, granting to the inhabitants of the province of Massachusetts Bay, and their successors, the territory therein described, and all "havens, ports, rivers, waters," &c. Indeed, the laws of the colony were not affected, *in fact*, by the annulling of the charter, whatever might have been the strict legal theory. (*a*) By statutes, passed in 1692, all the local laws of Massachusetts and of New Plymouth were to remain and continue in full force, in the respective places, until, &c. (*b*)

As to shores, flats, &c., by the ordinance of 1647, "it is declared that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and

(*a*) See 6 Mass. 438. 3 Amer. Jurist, 115, 241. 2 Hutchinson's History, (3d ed.) 20.

(*b*) Ancient Charters, 213, 229.

not more wheresoever it ebbs further" with a proviso securing the passage of boats or other vessels over the water. (*a*) A grant of land, therefore, "below high water mark," if not otherwise restricted, will extend to low water mark, if that be not more than one hundred rods; and if it be more, the grant will extend to that distance. (*b*) So if the grant bound the grantee on a cove or creek, or on the salt water, sea, bay, &c. But the grantee cannot always claim the flats in the direction of the exterior lines of his upland, but only in the direction towards low water mark from the two corners of his upland at high water mark: As in the case of a circular cove, &c. (*c*)

If a grant bound the grantee upon the bank or margin of a stream, the stream itself is excluded. (*d*)

When a river is the boundary between two nations or States, if the original property is in neither, and there is no convention respecting it, each holds to the middle of the river. But when one State is the original proprietor and grants the territory on one side only, it retains the river in its own domain, and the newly erected State, or the old State to which the cession is made, extends only *to* the river; and low water mark is the boundary. This is the law in case of fresh streams, as well as in those in which the tide ebbs and flows. (*e*) So it was held in Handly's Lessee *v.* Anthony, (*f*) on a claim to an island in the Ohio River, as part of the territory of Kentucky; the cession by Virginia describing the territory as "situate, lying and being to the northwest of the river Ohio." So by the cession of Georgia to Alabama, the *western bank* of the river Chatahochee is the dividing line between those States. (*g*)

In the ordinance for the government of the territory northwest of the river Ohio, passed July 13, 1787, it was declared, that "the navigable waters leading into the Mississippi and

(*a*) Ancient Charters, 148. See 7 Cush. 67. 3 Allen, 513.

(*b*) Adams *v.* Frothingham, 3 Mass. 352. Austin *v.* Carter, 1 Mass. 231.

(*c*) Rust *v.* Boston Mill Corporation, 6 Pick. 158. See further, 6 Mass. 332. 10 ib. 146. Gray *v.* Deluce, 5 Cush. 9. Emerson *v.* Taylor, 9 Greenl. 42.

(*d*) Hatch *v.* Dwight, 17 Mass. 298.

(*e*) Vattel, Book I. chap. 22. (*f*) 5 Wheat. 374.

(*g*) Alabama *v.* Georgia, 23 Howard, 505.

St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor." (*a*)

Generally, the public have only an easement in the land over which a highway or road passes; as in rivers that are actually, though not technically, navigable; and a grant of land, bounding on a highway or road, generally extends to the centre of the way. (*b*) And this is so as well in cases of deeds bounding land on a private as on a public way. (*c*)

A deed bounding land on a certain passage way "between the land hereby conveyed and the house of A," excludes the passage way; the conveyed land being "external to the way." (*d*) So where in a deed a line begins at a stake on the side of the road, and thence other lines are given to said road, and thence "by said road to the place of beginning," the road is excluded. (*e*)

It was said in Parker *v.* Smith, 17 Mass. 413, and in some subsequent cases, that a deed bounding land on a way is a covenant by the grantor that there is such a way, and that it is not a mere description. But a deed bounding land on "a thirty feet street" was held not to amount to a covenant that the street is of that width throughout, but to be matter of description only. (*f*) And in Howe *v.* Alger, 4 Allen, 206, the previous cases were discussed, and a decision made, that if land is conveyed as bounding on a street, and the grantor has no interest in the adjacent land so described, this does

(*a*) Journals of the old Congress, vol. 12, (Folwell's ed.) p. 62. 3 U. S. Laws, (Story's ed.) 2077. 5 Ohio, 410.

(*b*) 1 Conn. 103. 15 Johns. 454. 2 ib. 357. Reed's Petition, 13 N. Hamp. 381. 3 Gray, 319. 8 Cush. 595. 3 Kent Com. Lecture, 41. Doe *v.* Pearsey, 9 Dowl. & Ryl. 908 and 7 Barn. & Cres. 304.

(*c*) Fisher *v.* Smith, 9 Gray, 441. Holmes *v.* Bellingham, 7 C. B. N. S. 329.

(*d*) Codman *v.* Evans, 1 Allen, 446: And see Brainard *v.* Boston & N. Y. Central Railroad, 12 Gray, 407. Smith *v.* Slocomb, 9 Gray, 36 and 11 ib. 280.

(*e*) Phillips *v.* Bowers, 7 Gray, 21. Sibley *v.* Holden, 10 Pick. 249.

(*f*) Clap *v.* McNeil, 4 Mass. 589.

not amount to an implied covenant that there is such a street legally laid out. In that case, Dewey, J., said that the whole extent of the preceding cases is "that a grantor of land, describing the same by a boundary on a street, or way, if he be the owner of such adjacent land, is estopped from setting up any claim, or doing any acts inconsistent with the grantee's use of the street or way; and that such estoppel would also apply to his heirs, or those claiming under him."

A grant of land described as abutting upon a street, which was merely laid down upon a map, but not actually opened, is not an implied grant of way in such street, nor a covenant to open a way there. (*a*)

6. *If the words of a contract do not fully express, or even if they are contrary to, the evident intention of the parties, the intention is to be preferred to the expression.* (*b*)

Thus the condition of a bond of £200 being "to *render* a fair, just, and perfect *account in writing* of all sums received" was held to be broken by the obligor's neglect to pay over such sums. Lord Mansfield said, it was clearly the intention of the parties, that the money should be paid. Buller, J., said, it never could be meant that so large a penalty should be taken merely to enforce the making out of a paper of items and figures. (*c*) So a proviso, that an annuity to a married woman should cease, if she should "associate, continue to keep company with, or criminally correspond with J. F.," was extended to all intercourse, so that J. F.'s calling and leaving his card at the house, and sometimes being admitted, though no improper behavior on his part, or levity on hers, was shown, was decided to be sufficient cause to stop the annuity. (*d*) A covenant that the lessee shall not exercise the trade of a butcher upon the demised premises, is broken by his there selling raw meat by retail, though no beasts were slaughtered

(*a*) Case of Mercer Street, 4 Cowen, 542. And see Loring *v.* Otis, 7 Gray, 563. Walker *v.* City of Worcester, 6 ib. 548. Underwood *v.* Stuyvesant, 19 Johns. 181.

(*b*) Domat, (2d ed.) 37, § 11. 41 Penn. State R. 142.

(*c*) Bache *v.* Proctor, 1 Doug. 382.

(*d*) Dormer *v.* Knight, 1 Taunt. 417.

there; the intention being to prevent the lowering of the tenement in the scale of houses, by the exercise, whether wholly or partially, of a trade which the lessor supposed would depreciate its value in future. (*a*) So a covenant by a lessee not to use or exercise, or suffer to be used or exercised upon the premises, any trade or business whatsoever without license of the lessor, was held to be broken by assigning the lease to a schoolmaster who kept a school in the house. (*b*)

These, and numerous other cases, come under the first part of the rule, namely, when the words "do not fully express" the intention of the contracting parties. They might, perhaps, be as properly classed under the third rule, that "the subject-matter of an agreement is to be considered in construing the terms of it," &c.

The following examples fall under the latter part of the rule; that is, where the words are contrary to the evident intent of the parties; as Vernon *v.* Alsop, (*c*) and the other cases already mentioned, where the condition of a bond was wholly contrary to the bond itself and nullified it; and the cases of evident mistake, cited under the fifth rule. So of a note or bill of exchange made payable to the order of a fictitious person, which is held to be payable to bearer. (*d*)

Posthumus pro nato habetur. Therefore where one gave a bond to pay £900 to his daughter, if he should have no son living at the time of his decease, chancery relieved against the bond, upon its being shown that there was a posthumous son who would receive less of the obligor's property than the daughter, if the bond should be paid. (*e*)

(*a*) Doe *v.* Spry, 1 B. & Ald. 617.

(*b*) Doe *v.* Keeling, 1 M. & S. 95. See also Doe *v.* Worsley, 1 Campb. 20. Doe *v.* Laming, 4 Campb. 77. Tombs *v.* Painter, 13 East, 1. Quackenboss *v.* Lansing, 6 Johns. 49. For construction of a covenant *not to assign* a lease without license, see 2 Selw. N. P. (1st ed.) 408–412; 3 M. & S. 353, 15 Johns. 278, 3 Pick. 221, 2 Stark. Ev. (4th Am. ed.) 433, 7 Johns. 227.

(*c*) 1 Lev. 77. 1 Sid. 105 and T. Ray. 68.

(*d*) Kyd on Bills, (3d ed.) 208, 268. Gould on Pleading, c. iii. § 180.

(*e*) Gibson *v.* Gibson, 2 Freeman, 223. See also Millar *v.* Turner, 1 Ves. Sen. 85. It has long been the statute law of Massachusetts, that posthumous children shall have the same share in their father's estate, when he makes a

It is, perhaps, rather by legal operation, than by construction, that a contract, "if it will not take effect that way it is

will in which they are not provided for, as if he had died intestate; to be taken proportionally from the devisees and legatees who claim under the will. (Ancient Charters, 351, St. of 1783, c. 24; Revised Statutes, c. 62.) This statute provision assumes, that if the father die intestate, a posthumous child will inherit; and such is the common law. Introduction to Reeve on Descents, pages lii. liii. Lands descend to the children already born, and vest; but are devested by the birth of a posthumous child. This devesting, however, takes place, in England, only when a son is born, the other children being daughters. 2 Bl. Com. 211. In New England, there is no distinction of sex in the law of descents.

In Reeve *v.* Long, 4 Mod. 282, (and in several other books) the courts of C. B. and B. R. decided that a remainder to A's first son, after a life estate limited to A, could not be taken by A's posthumous son. But the House of Lords reversed the decision, though all the judges retained their first opinion. Thereupon the statute of 10 & 11 W. III. c. 16, was passed, to enable posthumous children to take remainders limited to the children of the first or other person to whom the freehold is previously granted or devised. See Bac. Ab. Remainder and Reversion, D. Bul. N. P. 105. Stedfast *v.* Nicoll, 3 Johns. Cas. 18.

A child *in ventre sa mere* is now considered as born for all purposes which are for his benefit. Hale *v.* Hale, Pre. Ch. 50. White *v.* Barber, 5 Bur. 2703. Doe *v.* Lancashire, 5 T. R. 49. Doe *v.* Clarke, 2 H. B. 399. Hall *v.* Hancock, 15 Pick. 255. Trower *v.* Butts, 1 Sim. & Stu. 181. Heinec. Pand. Pars I. §§ 124, 125, Pars V. § 22. 1 Domat, (2d ed.) 277, § 14. The statutes of Massachusetts assume that effectual provision may be made by will for such child; and the cases above cited show that such is the law.

Technically, a posthumous child is one who is born after the death of the father. But a child born after the death of the mother has the same rights, and is "of the same condition with other children." 1 Domat, (2d ed.) 20, § 7, 8, & 624, § 6. There is no statute provision in Massachusetts respecting children born after the mother's death. If therefore a mother, having property, should die before delivery, the rights of the child subsequently delivered (*exsectus vel editus*) not technically born (*natus*), would be wholly governed by the common law. If the father were previously dead, doubtless the child would be strictly and technically posthumous, and clearly within the existing statutes. And if the father were alive, the child would inherit from the mother; and by the civil law might succeed to the property, *pro rata*, against a will omitting to provide for him. 2 Domat, (2d ed.) 109, § 8. By that law, a father might disinherit a posthumous child. If he omitted to mention such child in his will, the will was inofficious, so far as such child was concerned. If he were provided for, the will, &c., was valid, as at common law. 2 Domat, *supra*. Just. Inst. Lib. II. tit. 13. Justinian reformed the Roman

intended, it may take effect another way." The general intention of the parties is, in this manner, effected, though the particular intention fails. This usually happens where some legal impediment withstands the particular intent of the parties; (*a*) as in case, abovementioned, of a note or bill payable to the order of a fictitious person.

A freehold cannot be made to commence *in futuro*. Therefore a grant of land, by bargain and sale, from a father to a son, "to have and to hold after the death of the grantor," cannot operate as a bargain and sale, though so intended. But it shall operate as a covenant by the father to stand seized to his own use during life, and to the use of the son after the father's death. Thus the son has full title to the land after his father's decease, which was the chief purpose of the parties. (*b*) The same effect is given to a release attempting to convey a freehold *in futuro*. (*c*) So a deed, meant for a release, but not legally operative as such, is held to operate as a grant. (*d*) A grant in consideration of natural affection may operate as a covenant to stand seized to the use of the grantee. (*e*) The words "limit and appoint" may operate as a grant of a reversion, though intended as an appointment of uses, but not being sufficient for that purpose. (*f*) A release from a trustee to his *cestui que trust* may be considered as a bargain and sale. (*g*) A release to one not in possession, does not, as such, pass any estate; but if made for a valuable consideration, and registered, it will operate as a bargain and sale, or other lawful conveyance, as, by the

law by prohibiting a parent from disinheriting such child. Novel 115. Did this Novel extend to mothers? Heinec. Recit. Lib. II. § 524.

(*a*) Shep. Touch. 82. 6 East, 105. Willes, 686. Gould on Pleading, Book iii. §§ 174–180. 2 Saund. (5th ed.) 97 c.

(*b*) Doe *v.* Simpson, 2 Wils. 22. Wallis *v.* Wallis, 4 Mass. 135. Doe *v.* Salkeld, Willes, 673. Doe *v.* Whittingham, 4 Taunt. 20.

(*c*) Roe *v.* Tranmarr, Willes, 682.

(*d*) Goodtitle *v.* Bailey, Cowp. 597. Hastings *v.* Blue Hill Turnpike, 9 Pick. 80.

(*e*) Vanhorn's Lessee *v.* Harrison, 1 Dallas, 137.

(*f*) Shove *v.* Pincke, 5 T. R. 124.

(*g*) Jackson *v.* Beach, 1 Johns. Cas. 399.

Massachusetts statutes, the recording of a deed duly executed is equivalent to actual livery of seizin. (*a*)

In these and similar cases, the deeds, which are permitted to have an operation different from what was designed, must be consistent, in their terms and incidents, with the operation allowed. If the terms, &c., are repugnant to such legal operation, the deed cannot have its intended operation. It will be void.

An agreement between a lessor and the assignee of his lessee, that the lessor shall have the premises as mentioned in the lease, &c., shall operate as a surrender. (*b*)

A covenant never to sue shall operate as a release or defeasance, to prevent circuity of action. (*c*) *Aliter*, of a covenant not to sue within a specified time. (*d*) A covenant not to sue within a limited time, and also that if a suit be brought within the time, the cause of action shall cease, or that the defendant shall be discharged from the debt or duty, or the plaintiff shall forfeit the debt, will be a bar to the suit. The defendant is not turned round to a suit on the covenant. But if the covenant is successfully pleaded to a suit on the original cause of action, the whole purpose of the covenant is answered, and the covenantee cannot maintain an action against the covenantor for disturbing him by suit. (*e*) Such covenant, however,

(*a*) Pray *v.* Pierce, 7 Mass. 381, Russell *v.* Coffin, 8 Pick. 143. See also 6 Mass. 32. 3 Pick. 521. 4 Mason, 45. 7 Mass. 494. Stearns on Real Actions, 12, 13. 2 Saund. 97, note.

(*b*) Smith *v.* Mapleback, 1 T. R. 441. Lord Hale and his associates, 1 Vent. 141, approved of Lord Hobart's commendation of judges that are curious and almost subtile (*astuti*) to invent reasons and means to make acts effectual according to the just intent of the parties. Hob. 277. And C. J. Willes says, "Judges, in these later times, have (and I think very rightly) gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intention of the parties, than to the shadow, to wit, the manner of passing it." Willes, 684, referring to 3 Lev. 372.

(*c*) Deux *v.* Jefferies, Cro. Eliz. 352. 2 Saund. 48, note (1).

(*d*) Deux *v.* Jefferies, Cro. Eliz 352, 2 Saund. 48, note (1). Clarivil *v.* Edwards, 1 Show. 331. Perkins *v.* Gilman, 8 Pick. 229. Garnett *v.* Macon, 2 Brock. 185. Bac. Ab. Release, A. 2.

(*e*) White *v.* Dingley, 4 Mass. 433. See Upham *v.* Smith, 7 Mass. 265, 8 Johns. 58. Bac. Ab. Pleas and Pleadings, I. 7.

is not a bar to a suit on the original cause of action, when it is made with one of two or more joint contractors; for it would defeat the intention of the parties. (*a*) A covenant never to sue one of two or more joint or joint and several obligors or promisors does not operate as a release; for a release of one, in such case, is a release of all, and the intention is not to discharge the debt, but to exempt one of the parties from liability. The only remedy of the covenantee, if afterwards sued, is on his covenant. (*b*) In 12 Mod. 415, Holt, C. J., is reported to have said that a covenant not to sue for a specified time is a defeasance. If it be so, it might be pleaded in bar to a suit brought within the time. But the law is clearly otherwise. (*c*) If, however, there be in such covenant a provision that the covenantee may plead it in bar of a suit commenced before the time has elapsed, the law may be different.

A license to enclose common may operate as a release of common, if so intended; for, as a license, it is determined by the death of the party granting it. (*d*) Licenses, that convey any interest in land, must be by deed; and Parker, C. J., says "they are considered as leases, and must always be pleaded as such." (*e*) But in Bacon's Abridgment (*f*) it is said, "If one license another to enjoy such a house or land till such a time, this amounts to a present and certain lease or interest for that time, and may be pleaded as such, though it may be also pleaded as a license."

A perpetual license in form would doubtless operate as a grant of an easement, and might be pleaded as a grant. Indeed a prescriptive right rests on the presumption of a grant; and so does the right acquired by adverse enjoyment for twenty

(*a*) Hutton *v.* Eyre, 6 Taunt. 289. Garnett *v.* Macon, 2 Brock. 185.

(*b*) March, 95. Fitzgerald *v.* Trant, 11 Mod. 254. Lacy *v.* Kynaston, 12 Mod. 415, 551. Dean *v.* Newhall, 8 T. R. 168. Shed *v.* Pierce, 17 Mass. 623. Tuckerman *v.* Newhall, ib. 581. Harrison *v.* Close, 2 Johns. 448. Walker *v.* McCulloch, 4 Greenleaf, 421. See also Brooks *v.* Stuart, 1 P. & Dav. 615 and 9 Ad. & El. 854.

(*c*) See Aloff *v.* Scrimshaw, 2 Salk. 573, and the cases above cited.

(*d*) *Semb.* Miles *v.* Etteridge, 1 Show. 349.

(*e*) 11 Mass. 538.

(*f*) Bac. Ab. Leases, &c., K. Pleas and Pleadings, I. 7.

years. These rights, however, are not often pleaded as acquisitions by grant.

It is a rule of pleading, that things must be pleaded according to their legal operation. But where a thing may operate in two ways, at the election of the party, he may plead it in one way or the other, according to his election, as in the case of a license, before mentioned.

7. *The time when a contract was made is to be regarded in expounding it; and contemporaneous exposition is of great weight in construction.*

"Every grant shall be expounded as the intent was at the time of the grant. As, if I grant an annuity to J. S. until he be promoted to a competent benefice, and at the time of the grant he was but a mean person, and afterwards is made an archdeacon, yet if I offer him a competent benefice according to his estate at the time of the grant, the annuity doth cease." (*a*) But a written agreement cannot be controlled by a contemporaneous oral understanding of the parties, which is inconsistent with it. (*b*)

Ancient grants are to be expounded as the law was at the time of making them. (*c*) Modern methods of conveyancing are not to be construed to affect ancient notions of equity. (*d*) So the state of the country, and of the manners of society, is to be regarded, in expounding contracts. Thus, in Adams *v.* Frothingham, (*e*) where a vote of the town of Newbury came in question, "granting W. Noyes a piece of land below high water mark, to set a shop upon, and not exceeding forty feet in the front," the question was whether the lot should extend back to low water mark, or only to a distance sufficient to accommodate a shop. The vote was passed in 1680. The court held that the lot extended to low water mark; though such words, in a recent grant, in times of precision and accuracy, and when flats have become valuable, might receive a

(*a*) By Wray, C. J., Cro. Eliz. 35. See 1 Sneed, 141.
(*b*) 7 Blackf. 432.
(*c*) Co. Lit. 8 *b*. Amb. 288.
(*d*) See remarks of Spencer, J., 16 Johns. 23.
(*e*) 3 Mass. 360.

different construction. It was also supposed, from the state of the times and the country, that the proprietors of Newbury desired to settle the township, and to afford advantageous situations, on the river, to the settlers. The court also relied, in part, upon the fact that those, who occupied under Noyes's grant, claimed and used the flats, as they needed them, for nearly a century, without complaint from the grantors; and thus a practical construction, by both parties, had been given to the grant, sufficient to remove any doubts that might have arisen from its terms. This practical construction of the parties, immediately after the grant, is what is generally called contemporaneous exposition, which is said to be *optima et fortissima in lege.* (*a*)

Where, in a deed given in 1694, the grantor gave the privilege of cutting timber, for the purpose of building on the premises, from his woods, it was held that it might be shown that the grantee and his heirs, with the knowledge of the grantor and his heirs, had cut wood for the purpose of erecting fences upon the premises; in order to evince the intention of the parties to apply the word "building" to the making of fences, as well as to the erection of houses, &c. (*b*)

It is an established rule, that where the language of ancient instruments is obscure, or their construction doubtful, usage may be resorted to, as it is the best practical exposition of the parties' meaning. In Attorney General *v.* Parker, (*c*) Lord Hardwicke said: "In the construction of ancient grants and deeds, there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by."

In Cooke *v.* Booth, (*d*) on a demise for the lives of A. B. and C. it was covenanted that if A. (the lessee,) his heirs, &c., should choose, upon the death of B. and C., or either of them,

(*a*) See Branch's Maxims, (Hening's ed.) 30. Codman *v.* Winslow, 10 Mass. 149.

(*b*) Livingston *v.* Ten Broeck, 16 Johns. 14. See also Jackson *v.* Wood, 13 Johns. 346.

(*c*) 3 Atk. 577. See also Withnell *v.* Gartham, 6 T. R. 388. Weld *v.* Hornby, 7 East, 199, by Lord Ellenborough.

(*d*) Cowp. 819.

to surrender and take a new lease, and add a new life, in lieu of the life so dying, the lessor, his heirs, &c., would grant a new lease for the lives of the substituted persons, *under the same rent and covenants* as in the original lease. There were several renewals of the lease, and in each instance there was a similar covenant for renewal. The court held that the parties had put their own construction on the covenant, and that it was therefore to be regarded as a covenant for perpetual renewal. But this case has been impeached upon all occasions, and is overruled by the judgment of the court of exchequer chamber, in Iggulden *v.* May. (*a*) The decision in the exchequer chamber proceeded on the ground that the covenant in the lease was not intended for a covenant of perpetual renewal; that the words were not such as to warrant that construction; in short, that there was no room left for doubt, on the face of the instrument, what was the intention of the parties. Lord Ellenborough (7 East, 242,) said, "If the continued grant of successive leases, and not the grant of one only, were intended, it is natural to expect that words should have been used distinctly marking a right of repeated renewal, instead of expressions more immediately applicable to the case of a single additional lease." And this is the settled and only proper doctrine, namely, that usage, or contemporaneous exposition is not to be called in aid, when the language of a contract is clear and precise, but only where it is equivocal or doubtful. (*b*) This rule of construction applies to ancient charters granted to corporations, as well as to grants to individuals. Charters are contracts between the crown, or the state, and other persons, whether corporate or unincorporate, to whom they are granted. (*c*)

(*a*) 2 New Rep. 449 and 7 East, 237, and before Lord Eldon, in chancery, 9 Ves. 325. See also Tritton *v.* Foote, 2 Cox. 174. Rubery *v.* Jervoise, 1 T. R. 229.

(*b*) By Spencer, J. 16 Johns. 23. Peake on Ev. (2d ed.) 119. 3 Stark. Ev. (4th Amer. ed.) 1031. Cortelyou *v.* Van Brundt, 2 Johns. 357.

(*c*) See Blankley *v.* Winstanley, 3 T. R. 279. The King *v.* Bellringer, 4 ib. 810. The King *v.* Osbourne, 4 East, 327. Rex *v.* Varlo, Cowp. 250. Mayor, &c. of London *v.* Long, 1 Campb. 22. Evans's Pothier, (1st Am. ed.) 189 *& seq.*

In construing ancient statutes, the court constantly resort to contemporaneous exposition. (*a*) Indeed, most of the rules, which are adopted for the construction of contracts, are applicable to the construction of statutes; and for the same reason, namely, that they equally tend to give effect to the intention of the makers. (*b*)

8. *When terms are doubtful or ambiguous, they are to be taken most strongly against the person engaging. Verba chartarum fortius accipiuntur contra proferentem.* "A grant shall be construed most strongly against the grantor," &c. (*c*) This rule, however, applied only to deeds poll, because the words of an indenture were regarded as the words of each party alike. (*d*)

The rule of the civil law is the same in terms, but directly the reverse in its meaning and operation. By the form of contracting, in that law, the words of a stipulation were those of the party to whom the engagement was made. The party promising only assented to the question proposed by the party stipulating. (*e*)

There seems to be little of good sense, or of principle, in the maxim, as it originally stood, either in the common or civil law. The assent of two or more minds is necessary to constitute a contract; and there is great force in the argument of Serjeant Catline, in Plowden, 140, namely, "what difference is there when the lessor saith, 'I will have twenty shillings yearly for the land,' and the lessee agrees to it, and when the lessee says, 'I will give you twenty shillings yearly for the land,' and the lessor agrees to it? Certainly, there is no difference at all. For, in contracts, it is not material which of the parties speaks the words, if the other agrees to them; for

(*a*) Sheppard *v.* Gosnold, Vaugh. 169. Rogers *v.* Goodwin, 2 Mass. 475. Packard *v.* Richardson, 17 ib. 144. Stuart *v.* Laird, 1 Cranch, 299. McKeen *v.* Delancy's Lessee, 5 ib. 22.

(*b*) Bac. Ab. Statute, I. Com. Dig. Parliament, R. 10–29. Dwarris on Statutes, (2d ed.) c. ix. & x.

(*c*) Shep. Touch. 87, 88. Plowd. 171. Co. Lit. 197 *a*.

(*d*) Plowd. 134. 2 Bl. Com. 384.

(*e*) Heinec. Pand. Pars vii. tit. 1. 1 Domat, (2d ed.) 37, §§ 13–15. 1 Evans's Poth. (1st Amer. ed.) 50, note.

the agreement of the minds of the parties is the only thing the law respects in contracts." The rule, however, did exist, and was upheld by the notion, that the terms of the agreement were to be regarded as the words rather of the promisor, by the common law, and of the promisee, by the civil law.

In the common law, this rule of construction, at the present day, has a very limited operation, and amounts, in effect, to nothing more than this, namely, that in a case of doubtful or ambiguous terms, the party promising shall be held to perform so much as to make the terms of his engagement operative, according to the spirit of those terms, *ut res magis valeat quam pereat.* The rule was always subject to all the preceding rules that have been mentioned. *They* were first to be applied, and *this* resorted to, only when they all failed; which would seldom happen. "This being a rule of some strictness and rigor," says Lord Bacon, "doth not as it were its office, but in the absence of other rules, which are of some equity and humanity." (*a*) And it never was applied in cases where the contract contained anything in its nature odious, or unequally burdensome; as, in case of a penalty, &c. (*b*) Nor where it would operate as a wrong upon third persons. Thus, although where the owner of an estate in fee makes a lease for life, without expressing for whose life, it shall be intended for the life of the lessee, as most favorable to him; yet it is otherwise, if such lease be given by a tenant in tail; for if it were to be construed for the life of the lessee, it might injure the reversioner. (*c*)

In case of a grant, &c., by the king or government, the rule of construction is reversed, and the grant is taken most beneficially for the grantor. (*d*)

Subject to these modifying remarks, this rule of construing an agreement most strongly against the promisor, has still some operation in practice, though a very limited one. In

(*a*) See 1 Powell on Con. 395. 1 Ev. Poth. (1st Amer. ed.) 52.

(*b*) 1 Powell on Con. 397 *& seq.*

(*c*) Co. Lit. 42, 183.

(*d*) 2 Bl. Com. 351. 2 Wooddeson, 307. Jackson *v.* Reeves, 3 Caines, 296.

Adams *v.* Frothingham, (*a*) and in Worthington *v.* Hylyer, (*b*) the court would have adopted this rule (as they declared) in order to give the party his full justice, if other rules had not been found sufficient for the purpose. It is said in the books that under this rule falls that class of cases, in which the masculine is held to include both sexes, and the indefinite is construed to be universal. (*c*) All these cases, however, seem fairly to come under some of the preceding rules of construction, as the fourth, respecting the subject matter, or the sixth, by which the intention is to be preferred to the expression, when the words do not express the evident intention.

Where a release of all lands, &c., belonging, used, occupied, and enjoyed, or deemed, taken, or accepted as part of clock mills, was given to the plaintiff, it was held that leasehold lands, *within the description*, passed by the release, though a release was a conveyance adapted to freehold estates; an assignment being the proper conveyance of a term for years. (*d*) The court held that the rule applied, in this case, that the deed should be construed most strongly against the grantor. Otherwise, the defendant would have been enabled, after a long interval of time, to invalidate his own conveyance, against the plaintiff's possession, and for the purpose of obtaining unjust possession for himself.

On the same principle, exceptions or reservations in a deed shall be taken most favorably to the grantee, and if not set down or described with certainty, the grantee shall have the benefit that may arise from such defect. (*e*) So where a deed may enure several ways, the grantee shall have his election which way to take it. (*f*) And where an instrument was so drawn that it could not be ascertained whether it was intended for a bill of exchange or a promissory note, it was held that the payee might regard and treat it, as the one or the other, at his election. (*g*)

(*a*) 3 Mass. 361. (*b*) 4 Mass. 205.
(*c*) 1 Powell on Con. 400 *&* *seq.*
(*d*) Doe *v.* Williams, 1 H. Bl. 25.
(*e*) Jackson *v.* Hudson, 3 Johns. 375. Jackson *v.* Gardner, 8 ib. 394.
(*f*) Heyward's case, 2 Co. 35.
(*g*) Edis *v.* Bury, 6 Barn. & Cres. 433 and 9 Dowl. & Ryl. 492.

A lease for seven, fourteen, or twenty-one years was given. The question arose, at whose option it was, at which of these periods the lease should determine. It was decided that it was at the option of the lessee, on the principle that the terms of the lease were to be construed most strongly against the lessor; or, in other words, most favorably to the lessee. (*a*)

In many instances of this nature, it is obvious that the interest of each party is the same. But where the lessor wishes to determine the lease, and the lessee wishes to hold on, the legal presumption, and perhaps the actual fact, would be that it is for the advantage of the lessor to determine it; and in such a case, the principle of this eighth rule is clearly applicable. But after all it is perhaps rather a rule of law and equity, than of construction of contracts, by which the lessee's option is secured to him.

In matters of election, in alternative contracts, it is the settled doctrine that the option is in the party who is to perform one of two or more acts. (*b*) Such also is the doctrine of the civil law; and Pothier states it as a consequence of his seventh rule of interpretation, namely, that "in case of doubt, a clause ought to be interpreted against the person who stipulates anything, and in discharge of the person who contracts the obligation."

On the same principle, if by the contract an election is given or reserved, of two several things, he who is the first agent, and who ought to do the first act, shall have the election. (*c*) And this will be the promisor or promisee, according to the nature of the contract. (*d*) But if a person, bound in the alternative to do one of two things, by a certain day, let the day pass without making an election, by performing one or

(*a*) Dann *v.* Spurrier, 3 Bos. & Pul. 399, 442 and 7 Ves. 231. See also Doe *v.* Dixon, 9 East, 15. There were *obiter dicta*, in a former case, (Goodright *v.* Richardson, 3 T. R. 462,) that either party might, in such case, determine the lease.

(*b*) Layton *v.* Pearce, 1 Doug. 15. Bac. Ab. Election, B. Com. Dig. Election, A. 2 Ev. Poth. (1st Amer. ed.) 46 *& seq.* Smith *v.* Sanborn, 11 Johns. 59.

(*c*) Co. Lit. 145, *a*.

(*d*) See examples, in Bac. Ab. & Com. Dig. *supra*.

the other, he loses his election, and the other party may elect which he will demand. As, where one was bound to pay six hundred dollars for a patent right, at the end of twelve months, or to account for the profits, and he did neither at the end of that time, the other party was held entitled to demand six hundred dollars, though the profits were less than that sum. (*a*)

There are cases, in which the mere omission of the party to perform one alternative is an election of the other. As, where goods are sold at six *or* nine months' credit, the purchaser, by not paying at the end of six months, elects to take credit for nine; and he cannot be sued before nine months have elapsed. (*b*) If, however, in this case, the contract had been, that at the end of three months, the buyer should give his note at three or six months, and he had done neither, doubtless, (on the principle of the foregoing cases,) he might have been sued for breach of his contract, though not for the price of the goods. He might be sued for the goods, at the expiration of the three months; as the election belonged to the seller, and the time of credit was no longer at the buyer's option. (*c*)

Where a contract, a will, or a statute, is unintelligible, and the meaning cannot be elicited by any of the foregoing rules of construction, it is inoperative and void. (*d*)

(*a*) M'Nitt *v.* Clark, 7 Johns. 465. More *v.* Morecomb, Cro. Eliz. 864. Abbot *v.* Rookwood, Cro. Jac. 594.

(*b*) Price *v.* Nixon, 5 Taunt. 338.

(*c*) Mussen *v.* Price, 4 East, 147. Brooke *v.* White, 1 New Rep. 330. Cothay *v.* Murray, 1 Campb. 335.

(*d*) 4 Mass. 205, by Parsons, C. J. Swinburne, Part vii. §§ 6–10. Powell on Devises, (1st ed.) 411. United States *v.* Cantril, 4 Cranch, 167. Bac. Ab. Statute, A.

CHAPTER VI.

OBLIGATION OF CONTRACTS.

The constitution of the United States, article I., § 10, provides, that no State shall pass any law impairing the obligation of contracts.

The reason and the meaning of this prohibition are to be sought, in part at least, in the history of the country previously to the adoption of this constitution. The finances of the States, and the ability of individuals, had been greatly impaired by the burdens imposed during the war of the revolution; and upon the establishment of peace, it was found, that the sources of profit, and the resources of enterprise were closed or greatly lessened, by the depression of property and the pressure of private and public debt.

Severe and urgent embarrassments, however temporary they may be supposed to be, often induce individuals and communities to resort to sinister and desperate methods of relief. Such were the attempts, in this instance. The States refused to redeem their paper, issued during the war; and tender laws were passed, compelling creditors to receive worthless or very insufficient articles in payment of their dues. Divers equally exceptionable legislative shifts and devices are to be found in the history of that period, resorted to for the purpose of relieving the citizens and the States from the performance of meritorious and solemn engagements. Shays's rebellion, in Massachusetts, was excited by the poverty of the people, their inability to pay their debts, and the uniform refusal of the legislature to emit a paper currency, subject to depreciation, and to be a tender; and also by the course of

law in the collection of debts. Lawyers became odious to debtors, (who were a great majority), by their agency in enforcing the law; and the effects of the odium then raised against them, and against men of capital, were perceptible long after prosperity was restored. (*a*)

But though the mischiefs, which had been felt, after the close of the war of the revolution, were doubtless the occasion of the clause in the constitution, forbidding the States to pass laws impairing the obligation of contracts, yet the clause is, by no means, to be limited to cases which had previously occurred. The convention which framed that instrument, warned by the past, intended not only to prevent a recurrence of the evils already endured, but also to guard against the happening of similar evils; "to establish justice," and the most perfect faith in agreements, and to ensure the sanctity of private property, so far as these objects can be secured by legislative enactments.

This clause in the constitution seems not to have met with any opposition from the people of the United States. In none of the "Debates on the Constitution," which have been seen, was this restriction upon the power of the States made a theme of complaint. Indeed, the authors of the Federalist, who met every objection that they heard or could devise, devote to this topic only a single page. In No. 44, Mr. Madison says: "Very properly have the convention added this

(*a*) The legislature of Kentucky, about forty years since, attempted, by a system of relief laws, stop laws, &c., to remedy the evils which arose from a depreciation of the bank notes (the principal currency) of that State; and the people were divided and convulsed on this system of relief. The courts of the State pronounced these laws unconstitutional. A breach of their State constitution was then added, by abolishing their supreme court and organizing another. The old court proceeded as before, and the new court proceeded as they could; and two sets of judges, counteracting each others' proceedings, led to such confusion and anarchy, as has not often been witnessed in civilized communities. The remedy was found worse than the disease, and the good sense of the people finally prevailed; and after the election of the governor and legislature, in 1827, the course of justice returned to its old and proper channels. The decisions of the new court, in 2 Monroe, are not regarded as authority.

constitutional bulwark in favor of private rights; and I am much deceived, if they have not, in so doing, as faithfully consulted the genuine sentiments, as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret, and with indignation, that sudden changes and legislative interference, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community." (*a*)

This prohibitory clause in the constitution has given rise to some of the ablest discussions that have been witnessed in the United States.

The first question that arises in this clause, respects the meaning of the term "contract." As was stated, *ante*, 1, the late chief justice of the United States, in a case arising on this constitutional prohibition, defined a contract to be "an agreement in which a party undertakes to do or not to do a particular thing." And the decisions, presently to be cited, have settled the point, that contracts executed, as well as executory; conveyances of land, as well as commercial engagements; public grants by a State to corporations and individuals, as well as private agreements between citizens, grants and charters in existence when the constitution was adopted, as well as those existing previously, even before the revolution; and compacts between the different States themselves, are equally within this prohibitory clause of the constitution.

This provision of the constitution has never been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general right of a legislature to legislate on the subject of divorces. (*b*) Though marriage is, in one sense, a contract, as it is both stipulatory and consensual, and cannot

(*a*) See also, in this connection, the remarks of Marshall, C. J., 12 Wheat. 354, 355.

(*b*) By Marshall, C. J., 4 Wheat. 629. See 10 N. Hamp. 385.

be valid without the concurrence of two competent minds, yet it is *sui generis*, and, unlike ordinary contracts, is *publici juris*, as it establishes most important domestic relations. And since every well organized society is essentially interested in the harmony and decorum of all its social relations, marriage, which is the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and cannot, like mere contracts, be dissolved by the mutual consent of the contracting parties only, but may be abrogated by the sovereign will, either with or without the consent of both parties, whenever the public good, or justice to both or either of the parties, will be thereby subserved. Such a remedial and conservative power is inherent in every independent nation, and cannot be surrendered or subjected to political restraint or foreign control, consistently with the public welfare. And therefore marriage, being much more than a contract, and depending essentially on the sovereign will, is not embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts. The obligation is created by the public law, subject to the public will, and not to that of the parties. So far as a dissolution of a marriage, by public authority, may be for the public good, it may be the exercise of a legislative function; but so far as it may be for the benefit of one of the parties, in consequence of a breach of the contract by the other, it is undoubtedly judicial. (*a*)

The next question, what is the exact import of the term "obligation," is perhaps not quite so authoritatively answered by the adjudications. It is manifest, that the obligation of a contract is something different from the contract itself; otherwise, the very phrase would be senseless, or merely tautological.

In Sturges *v.* Crowninshield, (*b*) Marshall, C. J. says, "the law binds the party to perform his undertaking; and this is, of course, the obligation of his contract." Trimble, J., (*c*) says, "the obligation of the contract consists in the power and

(*a*) By Robertson, C. J., 7 Dana, 183, 184. (*b*) 4 Wheat. 197.
(*c*) 12 Wheat. 318. See also 4 Littell, 34, 47.

efficacy of the law, which applies to and enforces performance of the contract, or the payment of an equivalent for non-performance. The obligation does not inhere in the contract itself, *proprio vigore*, but in the law applicable to the contract." Indeed, it is agreed on all hands, that the law of the contract forms its obligation. But what law? "All admit," says Chief Justice Marshall, "that the constitution refers to and preserves the legal, and not the moral obligation of a contract. Obligations purely moral are to be enforced by the operation of internal and invisible agents; not by the agency of human laws. The restraints imposed on the States by the constitution are intended for those objects which would, if not restrained, be the subject of State legislation." (*a*)

What, then, is the original legal obligation of a contract; the moral obligation, that is, the moral law, not being the law thereof?

On one side, it was said, that the universal law of all civilized nations, which declares that men shall perform their engagements, is the law intended in this clause of the constitution. It is this law which creates the obligation of a contract made in a savage wilderness, or on a desert island, where no municipal law exists. The writers on natural and national law give this view of the subject. (*b*)

On the other side, it was insisted, that the framers of the constitution had not the universal law of civilized nations in view, any more than the moral law; but that the obligation intended is the obligation imposed by the municipal law of the State where the contract is made. Justinian's Institutes were relied on: "*Obligatio est juris vinculum, quo necessitate adstringimur alicujus rei solvendæ secundum nostræ civitatis jura.*" Book iii., tit. 14. Paley, in his Moral Philosophy,

(*a*) 12 Wheat. 337.

(*b*) See quotations, 12 Wheat. 222, 223, in the margin. See also Hutcheson's Moral Philosophy, book ii., c. 9, § 1, where it is said, "that the rights founded on contracts are of the perfect sort, to be pursued even by force; and the sacred obligation of faith in contracts appears from the mischiefs which must ensue upon violating it." Heineccius, in his Elements of the Law of Nature and Nations, book i., c. 14, is very explicit to the same effect. Grebner's Philosophia Moralis, sive Ethica, et Jus Naturæ, pars ii., cap. vii. § 1.

book ii., c. 2, says, "a man is to be said to be obliged, when he is urged by a violent motive, resulting from the command of another."

Three of the justices of the supreme court of the United States held, that the constitutional prohibition against passing laws impairing the obligation of contracts referred to the universal law. The other four, that the municipal law of the State, where the contract is made, was intended.

This question cannot often arise. It was discussed with great power, in the case of Ogden *v.* Saunders, (*a*) and the whole case deserves attention. The question before the court, in that case, was, whether an insolvent law of New York, which discharged both the person of the debtor and his future acquisitions of property, impaired the obligation of contracts, as it respected debts contracted subsequently to the passing of the law. Four judges, against three, held such a law not to be unconstitutional. And such has been the opinion of State courts, before which the same question has been brought. (*b*)

One ground, on which this question was argued was, that, as the law existed before the contract was made, the contract was made with reference to the law, and so its obligation was not impaired, because the creditor knew that, on certain contingencies, the law would discharge the debtor, and therefore he took his chance. The answer given to this argument was, that the creditor also contracted with reference to the constitution, and that if the statute was unconstitutional, it was not law.

Previously to the decision of Ogden *v.* Saunders, it had been unanimously decided by the supreme court of the United States, in Sturges *v.* Crowninshield, (*c*) that a statute of New York was unconstitutional, which discharged both the body and the property of a debtor, so far as respected contracts made before the statute was passed. In that case, the court

(*a*) 12 Wheat. 213.

(*b*) 7 Johns. Ch. 297. 16 Johns. 233. 1 Ohio, 236. 5 Mass. 509. 13 ib. 16, 19.

(*c*) 4 Wheat. 122.

held, that until congress exercise the power of passing uniform bankrupt laws, the several States may pass bankrupt or insolvent laws, provided they do not impair the obligation of contracts; that laws releasing debtors from liability to imprisonment, statutes of limitation, &c., did not impair the obligation of contracts; as imprisonment, and the time of suing, &c., formed no part of the contract, but were the means of enforcing it. Of course, it was held, that as most of the insolvent laws of the States only discharged the person of the debtor, leaving the obligation to fulfil the contract in full force, and not exempting even his future acquisitions from the reach of creditors, they were not within the prohibitory clause of the constitution. "Undoubtedly," said Taney, C. J., in 1 Howard, 315, 316, "a State may regulate, at pleasure, the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may direct that the necessary implements of agriculture, or the tools of mechanics, or articles of necessity in household furniture shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every State, to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case, it is prohibited by the constitution." See also DeCordova *v.* City of Galveston, 4 Texas,

473, 474. Paschal *v.* Perez, 7 ib. 365. Auld *v.* Butcher, 2 Kansas, 155, 156. Clark *v.* Martin, 49 Penns. State Rep. 299, 302. 23 Maine, 318. 4 Humph. 13. 4 Foster, 344. 13 B. Monroe, 282. 35 Alab. 280. 37 ib. 679. 13 Richardson, 498. 2 Story on Const. (3d ed.) § 1385.

A grant by a State is a contract within the meaning of this prohibitory clause. Thus where the legislature of Georgia authorized the sale of a tract of wild land, and a grant was made by letters patent, in pursuance of the act of the legislature, to the Georgia Company, and a succeeding legislature declared the former act to be void; it was decided that the former act could not constitutionally be repealed, so as to rescind a sale made under it. (*a*) The same principle is asserted in Rehoboth *v.* Hunt, (*b*) in Pike *v.* Dyke, (*c*) and in Montgomery *v.* Kasson. (*d*)

In 1770, the officers of an episcopal parish church in Virginia purchased a tract of land "for the use and benefit of said church in said parish." By previously existing statutes, and the common law, the land thus purchased became vested, either directly or beneficially, in the episcopal church; and the property remained unimpaired notwithstanding the American revolution. For it is a principle of common law, that the division of an empire creates no forfeiture of previously vested rights of property. Several subsequent statutes recognized the rights of the church, and made provision for the management of its property. But in 1798, all these statutes were repealed, as inconsistent with the principles of the constitution of Virginia, and of religious freedom; and in 1801, the legislature asserted its right to all the property of the episcopal church in the respective parishes in the State, and authorized the overseers of the poor, in every parish where any glebe land was vacant, or should become so, to sell it and appropriate

(*a*) Fletcher *v.* Peck, 6 Cranch, 87. And see Bristoe *v.* Evans, 2 Overton, 341, 346.

(*b*) 1 Pick. 224.

(*c*) 2 Greenl. 213, 217. See also 5 Haywood, 106. 1 Nott & McCord, 401. 2 Peters, 657.

(*d*) 16 Cal. 189.

the proceeds to the use of the poor of the parish. The court decided, that even if the property had been granted to the church by the king, or by the State, there could be no legal pretence that it could be resumed, or that it would become the property of the State in consequence of the revolution. But, admitting that such might have been the right of the State, yet the court held that a statute passed in 1776 operated as a new grant, and a confirmation of the title of the church lands, to the use of the church, and vested an indefeasible and irrevocable title; and that a contrary doctrine would uproot the fundamental principle of a republican government, to wit, the right of the citizens to the free enjoyment of property lawfully acquired. (*a*)

The supreme court of North Carolina declared unconstitutional and void a statute repealing a grant of lands to the University of that State. (*b*)

In 1758, the government of New Jersey, by a convention with the remnant of the tribe of Delaware Indians, extinguished their title to all the lands in that territory, south of the river Raritan, by taking a release; in consideration of which release the government purchased a tract of land on which the Indians were to reside. In the act of the legislature, confirming the convention, it was provided "that the lands to be purchased for the Indians aforesaid should not thereafter be subject to any tax; any law, usage or custom to the contrary thereof in any wise notwithstanding." The Indians continued in possession of the land thus conveyed to them, until 1801, when they became desirous to join their brethren in Stockbridge, and applied to the legislature of New Jersey for liberty to sell their lands. An act was passed, granting this liberty, but wholly silent as to the privilege of exemption from taxation annexed to the land by the act of 1758. The commissioners, under the act of 1801, sold the land in 1803, to George Painter and others. In 1804, the legislature repealed the

(*a*) Terrett *v.* Taylor, 9 Cranch, 43. See also Pawlet *v.* Clark, 9 Cranch, 292. Lowry *v.* Francis, 2 Yerger, 534. Society *v.* New Haven, 8 Wheat. 464.

(*b*) University *v.* Foy, 2 Haywood, 310, 374. Den *v.* Foy, 1 Murph. 58.

section of the act of 1758, which exempted the land from taxation. The land was afterwards taxed, and the taxes demanded. The State court sustained the tax; but the supreme court of the United States held that the act of 1804 was unconstitutional, as it impaired the obligation of "a contract clothed in forms of unusual solemnity."

The privilege, though for the benefit of the Indians, was, by the terms which created it, annexed to the land itself, and not to their persons. It was for their advantage that it should be so annexed; because, in the event of a sale (on which alone the question would become material) the value would be enhanced by it. The State might have insisted on a surrender of this privilege as a condition of permitting the sale. But as the land was sold with the assent of the State, with all its immunities, the purchaser succeeded, with the assent of the State, to all the Indian rights, and became entitled to the benefit of the contract between the State and them. The obligation of that contract was impaired by a statute annulling so essential a part of it. (*a*)

In 1769, a charter was granted by the crown, incorporating twelve persons by the name of the Trustees of Dartmouth College, granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who were to govern the college, to fill all vacancies that might be created in their own body. This charter was accepted by the trustees, and the property, which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body. In 1816, the legislature of New Hampshire undertook to amend this charter, and to enlarge and improve the corporation of Dartmouth College. The number of trustees was increased to twenty-one; the appointment of the additional eleven was given to the executive of the State; and a board of overseers, consisting of twenty-five persons, was instituted, with power to inspect and control the most

(*a*) New Jersey *v.* Wilson, 7 Cranch, 164. See also Hardy *v.* Waltham, 7 Pick. 110. Atwater *v.* Inhabitants of Woodbridge, 6 Conn. 223. Osborne *v.* Humphrey, 7 ib. 335. Landon *v.* Litchfield, 11 ib. 251. But see 31 Conn. 410.

important acts of the trustees. The majority of the old trustees refused to accept the amended charter.

A suit was brought in the State court, by the old trustees, against an officer of the new board which had assumed the control of the institution and of its funds, to recover the property thus assumed. That court decided in favor of the new board; holding that the amended charter was not a violation of the constitution. (*a*) This decision was reversed by the supreme court of the United States, and the college was restored to its former foundation. (*b*)

The charter was held to be a contract; and no one doubted whether the amendment impaired its obligation. The chief question raised was respecting the nature of the corporation; whether it was public or private. The whole doctrine of public and private corporations, of eleemosynary institutions, &c., was most ably discussed; but that doctrine is not to be considered in this place. As to public corporations, such as counties, towns, &c., it is not doubted that the crown, or parliament, or a State legislature, may modify them at pleasure, provided private rights of property are not thereby infringed. It was admitted by the court, in this case, that if the charter were a grant of political power; if it created a civil institution to be employed in the administration of government; or if the funds of the college were public property; or if the State of New Hampshire, as a government, was alone interested in its transactions; the legislature of the State might act according to its own judgment, without restraint of its power by any limitation imposed by the constitution of the United States. But as the court held the college to be an eleemosynary institution, endowed with a capacity to take property for objects not connected with government; that the funds were bestowed on the faith of the charter; that the donors had stipulated for the future disposition and management of the funds in the manner prescribed by themselves; and though neither those who contributed the funds and made stipulations, nor those

(*a*) 1 N. Hamp. 111.

(*b*) 4 Wheat. 518. See also Norris *v.* Abingdon Academy, 7 Gill & Johns. 7. Regents of University of Maryland *v.* Williams, 9 ib. 365.

for whose benefit they were contributed and made, might be before the court; yet those, whom they had legally empowered to represent them forever, were entitled to assert all the rights which the original donors, &c., possessed, while in being.

The charter was held to be a contract, to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeded), were the original parties, and clearly within the letter and spirit of the constitution. And as the power of governing the college, and filling vacancies in the board of trustees, was expressly given by the crown to the trustees themselves, and their number was fixed at twelve, and was thus forever to continue, the alteration, without their consent, was of a character about which two opinions could not be entertained; that it was utterly subversive of the contract on the faith of which donations were made to the college. (*a*)

The principles of the foregoing adjudication have often been recognized and acted upon by the State judiciaries. In Wales *v.* Stetson (*b*) Parsons, C. J., says, " the rights legally vested in any corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." Hence, in Nichols *v.* Bertram, (*c*) where a suit was brought to recover the penalty for forcibly passing a toll gate on a turnpike road and the defence was that by statute of 1804 no turnpike corporation was entitled to toll unless there were a signboard at the toll gate, with the rate of toll legibly printed in capital letters; it was held, that though the letters on the board were not *capital*, yet as they were *large*, and as the act incorporating the turnpike was prior to the statute of 1804 and only required

(*a*) See also Allen *v.* McKeen, 1 Sumner, 276, where the principles of this case were applied to statutes of Maine, attempting to change the tenure of the office of President of Bowdoin College. See also 2 Fairf. 118. 13 Ired. 75, 80. 3 Jones, (N. C.) 207. 18 Cal. 590. St. John's College *v.* The State, 15 Maryl. 374.

(*b*) 2 Mass. 146. See also 9 Wend. 351. But see State *v.* Stebbins, 1 Stew. 299.

(*c*) 3 Pick. 342. See also Derby Turnpike Co. *v.* Parks, 10 Conn. 522.

the toll board to contain the rates of toll printed in "large *or* capital letters," the grant must prevail against the subsequent statute.

A statute authorizing certain persons to pass over a turnpike road without paying toll, who were not exempted from paying toll by the act incorporating the turnpike company, is unconstitutional and void, if not accepted by the company. (*a*)

The Dedham Bank issued bills in the form of drafts on the cashier of Middletown Bank in Connecticut, where its funds were deposited for the payment. These drafts became a common currency; and the legislature interposed, and enacted that no bank should issue any bill, draft, &c., payable at any place, except at the same bank; and that every bank which had issued or should issue any bill, draft, &c., payable at any other place than at the same bank, should be liable to pay the same in specie to the holder, on demand at said bank, without any demand at the place, where, on the face of it, it was payable. This statute, so far as it applied to drafts issued before its enactment, was held to be unconstitutional. The obligation of the drawer of a bill is to pay, on refusal by the drawee, and seasonable notice of his default. This obligation is impaired by a statute requiring payment to be made on different terms. (*b*)

A statute of Alabama provided that if any incorporated bank should not, after six months from the passing of said statute, make regular specie payments, its charter should be forfeited. This statute was held to be unconstitutional and void as to preëxisting banks, as it annexed a cause of forfeiture not contained in the acts incorporating them, and without the consent of the corporations. (*c*)

Where a company was incorporated for the purpose of making a turnpike road, but sufficient subscriptions were not obtained to authorize the granting of a charter, and an

(*a*) Pingry *v.* Washburn, 1 Aik. 264.

(*b*) King *v.* Dedham Bank, 15 Mass. 447.

(*c*) The State *v.* Tombeckbee Bank, 2 Stew. 30. See also Logwood *v.* Huntsville Bank, Minor, 23.

additional statute divided the contemplated road into two parts, and authorized the granting of two charters, and provided that those who had subscribed for stock at one place, should be members of one company, and those, who had subscribed at another place, should be members of the other company; the last statute was held to be unconstitutional and void as to those stockholders who had not agreed to its provisions. (*a*)

The legislature of Vermont passed an act releasing a debtor from imprisonment, and directing that the bond which he had given to the sheriff for the liberty of the prison limits, and which had been assigned to the creditor, should be discharged. The supreme court of that State decided that this act was unconstitutional. (*b*) So it was held by the supreme court of Indiana, that the legislature could not deprive a creditor of his right to recover payment from bail who were absolutely fixed. (*c*) So it was decided in Kentucky, that a party, who had commenced an action before the occupying claimant law of 1797 was passed, had a right, by the constitution, to have his cause decided according to the rules of law that were in force when his suit was commenced. (*d*) Like decisions have been made in North Carolina (*e*) and in Tennessee. (*f*)

Where a tract of land, including a river not navigable, was granted by patent, without any reservation, or any restriction in the use of the river, it was decided that a subsequent statute, which required the grantee to alter his dams on the river, so as to let salmon pass up, impaired the obligation of the contract contained in the patent, and was void. (*g*)

A statute, dividing a town and incorporating a new one, enacted that the new town should be held to pay its proportion

(*a*) Indiana, &c. Turnpike *v.* Phillips, 2 Pennsyl. 184.

(*b*) Starr *v.* Robinson, 1 Chip. 257. See also 1 Aik. 121. 2 Verm. 174, 517. 3 Verm. 360.

(*c*) Lewis *v.* Brackenridge, 1 Blackf. 220.

(*d*) Johnson *v.* Rowland, Pr. Dec. 90. And see also Grayson *v.* Lilly, 7 Monroe, 11. January *v.* January, ib. 544. Pool *v.* Young, ib. 588. McKinney *v.* Carroll, 5 Monroe, 98. Lapsley *v.* Brashears, 4 Littell, 53.

(*e*) Jones *v.* Crittenden, 1 Car. Law Repos. 385.

(*f*) Townsend *v.* Townsend, Peck, 1.

(*g*) People *v.* Platt, 17 Johns. 195.

towards the support of paupers, then on expense in the old town. A subsequent statute, exonerating the new town from this liability, was held to be void, as it impaired the obligation of the contract created by the statute of division and incorporation. (*a*)

In 4 Wheat. 207, Marshall, C. J., said that, " If, in a State where six years may be pleaded in bar to an action of assumpsit, a law should pass, declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there would be little doubt of its unconstitutionality."

And the supreme court of Massachusetts had previously declared, that " if the legislature of any State were to undertake to make a law preventing the legal remedy upon a contract lawfully made and binding on the party to it, there is no question that such legislature would, by such act, exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract, within the meaning of the constitution." (*b*) The same doctrine is explicitly asserted by Story, J., (*c*) and by the supreme court of Maine. (*d*)

A statute, therefore, providing that existing contracts, if made before a specified day, shall not be sued; or that, if sued, they shall not be enforced, would be unconstitutional, as impairing the obligation of contracts; provided such statute be wholly retrospective, or do not allow a reasonable time for the creditor to bring his action. And it will be found, that when statutes of limitation were first enacted, there was generally a future day fixed, before which they were not to operate; and a saving of all actions already pending. (*e*) There are several instances, under the provincial government of Massachusetts, in which a clause was inserted in a newly enacted limitation act, making it the duty of town officers to read the statute annually in open town meeting, for the purpose of giving

(*a*) Bowdoinham *v.* Richmond, 6 Greenl. 112. (*b*) 8 Mass. 430.
(*c*) 2 Gallis. 141. (*d*) 2 Greenl. 293, 294.
(*e*) See English Sts. 32 H. VIII. c. 2. Brook's Reading, 5, 6. 21 Jac. I. c. 16. Lord Tenterden's act, 9 Geo. IV. Massachusetts Ancient Charters, &c., 175, 216, 307, 522, 672, St. 1786, c. 52, 1807, c. 75, 1825, c. 109, § 2.

actual notice of its provisions to all the people. (*a*) The justices of the court of common pleas were also enjoined to cause these statutes to be read, at the opening of their courts, from time to time.

It was never deemed unjust or improper, either in England or in this country, for the legislature to narrow the time already prescribed for the commencement of actions, provided reasonable time were left for suitors to bring actions prior to the period last fixed. This is a regulation of the remedy, and not an impairing of the obligation of contracts. So it was viewed by the courts, in the cases already cited; and so it was expressly asserted in Call *v.* Hagger. (*b*) A statute, which should prescribe an unreasonably short time of limitation of suits on existing demands would doubtless be held to be unconstitutional, as it would be tantamount to a denial of all remedy. Berry *v* Ransdall, 4 Met. (Ky.) 292.

A compact between States is within the prohibitory clause of the constitution. In one of the articles of the compact between Virginia and Kentucky, it was declared, that all private rights and interests of lands within the said district (Kentucky), derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State (Virginia). Acts of the legislature of Kentucky provided that persons evicted from lands, in certain cases, should not be liable for mesne profits prior to actual notice of an adverse title, and that the "right owner," on recovering his estates from an intruder, &c., should pay for improvements made by the intruder, &c. Under the laws of Virginia, no such burdens were imposed on the owners of the lands. These acts were unanimously held to be unconstitutional. (*c*) But all reasonable quieting statutes, passed by the legislature of Kentucky, are within the principles and practice of Virginia, which has never been without a statute of limitations, since 1795. Hence, the

(*a*) Ancient Charters, &c., 605, 623.

(*b*) 8 Mass. 430. See also Locke *v.* Dane, 9 Mass. 360. Blackford *v.* Peltier, 1 Blackf. 36. Bigelow *v.* Pritchard, 21 Pick. 175.

(*c*) Green *v.* Biddle, 8 Wheat. 1. See also Bass *v.* Dinwiddie, Cooke, 130.

Kentucky statutes, limiting to seven years the time of bringing actions to recover lands held by adverse possession, do not violate said compact, though, by the statute of Virginia and the first statute of Kentucky, twenty years were allowed, within which a claimant might bring an action in such case. (*a*)

The foregoing decisions show the incorrectness of a remark sometimes made by courts, that the prohibitory clause in the constitution of the United States "was provided against paper money, instalment laws, &c.," (*b*) and warrant the suggestion which has been previously made, that though the evils of such laws might have been the occasion of the prohibition, yet the clause is not to be confined to cases that had previously occurred. Indeed, there is, in the same clause, a specific prohibition as to paper money, &c. If that had been all that was in view, the further mention of laws impairing the obligation of contracts would have been tautology.

In Foster *v.* Essex Bank, (*c*) it was held that an act providing that all corporations then existing, or thereafter to be established, whose powers would expire at a given time, should be continued as bodies corporate for three years beyond the time limited in their charters, for the purpose of suing and being sued, and closing their concerns, but not for continuing the business for which they were established, was constitutional. The object and effect of the act were not to impair the obligation of contracts, but to continue such obligation in existence, and enforce it.

This seems not to differ in principle from statutes extending the time within which actions are limited by previous statutes; as where the time limited for commencing a suit is three years, and, before the expiration of that time, the legislature extend the time to four years; such extending statutes have always been regarded as proper exercises of legislative authority, as well as the statutes, before referred to, which narrow the time within which suits shall be instituted.

(*a*) Hawkins *v.* Barney, 5 Peters, 457. See 3 Met. (Ky.) 566.

(*b*) 9 Mass. 363.

(*c*) 16 Mass. 245. See also Lincoln & Kennebec Bank *v.* Richardson, 1 Greenl. 79.

The legislature of a State cannot constitutionally repeal the charter of a bank, if such power be not reserved in the charter, (*a*) but may impose a tax on the capital stock, &c., of a bank previously incorporated by it, unless the right thus to tax has been expressly relinquished; (*b*) and may impose, prospectively, a penalty on such bank, for refusal or neglect to pay its bills on demand.

A statute of Pennsylvania granted a stay of execution under certain conditions, on all judgments or debts upon which stay of execution had been or might be waived by the debtor in any original obligation or contract upon which judgment had been or might thereafter be obtained. In a case in which debtors, by a sealed instrument, authorized an entry of judgment against them, "without any stay of execution after the day of payment," it was held that this was a release of their right to a stay of execution, and became a part of their contract, and that the legislature could not constitutionally authorize a stay of execution beyond the limit of that contract. (*c*)

A statute, under which contracts are authorized, cannot constitutionally be repealed or altered so as to affect those contracts. (*d*)

A statute providing that a debtor may remove his property, on which his creditor has a judgment lien, without rendering the property liable to sale on execution, is unconstitutional. (*e*)

A statute of the State of Delaware granted authority to

(*a*) Michigan State Bank *v.* Hastings, 1 Doug. (Mich.) 225.

(*b*) Providence Bank *v.* Billings, 4 Peters, 514. Judson *v.* The State, Minor, 150. Portland Bank *v.* Apthorp, 12 Mass. R. 252. See 3 Head, 317. *Aliter*, if that right is renounced in the charter of a bank. Jefferson Branch Bank *v.* Skelly, 1 Black, 436. Dodge *v.* Woolsey, 18 Howard, 331. Mechanics & Traders' Bank *v.* Debolt, ib. 380. Brown *v.* Penobscot Bank, 8 Mass. 445. And see 1 Vroom, 473.

(*c*) Billmeyer *v.* Evans, 40 Penns. State R. 324.

(*d*) Tuolumne Redemption Co. *v.* Sedgwick, 15 Cal. 515. McCanley *v.* Brooks, 16 ib. 11. Commonwealth *v.* New Bedford Bridge, 2 Gray, 339. By Thomas, J., 8 Gray, 587. But a license to retail spirituous liquors is not a contract, and is annulled by a statute prohibiting all sales of such liquors. Calder *v.* Kurby, 5 Gray, 597.

(*e*) Tillotson *v.* Millard, 7 Min. 513.

draw a lottery, and empowered the managers thereof to raise a certain sum, either by drawing the lottery themselves or their agents, or by a sale of the powers granted by that statute. And though the court did not regard the statute as a grant or contract, yet it held that the authority thereby delegated to the managers to make a contract with others, was binding, and that such contract, made by the managers, was obligatory on the State, and that the obligation thereof would not constitutionally be impaired by a subsequent statute. (*a*) See Bass *v.* Mayor of Nashville, Meigs, 421.

A statute of Michigan, inhibiting actions of ejectment by mortgagees before foreclosure, was held to be unconstitutional and void as to mortgages previously made; as it took away the right to rents and profits, which constituted a part of the mortgage security. (*b*) So a statute shortening the time allowed by a former statute for redemption of a mortgage under a power of sale, was held unconstitutional as to mortgages in existence when the statute was passed. (*c*)

The legislature of Maryland incorporated a company in 1812, to build a turnpike road between the cities of Baltimore and Washington, with power to take tolls, &c.; and in 1831 chartered a company to make a railroad between the same cities, on a line near, and parallel with, the turnpike. It was held that the contract with the turnpike company was not impaired by the incorporation of the railroad company; no exclusive privilege being granted to the former by its charter. (*d*)

But where a State legislature incorporated a company to build bridges across a river and to take tolls, with a clause in the incorporating act that it should "not be lawful for any

(*a*) State *v.* Phalen & Paine, 3 Harrington, 441.

(*b*) Mundy *v.* Monroe, 1 Mich. 68. And see Blackwood *v.* Van Vleet, 11 ib. 252. Stevens *v.* Brown, Walker Ch. (Mich.) 41.

(*c*) Cargill *v.* Pow r, 1 Mich. 369. See 4 Littell, 34.

(*d*) Turnpike Co. *v.* The State, 3 Wallace, 210. See also Charles River Bridge *v.* Warren Bridge, 11 Peters, 420 *& seq.* State *v.* Noyes, 47 Maine, 189. Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. Hamp. 35. See also Brewster *v.* Hough, 10 N. Hamp. 146. English *v.* New Haven & Northampton Co. 32 Conn. 240.

person or persons to erect any bridge within two miles, either above or below the bridges to be erected and maintained in pursuance" of said act; it was decided, (three judges dissenting,) that this clause meant and was a contract, not only that no person or persons should erect a bridge within such distance without legislative authority, but that the legislature itself would not make it lawful for any person or persons so to do; and that a subsequent statute purporting to grant authority to another company to build a bridge within those limits impaired the obligation of the contract with the first company, and was therefore unconstitutional and void. (*a*)

A statute of Tennessee allowing a defendant the value of his improvements upon land, in an action of ejectment brought against him, or by suit for the same, was held to be unconstitutional and void. (*b*)

A statute, which impairs the obligation of a contract made before its passage, is void, whether the contract exists in its original shape or has been merged in a judgment; as a statute prohibiting a levy on property that was subject to execution when the contract was made. (*c*)

There are decisions on this subject, which have not commanded general assent.

In Baxter *v.* Taber, (*d*) the court said, that the court of sessions had no authority to extend prison limits beyond the land of the county and the highways communicating with the prison. A different understanding had prevailed, and the sessions had included private property in the prison limits, and prisoners had passed over such property, relying on the assigned limits, as to the legal extent of their liberties, while in confinement for debt, and thereby had committed escapes, within the legal construction of the condition of their bonds.

(*a*) Binghamton Bridge, 3 Wallace, 52. And see Boston & Lowell Railroad *v.* Salem & Lowell Railroad, 2 Gray, 1. McRoberts *v.* Washburne, 10 Min. 23. Hartford Bridge Co. *v.* Union Ferry Co. 29 Conn. 210.

(*b*) Nelson *v.* Allen, 1 Yerg. 360.

(*c*) Forsyth *v.* Marbury, R. M. Charlt. 324.

(*d*) 4 Mass. 361.

By statute of 1818, c. 92, the legislature enacted that no person, who *had given* bond for the prison liberties, should be considered as having committed an escape in consequence of having entered upon private estate, &c. The constitutionality of this statute, so far as it was intended to operate on bonds already forfeited, was strongly controverted in argument, but was sustained by a majority of the court. (*a*) This decision was doubted by the court of New Hampshire, in the case of Woart *v.* Winnick, (*b*) and has never been deemed sound by the profession in Massachusetts.

By the militia law of Massachusetts (St. 1793, c. 14, § 3), persons who had held by commission the office of subaltern, or office of higher rank, were exempted from enrollment and duty in the militia. The term of service was immaterial. This statute was repealed by statute of 1809, c. 108, by which persons, who *had held* militia offices for a term less than five years, were exempted, on condition that they paid two dollars yearly to the town treasurer, and kept themselves furnished with equipments, and sent or carried them to the inspection in May. The court held, that this statute was constitutional, so far that an officer who had held a commission from 1797 to 1799, and was honorably discharged, was nevertheless liable as a conditional exempt. (*c*) This case seems to have been decided principally on the ground, that in time of war, &c., the exigencies of the State might require the services of its citizens, and that such an exemption would apply in war no less than in peace, if allowed at all, and thus the public defence would be weakened. (*d*) But if the statute of 1793 was a lawful contract between the State and those who subsequently held offices in the militia, the impolicy of that contract, however manifest, would not seem to prove that its

(*a*) Walter *v.* Bacon, 8 Mass. 468. Locke *v.* Dane, 9 Mass. 360. Patterson *v.* Philbrook, ib. 151.

(*b*) 3 N. Hamp. 480.

(*c*) Commonwealth *v.* Bird, 12 Mass. 443.

(*d*) In 49 Penn. State Rep. 302, it was said by Woodward, J., that "war does not suspend the constitutional rights of the citizens."

obligation was not impaired by taking from the officer the only benefit which he probably ever anticipated from becoming party to that contract.

A statute of Alabama conferred a military title, and settled an annuity for life on Samuel Dale, for services rendered and losses incurred by him in a war with the Creek Indians. Before any payment was made to said Dale, this statute was repealed. A majority of the court of that State held, that the statute created no obligation or contract on the part of the State, and that the repeal thereof was not unconstitutional. (*a*) The reasons of the dissenting judges will probably commend themselves to the profession.

It is to be observed, in conclusion of the subject of laws impairing the obligation of contracts, under the prohibition in the constitution, that the prohibitory clause does not extend to a State law enacted before the constitution went into operation, namely, the first Wednesday in March, 1789. (*b*)

A notice of two or three points, analogous to the doctrines of the preceding part of this chapter will close this discussion of the law of contracts.

The rate of interest, in England, has several times been altered by statute. The weight of authority seems to be, that when a contract bearing interest is made before the passing of a statute which reduces or enhances the rate of interest, it will carry the interest allowed at the time the contract was made. (*c*) From a brief and probably inaccurate note of Walker *v.* Perrin, (*d*) a different doctrine is to be inferred.

(*a*) Dale *v.* The Governor, 3 Stew. 387.

(*b*) Owings *v.* Speed, 5 Wheat. 420.

(*c*) Dalison, 12, pl. 17. 1 Hawk. c. 29, § 11. Bac. Ab. Usury, B. Ord on Usury, 35. Walker *v.* Penry, 2 Vernon, 42, 78, 145. In 4 Wheat. 207, Marshall, C. J., said: "If a law should declare that contracts already entered into, and receiving the legal interest, should be usurious and void, either in whole or in part, it would impair the obligation of the contract and would be clearly unconstitutional."

(*d*) Pre. Ch. 50.

And Twisden, J., in Rex *v.* Allen, (*a*) is reported to have said, that if the lender of money accepts a higher rate of interest than the statute allows, on a bond made before it was passed, he would subject himself to the penalty of usury. (*b*)

It is an old and established maxim of the common law, that where a man covenants to do an act that is lawful, and an act of parliament comes and makes it unlawful, this is a repeal of the covenant. So, if a man covenants not to do a thing which it was lawful for him to do, and an act of parliament comes after and compels him to do it, there the act repeals the covenant. (*c*) The question naturally presents itself, how this doctrine is affected by the aforesaid constitutional provision. In The State *v.* Jones, 1 Ired. 414, it was held that the legislature might constitutionally pass an act changing the location of the seat of justice in a county, although a contract for the purchase of another site had been previously made by commissioners appointed by law for that purpose.

So far as statutes impair the obligation of contracts, within the true intent of the constitution, it is clear that the above maxim is narrowed in its operation. The constitution, being the paramount law, must prevail. The maxim, however, may remain true, so far as acts of congress are substituted for acts of parliament, and are within the legitimate power of congress. Parliament is said to be omnipotent, and the prohibitory clause in the constitution does not restrain congress. That clause extends only to laws passed by a State legislature. (*d*)

Congress may declare war, or lay embargoes, and thereby render unlawful the fulfilment of contracts; and all acts, which congress may constitutionally pass, may doubtless impair the obligation of contracts with which they interfere.

The cases on this point, in the English books, are principally those in which political movements have interposed between the contracting parties, and rendered the performance

(*a*) T. Ray. 197.

(*b*) See also Procter *v.* Cooper, Pre. Ch. 116.

(*c*) Co. Lit. 206 *a*. Bac. Ab. Covenant, G. 1 Salk. 198. 12 Mod. 169. 1 Ld. Raym. 321. 7 Mass. 338.

(*d*) Evans *v.* Eaton, Peters's C. C. 322.

of a contract unlawful. Alien enemies cannot, during war, recover debts, nor enforce performance of any agreements made during a state of amity. On the return of peace, however, the rights and obligations of the parties are restored. But no liability for non-performance during war attaches on the cessation of hostilities. If the contract then remain capable of performance, it will be enforced at law. If it be a contract which is wholly defeated by the intervention of war, then the war, and the law existing during war, wholly exonerate the party; "repeal the covenant." (*a*) An embargo is always regarded as a temporary suspension of commercial intercourse, and therefore it merely postpones the performance of a contract. (*b*) There are some distinctions, in the English decisions, between an embargo laid by the government of both the contracting parties, and by the government of one of the parties only; holding that, in the latter case, the act of the government is the act of the party, and no defence or excuse for non-performance of his engagements.

Still, there doubtless is much room left for the operation of the common law maxim, even under State legislation. It is not easy to lay down the limits with exactness. Perhaps statutes which operate, incidentally only, to impair the obligation of contracts, and do not *ex necessitate* produce that effect; that is, where such impairing is not the inevitable, and therefore cannot be supposed to be the intended, effect of the statutes; they will take effect constitutionally, though contracts are thereby impaired. As if a contract is made for the erection of a wooden house in a city, by a given day, and a statute, in the mean time, prohibits the building of such house. Or if a man contracts to build a house on a specified spot of land, and the legislature, or other body authorized by the legislature, lay out a highway over the spot. "The framers of the constitution," says Marshall, C. J., 4 Wheat. 629, "did not intend to restrain the States in the regulation of their civil

(*a*) See Touteng *v.* Hubbard, 3 Bos. & Pul. 291. Atkinson *v.* Ritchie, 10 East, 530.

(*b*) Hadley *v.* Clarke, 8 D. & E. 259. Baylies *v.* Fettyplace, 7 Mass. 325.

institutions adopted for internal government; and that the instrument they have given to us, is not to be so construed, may be admitted." In People *v.* Hawley, 3 Mich. 330, it was held that a State, in the exercise of its police powers, may prohibit any trade or employment which is found to be injurious to its citizens; and if the exercise of such power operates to prevent the performance of contracts previously made, "it does not," said the court, "operate directly upon the contract, and therefore is not within the prohibition of the constitution of the United States."

By a law of Connecticut, when the last day of grace on a promissory note fell on one of certain enumerated holidays, to wit, on a fast or thanksgiving day, the fourth of July, or Christmas, the note was payable on the first week-day preceding. After a note had been given, on which the last day of grace was the first day of the ensuing January, a statute was passed directing that the former statute should be amended by inserting, after the word Christmas, the first day of January; and the court of that State decided that this amendment operated upon the parties to that note, so that payment could be legally demanded and the note protested, on the last day of December. Barlow *v.* Gregory, 31 Conn. 261.

A statute of Pennsylvania directed the annual appointment, by the governor, of canal commissioners, and their pay was prescribed at four dollars per diem. A subsequent statute, passed while commissioners were in office under the former, and to take effect from its passage, reduced their pay to three dollars per diem. The supreme court of the United States decided that there was no contract between the State and the commissioners, and that the second statute was constitutional and valid. Butler *v.* Commonwealth of Pennsylvania, 10 Howard, 402. So it was decided by the court of Tennessee, that the compensation of officers of government may be reduced by the legislature during the time for which such officers were appointed; a law fixing the compensation for the discharge of the duties of an officer not constituting a contract with him, within the meaning of the constitution of the

United States. Haynes *v.* The State, 3 Humph. 480. See also 6 Serg. & R. 323. 5 Watts & Serg. 418. 4 Barr, 51. 15 Texas, 577.

For further matter, on the subject of this chapter, see 1 Kent Com. (11th ed.) 445 *&c. seq.* Sedgwick on Statutory and Constitutional Law. Smith on Statute and Constitutional Law.

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